V. CHANDRASEKARAN & ANR.
*v.*
THE ADMINISTRATIVE OFFICER & ORS.
(Civil Appeal Nos. 6342-6343 of 2012)

SEPTEMBER 18, 2012

**[DR. B.S. CHAUHAN AND JAGDISH SINGH KHEHAR, JJ.]**

*Land Acquisition – Acquisition proceeding – Under Land Acquisition Act – Proceeding never challenged in respect of land in question – Compensation accepted – Possession of land given to authority concerned – Declaration u/s. 6, in respect of the land other than the land in question, quashed – The original tenure-holder selling the land in question to the appellants (vendees) – Applications, by original tenure-holders for re-conveyance of the land in question, rejected – Writ petitions by the vendees seeking quashing of Notification u/s. 4 and in another petition seeking direction to re-convey the land in their favour – Single Judge of High Court allowing the petitions – Division Bench of High Court setting aside order of Single Judge – Vendees seeking release of the land in question in their favour subject to refund of compensation amount – On appeal, held: The person interested, if does not raise any objection u/s. 5A, accepts the compensation and does not challenge acquisition proceedings, cannot be permitted to challenge the proceeding after about 3 decades – The quashing of the declaration in some other case, would not enure any benefit to such person – Once the possession of the land was taken by the State and the land got vested in it free from all encumbrances, it cannot be divested and restored to the person interested – The person interested becomes persona non grata once the land vests in the State – The person who purchases the land subsequent to the issuance of notification u/s. 4, is not competent to challenge*





*the validity of the acquisition proceedings because the sale deed does not confer upon him any title – The vendees have also not approached the court with clean hands as they have played fraud upon the authorities and used forged document – Hence not entitled to any equitable relief either – Appeals dismissed with cost of Rs. 25 lacs – Land Acquisition Act, 1894 – ss. 4 and 6.*

*Administration of Justice – Abuse of process of court – Held: A petition or an affidavit containing a misleading/ inaccurate statement, only to achieve ulterior purpose, amounts to an abuse of process of the court.*

*Maxims:*

*'Nemo dat quod non habet' – Applicability of.*

*'Jure Naturae Aequum Est Neminem cum Alterius Detrimento Et Injuria Fieri Locupletiorem' – Meaning and applicability of.*

**A notification u/s. 4(1) of Land Acquisition Act, 1894 was issued in the year 1978. The notification was in respect of land including the suit land. A declaration u/s. 6 of the Act was also issued.**

**Writ Petitions were filed challenging the acquisition proceedings in respect of the land other than the suit land. In that round of litigation, which went up to Supreme Court, the declaration u/s. 6 was quashed and notification u/s. 4 was quashed only qua those lands, in respect of which the acquisition proceedings were challenged. In the meantime, award was passed in respect of the land including the suit land.**

**Second batch of writ petitions were filed challenging the acquisition proceedings and the award. The petitions were allowed. Thereafter, second award was made in**

**respect of the remaining part of the acquired land which also included the suit land.**

**In respect of the suit land, the persons interested/ tenure-holders never filed any objections u/s. 5A of the Act, nor did they challenge the acquisition proceedings at any stage. They accepted the compensation amount under protest for inadequacy of compensation amount. Possession of the suit land was taken over by the Authority.**

**Thereafter, the tenure-holders transferred the suit land in favour of the appellants in the year 2004 and 2005. Appellants claimed to have acquired possession of the suit land. They also obtained permission from the Development Authority to construct flat thereon.**

**The original tenure-holders filed applications for re-conveyance of the suit land, which was rejected. Aggrieved thereby, the appellants filed two writ petitions. In one petition they sought for the quashing of the Notification u/s. 4 issued in the year 1978 pertaining to the land that comprised 9 survey numbers including the suit land. In another petition they sought quashing of the letter dated 7.7.2008 and for the issuance of directions to re-convey the suit land in their favour.**

**Single Judge of High Court allowed both the petitions, observing that since declaration u/s. 6 was quashed in toto and no fresh declaration was issued thereafter, the land acquisition proceedings had lapsed and hence the suit land was free from all acquisition proceedings. Division Bench of the High Court reversed the judgment of Single Judge. Hence the present appeals.**

**In appeal, the appellants inter-alia contended that as the High Powered Committee, constituted by the**



**respondent-Board, submitted the report which noted that the suit land was not required by the Board and the same stands vested in the State, the land could be released in favour of the appellants, subject to the refunding of the compensation amount which the tenure-holders had received in 1983, to the authority, though the same had not been accepted. The appellants were still willing to refund the compensation amount.**

**Dismissing the appeals, the Court**

**HELD: 1. A person who purchases land subsequent to the issuance of a Section 4 notification with respect to it, is not competent to challenge the validity of the acquisition proceedings on any ground whatsoever, for the reason that the sale deed executed in his favour does not confer upon him any title, and at the most he can claim compensation on the basis of his vendor's title. [Para 9] [624-C-D]**

*Pandit Leela Ram v. Union of India* **AIR 1975 SC 2112: 1976 (1) SCR 341;** *Sneh Prabha v. State of Uttar Pradesh* **AIR 1996 SC 540: 1995 (5) Suppl. SCR 264 ;** *Union of india v. Shri Shiv Kumar Bhargava and Ors.* **JT (1995) 6 SC 274: 1995 (1) SCR 354 ;** *U.P. Jal Nigam v. M/s. Kalra Properties Pvt. Ltd.* **AIR 1996 SC 1170: 1996 (1) SCR 683 ;** *Ajay Kishan Singhal v. Union of India* **AIR 1996 SC 2677: 1996 (4) Suppl. SCR 319 ;** *Mahavir and Anr. v. Rural Institute, Amravati and Anr.* **(1995) 5 SCC 335: 1995 (2) Suppl. SCR 421 ;** *Gian Chand v. Gopala and Ors.* **(1995) 2 SCC 528: 1995 (1) SCR 412 ;** *Meera Sahni v. Lieutenant Governor of Delhi and Ors.* **(2008) 9 SCC 177: 2008 (10) SCR 1012 – relied on.**

*Star Wire (India) Ltd. v. State of Haryana and Ors.* **(1996) 11 SCC 698: 1996 (7) Suppl. SCR 6;** *Tika Ram v. State of U.P.* **(2009) 10 SCC 689: 2009 (14) SCR 905 – referred to.**

**2.1. The relief obtained by some persons, by approaching the court immediately after the cause of action has arisen, cannot be the basis for other persons who have belatedly filed their petition, to take the benefit of earlier relief provided, for the reason that, such persons cannot be permitted to take impetus of an order passed by the court, at the behest of another more diligent person. [Para 10] [624-F]**

**2.2. Therefore, in the event that the person interested has not filed objections in response to a notice issued under Section 5-A, and has not challenged the acquisition proceedings, the quashing of the declaration issued under Section 6 in some other case, would not enure any benefit to such person. More so, where the possession of land has already been taken, and such land stands vested in the State, free from all encumbrances as provided under Sections 16 and 17(2) of the Act, prior to the date of decision of the court quashing the declaration in toto, no benefit can be taken by him. Where a party has not filed objections to the notice issued under Section 5-A, the declaration qua such persons is generally neither quashed, nor does it stand vitiated qua him, by any error of law warranting interference. There is also another view with respect to this matter, which is that, in case the said land has been acquired for a Scheme, which does not fall within the ambit of "public purpose" then, in such a case, it would not be a case of acquisition under the Act, instead, it would amount to colourable exercise of power. [Para 15] [626-E-H; 627-A]**

**2.3. Quashing the declaration under Section 6 in cases filed by others, would not enure any benefit to the original tenure holders/appellants. Furthermore, even if the declaration stood quashed in toto, it could not save the suit land, as its possession had already been taken over. [Para 42] [637-C-D]**



*Ratan Chandra Sammanta and Ors. v. Union of India and Ors.* **AIR 1993 SC 2276: 1993 (3) SCR 751 ;** *State of Karnataka and Ors. v. S.M. Kotrayya and Ors*. **(1996) 6 SCC 267: 1996 (5) Suppl. SCR 426 ;** *Jagdih Lal and Ors. v. State of Haryana and Ors*. **AIR 1997 SC 2366;** *Abhey Ram (dead) by L.Rs. and Ors. v. Union of India and Ors*. **AIR 1997 SC 2564: 1997 (3) SCR 931 ;** *H.M.T. House Building Co-operative Society v. Syed Khader and Ors.* **AIR 1995 SC 2244: 1995 (2) SCR 200 ;** *Delhi Admn. v. Gurdip Singh Uban and Ors.* **AIR 1999 SC 3822: 1999 (1) Suppl. SCR 650;** *Om Prakash v. Union of India and Ors.* **AIR 2010 SC 2430 – relied on.**

*H.M.T. House Building Cooperative Society v. M. Venkataswamappa and Ors.* **(1995) 3 SCC 128 – referred to.**

**3.1. Once the land is vested in the State, free from all encumbrances, it cannot be divested and proceedings under the Act would not lapse, even if an award is not made within the statutorily stipulated period. [Para 16] [627-C]**

*Avadh Behari Yadav v. State of Biharand. Ors.* **(1995) 6 SCC 31: 1995 (3) Suppl. SCR 197 ;** *U.P. Jal Nigam v. M/s. Kalra Properties Pvt. Ltd.* **AIR 1996 SC 1170: 1996 (1) SCR 683;** *Allahabad Development Authority v. Nasiruzzaman and Ors.* **(1996) 6 SCC 424: 1996 (5) Suppl. SCR 435;** *M. Ramalinga Thevar v. State of Tamil Nadu and Ors.* **(2000) 4 SCC 322: 2000 (3) SCR 167;** *Government of Andhra Pradesh v. Syed Akbar and Ors.* **AIR 2005 SC 492: 2004 (6) Suppl. SCR 208 – relied on.**

**3.2. The land, once acquired, cannot be restored to the tenure holders/persons-interested, even if it is not used for the purpose for which it was so acquired, or for any other purpose either. The proceedings cannot be withdrawn/abandoned under the provisions of Section 48 of the Act, or under Section 21 of the General Clauses Act,**

**once the possession of the land has been taken and the land vests in the State, free from all encumbrances. Once the land is acquired and it vests in the State, free from all encumbrances, it is not the concern of the land owner, whether the land is being used for the purpose for which it was acquired or for any other purpose. He becomes *persona non-grata* once the land vests in the State. He has a right to only receive compensation for the same, unless the acquisition proceeding is itself challenged. The State neither has the requisite power to reconvey the land to the person-interested, nor can such person claim any right of restitution on any ground, whatsoever, unless there is some statutory amendment to this effect. [Paras 17 and 22] [627-E-F; 629-E-G]**

*State of Madhya Pradesh v. V.P. Sharma* **AIR 1966 SC 1593: 1966 SCR 557 ;** *Lt. Governor of Himachal Pradesh and Anr. v. Shri Avinash Sharma* **AIR 1970 SC 1576: 1971 (1) SCR 413 ;** *Satendra Prasad Jain v. State of U.P. and Ors.* **AIR 1993 SC 2517: 1993 (2) Suppl. SCR 336 ;** *Rajasthan Housing Board and Ors. v. Shri Kishan and Ors.* **(1993) 2 SCC 84: 1993 (1) SCR 269 ;** *Dedicated Freight Corridor Corporation of India v. Subodh Singh and Ors.* **(2011) 11 SCC 100: 2011 (3) SCR 1160;** *Fruit and Vegetable Merchants Union v. The Delhi Improvement Trust* **AIR 1957 SC 344: 1957 SCR 1;** *Gulam Mustafa and Ors. v. State of Maharashtra and Ors*. **AIR 1977 SC 448: 1977 (1) SCR 875 ;** *State of Kerala and Anr. v. M. Bhaskaran Pillai and Anr.* **(1997) 5 SCC 432: 1997 (1) Suppl. SCR 87;** *Government of Andhra Pradesh v. Syed Akbar and Ors.* **AIR 2005 SC 492: 2004 (6) Suppl. SCR 208– relied on.**

*C. Padma and Ors. v. Deputy Secretary to the Government of Tamil Nadu and Ors.* **(1997) 2 SCC 627: 1996 (9) Suppl. SCR 158 ;** *Bhagat Singh v. State of U.P. and Ors.* **AIR 1999 SC 436 1998 (3) Suppl. SCR 404:;** *Niladri Narayan Chandradhurja v. State of West Bengal* **AIR 2002 SC 2532;** *Northern Indian Glass Industries v. Jaswant Singh and Ors.* **(2003) 1 SCC 335: 2002 (3) Suppl. SCR 534 ;** *Leelawanti and Ors. v. State of Haryana and Ors.* **(2012) 1 SCC 66;** *Pratap v. State of Rajasthan* **AIR 1996 SC 1296: 1996 (2) SCR 1088 ;** *Chandragaudaj Ramgonda Patil v. State of Maharashtra* **(1996) 6 SCC 405 : 1996 (5) Suppl. SCR 445;** *State of Kerala and Ors. v. M. Bhaskaran Pillai and Anr.* **AIR 1997 SC 2703: 1997 (1) Suppl. SCR 87 ;** *Printers Mysore Ltd. v. M.A. Rasheed and Ors.* **(2004) 4 SCC 460: 2004 (3) SCR 799;** *Bangalore Development Authority v. R. Hanumaiah* **(2005) 12 SCC 508: 2005 (3) Suppl. SCR 901;** *Delhi Airtech Services (P) Ltd. and Anr. v. State of U.P. and Anr.* **(2011) 9 SCC 354: 2012 (12) SCR 191 – referred to.**



**4.1. The general rule of law is that no one can transfer a better title than he himself possesses; *Nemo dat quod non habet.* However, this Rule has certain exceptions and one of them is, that the transfer must be in good faith for value, and there must be no misrepresentation or fraud, which would render the transactions as void and also that the property is purchased after taking reasonable care to ascertain that the transferee has the requisite power to transfer the said land, and finally that the parties have acted in good faith, as is required under Section 41 of the Transfer of Property Act, 1882. [Para 23] [629-H; 630-A-B]**

**4.2. In the instant case, the tenure holders/person-interested neither filed objections under Section 5-A of the Act, nor have they challenged the land acquisition proceedings, so far as the suit land is concerned, instead they chose to withdraw the compensation awarded in 1983 and 1986; after the expiry of about three decades and hence, they cannot be permitted to challenge the acquisition proceedings on any ground whatsoever. The appellants cannot claim title/relief better than what the original vendors were entitled to. [Para 30] [633-A-B]**

*Asa Ram and Anr. v. Mst. Ram Kali and Anr.* **AIR 1958 SC 183: 1958 SCR 988 ;** *State Bank of India v. Rajendra Kumar Singh and Ors.* **AIR 1969 SC 401: 1969 SCR 216;** *Controller of Estate Duty, Lucknow v. Aloke Mitra* **AIR 1981 SC 102: 1981 (1) SCR 943;** *Hanumant Kumar Talesara v. Mohal Lal* **AIR 1988 SC 299: 1988 (2) SCR 99;** *State of Punjab v. Surjit Kaur(Dead) through LRs.* **JT (2001) 10 SC 42 – relied on.**

*Wardington Lyngdoh and Ors. v. Collector, Mawkyrwat* **(1995) 4 SCC 428: 1995 (3) SCR 354;** *Ajit Singh and Anr. v. State of Punjab and Ors.* **(1994) 4 SCC 67 – referred to.**

**5. The reliefs sought by the appellants in their two writ petitions are mutually inconsistent and contradictory. In the event that the appellants wanted a declaration to the effect that the acquisition proceedings in pursuance of issuance of the Section 4 notification, dated 15.5.1978 had lapsed or were void, the question of seeking re-conveyance of the said land could not arise. More so, the appellants cannot claim relief in respect of 9 survey numbers as in the present appeals, relief is restricted only to 4 of the survey numbers. It is apparent that the appellants' claim cannot co-exist and can be said to be blowing hot and blowing cold, simultaneously. As the original vendors i.e. vendors of the first sale were not vested with any title over the said land, the transfer by them, was itself void and all subsequent transfers would also, as a result, remain ineffective and unenforceable in law. Therefore, sale deeds executed in the years 2004-05 would not confer any title on the appellants. [Paras 28 and 42] [632-B-D; 637-G-H; 638-A]**

*Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Limited* **(2011) 10 SCC 420 : 2011 (12) SCR 473 – relied on.**

**6.1. The High Court observed that the appellant have**



**played fraud upon the authorities in order to obtain the sanction of their plan of construction of flats on the land in question. The High Court also recorded findings to the effect that the appellants have "managed", not only to obtain certain orders from the department, but have also misused the process of the court to achieve a sinister design. The court further took note that one of the appellants had filed an additional affidavit before the High Court in a writ petition by way of which, had attempted to mislead the court through furnishing of false information. It has even been admitted at the Bar, that the letter dated 7.7.2005 which was placed on the record by the appellants before the High Court, was in fact, a forged document. The appellants have not approached the court with clean hands, and are therefore, not entitled for any relief. Whenever a person approaches a Court of Equity, in the exercise of its extraordinary jurisdiction, it is expected that he will approach the said court not only with clean hands but also with a clean mind, a clean heart and clean objectives. Thus, he who seeks equity must do equity. The legal maxim** *"Jure Naturae Aequum Est Neminem cum Alterius Detrimento Et Injuria Fieri Locupletiorem"*, **means that it is a law of nature that one should not be enriched by causing loss or injury to another. [Paras 32, 33 and 34] [633-E-H; 634-A-C]**

*The Ramjas Foundation and Ors. v. Union of India and Ors.* **AIR 1993 SC 852: 1992 (2) Suppl. SCR 426;** *Nooruddin v. (Dr.) K.L. Anand* **(1995) 1 SCC 242;** *Ramniklal N. Bhutta and Anr. v. State of Maharashtra and Ors.* **AIR 1997 SC 1236: 1996 (8) Suppl. SCR 787 – relied on.**

**6.2. The appellants filed an affidavit before the High Court only to mislead the court by furnishing false information. The judicial process cannot become an instrument of oppression or abuse, or a means in the process of the court to subvert justice, for the reason that**

**the court exercises its jurisdiction, only in furtherance of justice. The interests of justice and public interest coalesce, and therefore, they are very often one and the same. A petition or an affidavit containing a misleading and/or an inaccurate statement, only to achieve an ulterior purpose, amounts to an abuse of process of the court. [Paras 35 and 42] [634-E-F; 638-F]**

*Dalip Singh v. State of U.P. and Ors.* **(2010) 2 SCC 114: 2009 (16) SCR 111 – relied on.**

**6.3. The truth should be the guiding star in the entire judicial process. "Every trial is a voyage of discovery in which truth is the quest". An action at law is not a game of chess, therefore, a litigant cannot prevaricate and take inconsistent positions. It is one of those fundamental principles of jurisprudence that litigants must observe total clarity and candour in their pleadings. [Para 37] [635-B-C]**

*Ritesh Tewari and Anr. v. State of Uttar Pradesh and Ors.* **(2010) 10SCC 677: 2010 (11) SCR 589;** *Amar Singh v. Union of India* **(2011) 7 SCC 69: 2011 (6) SCR 403 – relied on.**

**6.4. Wrongdoers must be denied profit from their frivolous litigation, and that they should be prevented from introducing and relying upon, false pleadings and forged or fabricated documents in the records furnished by them to the court. Thus, the appellants have disentitled themselves for any equitable relief. [Para 38, 39] [635-G-H]**

*Maria Margarida Sequeria Fernandes and Ors. v. Erasmo Jack deSequeria (dead)* **(2012) 5 SCC 370;** *Ramrameshwari Devi v. Nirmala Devi* **(2011) 8 SCC 249: 2011 (8) SCR 992 – relied on.**



**7.1. Section 16-A has been added to the Act by the State Amendment Act, 1996, and the same imposes a complete restriction on the sale of acquired land by the tenure holder. In case the land is transferred in contravention of these provisions, the Government may, by way of an order, declare the transfer to be null and void, and on such declaration, the land shall, as penalty, be forfeited to, and vest in, the Revenue Department of the Government, free from all encumbrances. Therefore, the sale deeds in favour of the appellants are void and unenforceable. In such a fact-situation, the appellants could not have come in possession of the suit land which had been vested in the State ages ago, in the years 1983 and 1986. Such a course is not possible without the collusion of the officers of the State/Board. [Paras 40 and 41] [635-H; 636-A-D]**

**7.2. The Chief Secretary of the State is requested to examine the issues involved in the case and find out as who were the officials of the State or Board responsible for this loot of the public properties and proceed against them in accordance with law. He is further directed to ensure eviction of the appellants from the public land forthwith. [Para 44] [640-G-H]**

**8. The appeals are dismissed with the costs of Rupees Twenty Five lacs, which the appellants are directed to deposit with the Supreme Court Legal Services Authority within a period of six weeks. [Para 43] [640-F]**

**Case Law Reference:**

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|---|---|---|
| **1976 (1) SCR 341** | **Relied on** | **Para 6** |
| **1995 (5) Suppl. SCR 264** | **Relied on** | **Para 6** |
| **1995 (1) SCR 354** | **Relied on** | **Para 6** |
| **1996 (1) SCR 683** | **Relied on** | **Para 7** |

| | | |
|---|---|---|
| 1996 (7) Suppl. SCR 6 | Referred to | Para 7 |
| 1996 (4) Suppl. SCR 319 | Relied on | Para 8 |
| 1995 (2) Suppl. SCR 421 | Relied on | Para 8 |
| 1995 (1) SCR 412 | Relied on | Para 8 |
| 2008 (10) SCR 1012 | Relied on | Para 8 |
| 2009 (14) SCR 905 | Referred to | Para 8 |
| 1993 (3) SCR 751 | Relied on | Para 10 |
| 1996 ( 5) Suppl. SCR 426 | Relied on | Para 10 |
| AIR 1997 SC 2366 | Relied on | Para 10 |
| 1997 (3) SCR 931 | Relied on | Para 11 |
| 1995 (2) SCR 200 | Relied on | Para 12 |
| (1995) 3 SCC 128 | Referred to | Para 12 |
| 1999 (1) Suppl. SCR 650 | Relied on | Para 13 |
| AIR 2010 SC 2430 | Relied on | Para 14 |
| 1995 (3) Suppl. SCR 197 | Relied on | Para 16 |
| 1996 (1) SCR 683 | Relied on | Para 16 |
| 1996 (5) Suppl. SCR 435 | Relied on | Para 16 |
| 2000 (3) SCR 167 | Relied on | Para 16 |
| 2004 (6) Suppl. SCR 208 | Relied on | Para 16 |
| 1966 SCR 557 | Relied on | Para 17 |
| 1971 (1) SCR 413 | Relied on | Para 17 |
| 1993 (2) Suppl. SCR 336 | Relied on | Para 17 |
| 1993 (1) SCR 269 | Relied on | Para 17 |
| 2011 (3) SCR 1160 | Relied on | Para 17 |



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|---|---|---|
| 1957 SCR 1 | Relied on | Para 18 |
| 1977 (1) SCR 875 | Relied on | Para 19 |
| 1997 (1) Suppl. SCR 87 | Relied on | Para 20 |
| 1996 (9) Suppl. SCR 158 | Relied on | Para 20 |
| 1998 (3) Suppl. SCR 404 | Relied on | Para 20 |
| AIR 2002 SC 2532 | Relied on | Para 20 |
| 2002 (3) Suppl. SCR 534 | Relied on | Para 20 |
| (2012) 1 SCC 66 | Relied on | Para 20 |
| 2004 (6) Suppl. SCR 208 | Relied on | Para 21 |
| 1996 (2) SCR 1088 | Referred to | Para 21 |
| 1996 (5) Suppl. SCR 445 | Referred to | Para 21 |
| 1997 (1) Suppl. SCR 87 | Referred to | Para 21 |
| 2004 (3) SCR 799 | Referred to | Para 21 |
| 2005 (3) Suppl. SCR 901 | Referred to | Para 21 |
| 2012 (12) SCR 191 | Referred to | Para 21 |
| 1958 SCR 988 | Relied on | Para 23 |
| 1969 SCR 216 | Relied on | Para 23 |
| 1981 (1) SCR 943 | Relied on | Para 23 |
| 1988 (2) SCR 99 | Relied on | Para 23 |
| JT (2001) 10 SC 42 | Relied on | Para 23 |
| 1995 (3) SCR 354 | Relied on | Para 23 |
| (1994) 4 SCC 67 | Referred to | Para 25 |
| 2011 (12) SCR 473 | Relied on | Para 29 |
| 1992 (2) Suppl. SCR 426 | Relied on | Para 34 |

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|---|---|---|
| **(1995) 1 SCC 242** | **Relied on** | **Para 34** |
| **1996 (8) Suppl. SCR 787** | **Relied on** | **Para 34** |
| **2009 (16) SCR 111** | **Relied on** | **Para 36** |
| **2010 (11) SCR 589** | **Relied on** | **Para 37** |
| **2011 (6) SCR 403** | **Relied on** | **Para 37** |
| **(2012) 5 SCC 370** | **Relied on** | **Para 38** |
| **2011 (8) SCR 992** | **Relied on** | **Para 38** |

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 6342-6343 of 2012.

From the Judgment & Order dated 24.1.2012 of the High Court of Judicature at Madras in W.A. Nos. 805 & 806 of 2011.

Abhishek Manu Singhvi, Rajiv Dutta, K.K. Mani, Krishna Ravindran, Jayveer, T. Sheela, Abhishek Krishna for the Appellants.

S. Gomathi Nayagam, AAG, B. Balaji, G. Hari hara Arun Soma Sankar, Rakesh Sharma, P. Krishnamoorthy for the Respondents.

The Judgment of the Court was delivered by

**Dr. B. S. CHAUHAN, J.** 1. These appeals have been preferred against the impugned judgment and order dated 24.1.2012, passed by the High Court of Judicature at Madras in Writ Appeal Nos. 805-806 of 2011, by which, the Division Bench reversed the judgment and order of the learned Single Judge, dated 1.11.2010 passed in relation to land acquisition proceedings.

2. Facts and circumstances giving rise to these appeals are as under:

A. A Notification under Section 4(1) of the Land Acquisition



Act, 1894 (hereinafter referred to as 'the Act'), was issued on 15.5.1978 with respect to land measuring 58.59 acres, in the revenue estate of Tambaram Village, Saidapet Taluk, Chengalpet District, Tamil Nadu, including the suit land measuring 2.26 acres in Survey Nos. 283/1 (extent of 27 cents), 284/1 (extent of 70 cents), 284/2 (extent of 65 cents) and 284/3 (extent of 64 cents). As the provisions of the Urgency Clause under Section 17 of the Act were not invoked, the persons interested were at liberty to file objections under Section 5-A of the Act. A declaration under Section 6 of the Act with respect to the said land was issued on 6.6.1981. Very few among the persons interested, challenged the land acquisition proceedings by way of filing 8 writ petitions, including Writ Petition Nos. 8897 and 8899 of 1983 etc. which were filed by some of the original tenure-holders of the suit land on several grounds. However, the said petitioners did not challenge the acquisition proceedings so far as the suit land is concerned, rather they chose to restrict their cases to the other parts of their lands. The batch of said writ petitions was allowed by way of a common judgment and order, dated 16.12.1983, quashing the declaration issued under Section 6 of the Act on the ground that the inquiry was not conducted fairly, and that the objections raised by the said writ petitioners under Section 5-A, were also not dealt with properly. However, the learned Single Judge upheld the Notification issued under Section 4 of the Act and hence, granted liberty to the Government of Tamil Nadu to continue with the said acquisition proceedings, in accordance with law.

B. Being aggrieved by this, the writ petitioners including the predecessors-in-interest of the appellants, preferred Writ Appeal Nos. 214 to 225 and 435 of 1984, before the Division Bench of the High Court, against the judgment and order dated 16.12.1983, praying for quashing of the Notification issued under Section 4 of the Act, as well. The

Government did not challenge the judgment and order dated 16.12.1983. The said writ appeals were allowed vide judgment and order dated 23.8.1985, and the said notification under Section 4(1) of the Act, only in respect of the land, which constituted the subject matter of the aforementioned appeals, was quashed. Against the judgment and order dated 23.8.1985, the Government of Tamil Nadu preferred a Special Leave Petition before this Court, which was dismissed vide order dated 6.5.1992. Thus, those orders attained finality.

C. In the meantime, an Award was passed with respect to the said land, including the suit land, on 28.6.1983, to the extent of 4.26 acres i.e. Survey Nos. 283/1, 284/1 and 284/3.

D. A second batch of writ petitions was filed before the High Court challenging the acquisition proceedings, as well as the Award. All the said writ petitions were allowed, following the earlier judgments dated 16.12.1983 and 23.8.1985 vide judgment and order dated 22.12.1986.

E. A second award was made on 14.8.1986, in relation to the remaining part of said land, including a part of the suit land, i.e. Survey No. 284/2.

F. So far as the suit land is concerned, the persons-interested/tenure-holders never filed any objection under Section 5-A of the Act, and nor have they challenged the acquisition proceedings, at any stage. Instead, they accepted the compensation amount under protest. Possession of the suit land was taken over by the authority subsequently. There is nothing on record to show whether the claimants had filed any application for making a reference under Section 18 of the Act.

G. The tenure-holders/persons-interested in the suit land, after receiving compensation, and handing over the possession to the respondents authorities with respect to the suit land, transferred the said land to some persons, and ultimately, after undergoing multiple sales, the suit land was purchased by the appellants herein, vide sale-deeds dated 4.3.2004, 10.11.2004, 7.7.2005 and 11.8.2005. As a result thereof, they claim to have acquired possession of the said suit land. The appellants planned to construct flats upon the said land, for the purpose of which, they had also obtained permission from the Chennai Metropolitan Development Authority on 16.3.2007. Applications were filed by the original tenure-holders for re-conveyance of the suit land which stood as rejected vide order dated 7.7.2008.

H. Being aggrieved, the appellants filed Writ Petition No. 6108 of 2009 for the quashing of the Notification dated 15.5.1978, issued under Section 4 of the Act, pertaining to the land that comprised 9 Survey Numbers, including the suit land contending that the declaration under Section 6 had been quashed in toto and no fresh declaration was subsequently issued. The proceedings therefore, automatically lapsed as there could be no Award without a fresh declaration, and therefore, all subsequent proceedings would be *void ab-initio*. Another Writ Petition No. 20896 of 2009, was also filed seeking totally inconsistent/contrary reliefs i.e. praying for the quashing of the letter dated 7.7.2005, as also for the issuance of directions to re-convey the suit land in favour of the appellants.

I. A learned Single Judge, vide judgment and order dated 1.11.2010 allowed both Writ Petitions, observing that as the Section 6 declaration had been quashed in toto and no fresh declaration was issued thereafter, the land acquisition proceedings had lapsed and the suit land was hence, free from any and all acquisition proceedings.

J. Being aggrieved, the Tamil Nadu Housing Board

(hereinafter referred to as 'the Board') – the respondents, then filed writ appeals which have been allowed vide impugned judgment and order dated 24.1.2012, reversing the judgment and order of the learned Single Judge.

Hence, these appeals.

3. Dr. Abhishek M. Singhvi and Mr. Rajiv Dutta, learned senior counsel appearing for the appellants, have submitted that, since the Section 6 declaration dated 6.6.1981 has been quashed in toto and no fresh declaration was made thereafter, subsequent proceedings are *void ab-initio*. The appellants, before purchasing the suit land made various inquiries and were informed in writing by various authorities, that the said land was not the subject matter of any acquisition proceedings at the relevant time. More so, a high powered committee, constituted by the Board itself, submitted a report that the suit land was not required by the Board, and that even though the possession of the land had been taken, the land vested in the State. There was no approach road to the suit land and thus, the said land could not be utilised for the purpose for which, it was acquired. The Board was not in a position to utilise the suit land and, thus, it could be released in favour of the appellants, subject to refunding the compensation amount received by the land owners. More so, the compensation amount received by the persons aggrieved in 1983 was received under protest, and was refunded to them in 2010, by way of demand draft, though the same was not accepted by the Board and was therefore, returned to the tenure-holders. The appellants are still willing to refund the amount of compensation received by the persons-interested, in pursuance of the illegal and void awards, dated 28.6.1983 and 14.8.1986. Therefore, the impugned judgment and order are liable to be set aside and the present appeals should be allowed.

4. On the contrary, Shri S. Gomathi Nayagam, learned Additional Advocate General appearing for the respondents, has vehemently opposed the appeals, contending that the



predecessor-in-interest, of the appellants did not raise any objection under Section 5-A of the Act, with respect to such acquisition proceedings at any stage, rather they accepted the compensation granted under protest. To receive an award under protest is a legal requirement for the purpose of making a reference under Section 18 of the Act. The quashing of the declaration under Section 6 of the Act would not automatically apply to the suit land, as it was not the subject matter of challenge with respect to the acquisition proceedings before court. The appellants did not make any inquiry whatsoever, with respect to the title of the suit land, though inquiry was sought to be made in relation to the said land, by different persons in altogether different contexts. The report of the high powered committee appointed by the Board itself, is self-contradictory, as they clearly provided that possession had been taken and, in view of the fact that once possession is taken, the said land vests in the State, free from all encumbrances under Section 16 of the Act, the same cannot be divested. Therefore, the question of re-conveying the suit land in favour of the appellants cannot possibly arise. Land can be released from acquisition proceedings either under Section 48 of the Act, or in exercise of powers under the General Clauses Act, 1897, but this can be done only prior to the vesting of the land in the State, which in itself is prior to taking possession thereof. The appellants, being purchasers of the said suit land, after more than 20 years of the Award, cannot challenge the acquisition proceedings at such a belated stage. More so, the vendors were not competent to make any transfer, as none of them had good title over the suit land. Therefore, any and all sale transactions are illegal and void. The sale-deeds executed in favour of the appellants, do not confer upon them, any title. More so, the subsequent purchasers cannot challenge the validity of the land acquisition. The appeals lack merit and are therefore liable to be dismissed.

5. We have considered the rival submissions made by the learned counsel for the parties and perused the records.

However, before coming to the merit of the case, it is desirable to consider the legal issues involved herein.

**Whether subsequent purchaser can challenge the acquisition proceedings**:

6. The issue of maintainability of the writ petitions by the person who purchases the land subsequent to a notification being issued under Section 4 of the Act has been considered by this Court time and again.

In *Pandit Leela Ram v. Union of India,* AIR 1975 SC 2112, this Court held that, any one who deals with the land subsequent to a Section 4 notification being issued, does so, at his own peril. In *Sneh Prabha v. State of Uttar Pradesh,* AIR 1996 SC 540, this Court held that a Section 4 notification gives a notice to the public at large that the land in respect to which it has been issued, is needed for a public purpose, and it further points out that there will be "an impediment to any one to encumber the land acquired thereunder." The alienation thereafter does not bind the State or the beneficiary under the acquisition. The purchaser is entitled only to receive compensation. While deciding the said case, reliance was placed on an earlier judgment of this Court in *Union of india v. Shri Shiv Kumar Bhargava & Ors.,* JT (1995) 6 SC 274.

7. Similarly, in *U.P. Jal Nigam v. M/s. Kalra Properties Pvt. Ltd.,* AIR 1996 SC 1170, this Court held that, purchase of land after publication of a Section 4 notification in relation to such land, is void against the State and at the most, the purchaser may be a person-interested in compensation, since he steps into the shoes of the erstwhile owner and may therefore, merely claim compensation. (See also: *Star Wire (India) Ltd. v. State of Haryana & Ors.,* (1996) 11 SCC 698).

8. In *Ajay Kishan Singhal v. Union of India,* AIR 1996 SC 2677; *Mahavir & Anr. v. Rural Institute, Amravati & Anr.,* (1995) 5 SCC 335; *Gian Chand v. Gopala & Ors.,* (1995) 2



SCC 528; and *Meera Sahni v. Lieutenant Governor of Delhi & Ors.,* (2008) 9 SCC 177, this Court categorically held that, a person who purchases land after the publication of a Section 4 notification with respect to it, is not entitled to challenge the proceedings for the reason, that his title is void and he can at best claim compensation on the basis of vendor's title. In view of this, the sale of land after issuance of a Section 4 notification is void and the purchaser cannot challenge the acquisition proceedings. (See also: *Tika Ram v. State of U.P.,* (2009) 10 SCC 689).

9. In view of the above, the law on the issue can be summarized to the effect that a person who purchases land subsequent to the issuance of a Section 4 notification with respect to it, is not competent to challenge the validity of the acquisition proceedings on any ground whatsoever, for the reason that the sale deed executed in his favour does not confer upon him, any title and at the most he can claim compensation on the basis of his vendor's title.

**The acquisition challenged by one – whether others can also take the benefit of the same**.

10. The relief obtained by some persons, by approaching the Court immediately after the cause of action has arisen, cannot be the basis for other persons who have belatedly filed their petition, to take the benefit of earlier relief provided, for the reason that, such persons cannot be permitted to take impetus of an order passed by the court, at the behest of another more diligent person. (Vide: *Ratan Chandra Sammanta & Ors. v. Union of India & Ors.,* AIR 1993 SC 2276; *State of Karnataka & Ors. v. S.M. Kotrayya & Ors.,* (1996) 6 SCC 267; and *Jagdih Lal & Ors. v. State of Haryana & Ors.,* AIR 1997 SC 2366).

11. In *Abhey Ram (dead) by L.Rs. & Ors. v. Union of India & Ors.,* AIR 1997 SC 2564, a three Judge Bench of this Court, dealt with an issue similar to the one involved herein.

The question that arose was whether the quashing of the notification/declaration under the Act by the court in respect of other matters, would confer benefit upon non-parties also. The Court held as under:

> "The question then arises is whether the quashing of the declaration by the Division Bench in respect of the other matters would enure the benefit to the appellants also. Though, prima facie, the argument of the learned counsel is attractive, on deeper consideration, it is difficult to give acceptance to the contention….. If it were a case entirely relating to Section 6 declaration as has been quashed by the High Court, necessarily that would enure the benefit to others also, though they did not file any petition, *except to those whose lands were taken possession of and were vested in the State under Sections 16 and 17(2) of the Act free from all encumbrances."* (Emphasis added)

12. In *H.M.T. House Building Co-operative Society v. Syed Khader & Ors.,* AIR 1995 SC 2244, this Court quashed the land acquisition proceedings in toto, wherein the land had been acquired by the Government for the use of the cooperative society which had planned a housing scheme upon it, in view of the conclusion that it could not be called a "public purpose", within the meaning of the Act. The Court further directed the respondents therein to restore the possession of the land to the tenure-holders/persons-interested, and such persons were thereafter, directed to refund the amount received by them as compensation. (See also: *H.M.T. House Building Cooperative Society v. M. Venkataswamappa & Ors.,* (1995) 3 SCC 128)

13. The said judgment has subsequently been approved and followed by this Court, in *Delhi Admn. v. Gurdip Singh Uban & Ors.,* AIR 1999 SC 3822, wherein this Court held as follows:

> "Quashing the notification in the cases of individual writ petitions cannot be treated as quashing the whole of it.



> That was what was held in *Abhey Ram* case (supra). The main points raised before us are fully covered by the judgment of the three-Judge Bench in *Abhey Ram's* case."

14. In *Om Prakash v. Union of India & Ors.,* AIR 2010 SC 2430, this Court considered a similar issue and reiterated the view taken by this Court in *Abhey Ram* (supra), wherein it was held that, in case a person interested has not filed any objection to the notice issued under Section 5-A of the Act, or challenged the acquisition proceedings, he cannot claim that the order of quashing the declaration in some other matter, would also cover his case. The Court held as under:

> "The facts of the aforesaid cases would show that in the case in hand as many as four declarations under Section 6 of the Act were issued from time to time. Finally when declaration is quashed by any Court, it would only enure to the benefit of those who had approached the Court. It would certainly not extend the benefit to those who had not approached the Court or who might have gone into slumber."

15. Therefore, the law on the issue can be summarised to state that, in the event that the person interested has not filed objections in response to a notice issued under Section 5-A, and has not challenged the acquisition proceedings, the quashing of the declaration issued under Section 6 in some other case, would not enure any benefit to such person. More so, where the possession of land has already been taken, and such land stands vested in the State, free from all encumbrances as provided under Sections 16 and 17(2) of the Act, prior to the date of decision of the Court quashing the declaration in **toto,** no benefit can be taken by him. Where a party has not filed objections to the notice issued under Section 5-A, the declaration qua such persons is generally neither quashed, nor does it stand vitiated qua him, by any error of law warranting interference. There is also another view with respect to this matter, which is that, in case the said land has been

acquired for a Scheme, which does not fall within the ambit of "public purpose" then, in such a case, it would not be a case of acquisition under the Act, instead, it would amount to colourable exercise of power.

**Land once vested in the Government – whether can be divested:**

16. It is a settled legal proposition, that once the land is vested in the State, free from all encumbrances, it cannot be divested and proceedings under the Act would not lapse, even if an award is not made within the statutorily stipulated period. (Vide: *Avadh Behari Yadav v. State of Bihar &. Ors.,* (1995) 6 SCC 31; *U.P. Jal Nigam v. Kalra Properties (P) Ltd.* (Supra); *Allahabad Development Authority v. Nasiruzzaman & Ors.,* (1996) 6 SCC 424, *M. Ramalinga Thevar v. State of Tamil Nadu & Ors.,* (2000) 4 SCC 322; and *Government of Andhra Pradesh v. Syed Akbar & Ors.,* AIR 2005 SC 492).

17. The said land, once acquired, cannot be restored to the tenure holders/persons-interested, even if it is not used for the purpose for which it was so acquired, or for any other purpose either. The proceedings cannot be withdrawn/ abandoned under the provisions of Section 48 of the Act, or under Section 21 of the General Clauses Act, once the possession of the land has been taken and the land vests in the State, free from all encumbrances. (Vide: *State of Madhya Pradesh v. V.P. Sharma,* AIR 1966 SC 1593; *Lt. Governor of Himachal Pradesh & Anr. v. Shri Avinash Sharma,* AIR 1970 SC 1576; *Satendra Prasad Jain v. State of U.P. & Ors.,* AIR 1993 SC 2517; *Rajasthan Housing Board & Ors. v. Shri Kishan & Ors.,* (1993) 2 SCC 84 and *Dedicated Freight Corridor Corporation of India v. Subodh Singh & Ors.,* (2011) 11 SCC 100).

18. The meaning of the word 'vesting', has been considered by this Court time and again. In *Fruit and Vegetable Merchants Union v. The Delhi Improvement Trust,* AIR 1957



SC 344, this Court held that the meaning of word 'vesting' varies as per the context of the Statute, under which the property vests. So far as the vesting under Sections 16 and 17 of the Act is concerned, the Court held as under.-

> "In the cases contemplated by Sections 16 and 17, the property acquired becomes the property of Government without any condition or ; limitations either as to title or possession. The legislature has made it clear that vesting of the property is not for any limited purpose or limited duration."

19. In *Gulam Mustafa & Ors. v. State of Maharashtra & Ors.,* AIR 1977 SC 448, in a similar situation, this Court held as under:-

> "Once the original acquisition is valid and title has vested in the Municipality, how it uses the excess land is no concern of the original owner and cannot be the basis for invalidating the acquisition. There is no principle of law by which a valid compulsory acquisition stands voided because long later the requiring Authority diverts it to a public purpose other than the one stated in the ….declaration."

20. Similarly, in *State of Kerala & Anr. v. M. Bhaskaran Pillai & Anr.,* (1997) 5 SCC 432, this Court held as under:

> "It is settled law that if the land is acquired for a public purpose, after the public purpose was achieved, the rest of the land could be used for any other public purpose. In case there is no other public purpose for which the land is needed, then instead of disposal by way of sale to the erstwhile owner, *the land should be put to public auction and the amount* fetched in the public auction can be better utilised for the public purpose envisaged in the Directive Principles of the Constitution.

(See also: *C. Padma & Ors. v. Deputy Secretary to the*

*Government of Tamil Nadu & Ors.,* (1997) 2 SCC 627; *Bhagat Singh v. State of U.P. & Ors.,* AIR 1999 SC 436; *Niladri Narayan Chandradhurja v. State of West Bengal,* AIR 2002 SC 2532; *Northern Indian Glass Industries v. Jaswant Singh & Ors.,* (2003) 1 SCC 335; and *Leelawanti & Ors. v. State of Haryana & Ors.,* (2012) 1 SCC 66).

21. In *Government of Andhra Pradesh & Anr. v. Syed Akbar* (Supra), this Court considered this very issue and held that, once the land has vested in the State, it can neither be divested, by virtue of Section 48 of the Act, nor can it be reconveyed to the persons-interested/tenure holders, and that therefore, the question of restitution of possession to the tenure holder, does not arise. (See also: *Pratap v. State of Rajasthan,* AIR 1996 SC 1296; *Chandragaudaj Ramgonda Patil v. State of Maharashtra,* (1996) 6 SCC 405; *State of Kerala & Ors. v. M. Bhaskaran Pillai & Anr.,* AIR 1997 SC 2703; *Printers (Mysore) . Ltd. v. M.A. Rasheed & Ors.* (2004) 4 SCC 460; *Bangalore Development Authority v. R. Hanumaiah,* (2005) 12 SCC 508; and *Delhi Airtech Services (P) Ltd. & Anr. v. State of U.P. & Anr.* (2011) 9 SCC 354).

22. In view of the above, the law can be crystallized to mean, that once the land is acquired and it vests in the State, free from all encumbrances, it is not the concern of the land owner, whether the land is being used for the purpose for which it was acquired or for any other purpose. He becomes *persona non-grata* once the land vests in the State. He has a right to only receive compensation for the same, unless the acquisition proceeding is itself challenged. The State neither has the requisite power to reconvey the land to the person-interested, nor can such person claim any right of restitution on any ground, whatsoever, unless there is some statutory amendment to this effect.

23. The general rule of law is undoubted, that no one can transfer a better title than he himself possesses; *Nemo dat quod non habet*. However, this Rule has certain exceptions and one



of them is, that the transfer must be in good faith for value, and there must be no misrepresentation or fraud, which would render the transactions as void and also that the property is purchased after taking reasonable care to ascertain that the transferee has the requisite power to transfer the said land, and finally that, the parties have acted in good faith, as is required under Section 41 of the Transfer of Property Act, 1882. (Vide: *Asa Ram & Anr. v. Mst. Ram Kali & Anr.,* AIR 1958 SC 183; *State Bank of India v. Rajendra Kumar Singh & Ors.,* AIR 1969 SC 401, *Controller of Estate Duty, Lucknow v. Aloke Mitra,* AIR 1981 SC 102; *Hanumant Kumar Talesara v. Mohal Lal,* AIR 1988 SC 299; and *State of Punjab v. Surjit Kaur (Dead) through LRs.,* JT (2001) 10 SC 42).

24. This Court has earlier taken the view that, in case the award is not accepted under protest, the persons interested cannot make an application to make a reference under Section 18, (Vide: *Wardington Lyngdoh & Ors. v. Collector, Mawkyrwat,* (1995) 4 SCC 428), wherein this Court held that, a person who has received the amount of award made under Section 11 of the Act, without protest, will not be entitled to make an application under Section 18 of the Act. Therefore, receipt of the said amount under protest, is a condition precedent for making an application under Section 18, within the limitation prescribed under the Act.

25. The aforesaid view however, has not been consistently reiterated, as is evident from the judgment in *Ajit Singh & Anr. v. State of Punjab & Ors.,* (1994) 4 SCC 67, wherein it was held that, merely an application under Section 18 of the Act would make it clear that the person-interested has not accepted the award made by the authority.

26. The instant case requires to be examined in the light of the aforesaid legal propositions.

From the facts it is evident that, the predecessor-in-interest of the appellants approached the court by filing Writ Petitions

as well as writ appeals, with respect to some of their lands, but for the reasons best known to them, they did not challenge the acquisition proceedings so far as the suit land is concerned. The appellants filed a writ petition for quashing the land acquisition proceedings and/or seeking a declaration to the effect that the notification issued under Section 4 of the Act on 15.5.1978, in relation to Survey Nos. 282/1, 282/2, 283/1, 283/2, 284/1, 284/2, 284/3, 284/4 situated in Tambaram Village, Chennai, had lapsed and become inoperative and consequently, to issue a mandamus, barring the respondents, their men, their agents, subordinates, servants or anyone acting under them, from interfering in any manner, with the peaceful enjoyment of the properties belonging to the appellants, as stipulated in the aforementioned surveys.

27. The appellants also filed another writ petition for quashing the orders passed in relation to the applications of their predecessors-in-interest with respect to re-conveyance of the said land. The reliefs claimed therein *inter-alia,* are as under:

> "Issue a writ of Certiorarified Mandamus or any other order or direction in the nature of a writ of Certiorarified Mandamus by calling for the records comprised in the proceedings of the 4th respondent bearing Letter No. 2899/LAI(1)/2007-6 dated 7.7.2008 and quash the same as illegal and unconstitutional and consequently issue a Writ of Mandamus directing the respondents to reconvey the property situate at Survey No. 283/1 measuring about 0.27 cents, Survey No. 284/1 measuring about 0.70 cents, Survey No.284/2 measuring about 0.65 cents and Survey No.284/3 measuring about 0.64 cents in 166 of Tambaram Village, Old State Bank Colony, Saidapet Taluk, Chengalpat District as per the provisions contained in Sec.48-B of the Land Acquisition (Tamil Nadu Amendment) Act 1996 (Tamil Nadu Act of 16 of 1997) and pass such further or other orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and thus render justice."



28. It is evident from the relief clauses of the two writ petitions filed by the appellants, that the reliefs sought by them are mutually inconsistent and contradictory. In the event that the appellants wanted a declaration to the effect that the acquisition proceedings in pursuance of issuance of the Section 4 notification, dated 15.5.1978 had lapsed or were void, the question of seeking re-conveyance of the said land could not arise. More so, it is difficult to understand, how the appellants can claim relief in respect of 9 survey numbers. In the present appeals, relief is restricted only to 4 of the survey numbers. Dr. A.M. Singhvi has not pressed for the relief of reconveyance. However, it is apparent that the appellants' claim cannot co-exist and can be said to be blowing hot and blowing cold, simultaneously.

29. In *Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Limited,* (2011) 10 SCC 420, this Court considered a large number of judgments on the issue of estoppels and held as under:

> "A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience…..
>
> …….The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had."

30. In the instant case, the tenure holders/person-interested neither filed objections under Section 5-A of the Act, nor have they challenged the land acquisition proceedings, so far as the suit land is concerned, instead they chose to withdraw the compensation awarded in 1983 and 1986; after the expiry of about three decades and hence, they cannot be permitted to challenge the acquisition proceedings on any ground whatsoever. The appellants cannot claim title/relief better than what the original vendors were entitled to.

31. In fact, the appellants have claimed reliefs in the writ petitions with respect to not just the suit land but also in relation to the land which was the subject matter of an earlier litigation by their predecessors-in-interest. We fail to understand for what purpose the relief of quashing the acquisition proceedings has been sought when, in respect of the said land, the proceedings already stood quashed.

32. The High Court dealt with the proceeding, issued in RC No. 8222/95/F5, which is purported to have been issued by one K.Muthu, Special Tahsildar (Land Acquisition), and observed that the said proceeding itself stood cancelled and somehow a xerox copy of the said proceeding was obtained by the appellants and they utilised the same to secure permission for sanctioning their plan of construction of flats on the said land. Thus, the appellant have played fraud upon the authorities in order to obtain the said sanction. Even as per the RC No. 8222/95/F5, it is evident that the possession of the suit land was taken over ages ago and therefore, the said suit land was the subject matter of the earlier litigation.

33. The High Court also recorded findings to the effect that the appellants have "managed", not only to obtain certain orders from the department, but have also misused the process of the court to achieve a sinister design. The court further took note that one of the appellants had filed an additional affidavit before the High Court in a writ petition by way of which, had attempted to mislead the court through furnishing of false information.



It has even been admitted at the Bar, that the letter dated 7.7.2005 which was placed on the record by the appellants before the High Court, was in fact, a forged document.

34. The appellants have not approached the court with clean hands, and are therefore, not entitled for any relief. Whenever a person approaches a Court of Equity, in the exercise of its extraordinary jurisdiction, it is expected that he will approach the said court not only with clean hands but also with a clean mind, a clean heart and clean objectives. Thus, he who seeks equity must do equity. The legal maxim *"Jure Naturae Aequum Est Neminem cum Alterius Detrimento Et Injuria Fieri Locupletiorem"*, means that it is a law of nature that one should not be enriched by causing loss or injury to another. (Vide: *The Ramjas Foundation & Ors. v. Union of India & Ors.,* AIR 1993 SC 852; *Nooruddin v. (Dr.) K.L. Anand,* (1995) 1 SCC 242; and *Ramniklal N. Bhutta & Anr. v. State of Maharashtra & Ors.,* AIR 1997 SC 1236).

35. The judicial process cannot become an instrument of oppression or abuse, or a means in the process of the court to subvert justice, for the reason that the court exercises its jurisdiction, only in furtherance of justice. The interests of justice and public interest coalesce, and therefore, they are very often one and the same. A petition or an affidavit containing a misleading and/or an inaccurate statement, only to achieve an ulterior purpose, amounts to an abuse of process of the court.

36. In *Dalip Singh v. State of U.P. & Ors.,* (2010) 2 SCC 114, this Court noticed an altogether new creed of litigants, that is, dishonest litigants and went on to strongly deprecate their conduct by observing that, the truth constitutes an integral part of the justice delivery system. The quest for personal gain has become so intense that those involved in litigation do not hesitate to seek shelter of falsehood, misrepresentation and suppression of facts in the course of court proceedings. A litigant who attempts to pollute the stream of justice, or who

touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.

37. The truth should be the guiding star in the entire judicial process. "Every trial is a voyage of discovery in which truth is the quest". An action at law is not a game of chess, therefore, a litigant cannot prevaricate and take inconsistent positions. It is one of those fundamental principles of jurisprudence that litigants must observe total clarity and candour in their pleadings. (Vide: *Ritesh Tewari & Anr. v. State of Uttar Pradesh & Ors.,* (2010) 10 SCC 677; and *Amar Singh v. Union of India,* (2011) 7 SCC 69).

38. In *Maria Margarida Sequeria Fernandes & Ors. v. Erasmo Jack de Sequeria* (dead), (2012) 5 SCC 370), this Court taking note of its earlier judgment in *Ramrameshwari Devi v. Nirmala Devi,* (2011) 8 SCC 249 held:

> "False claims and defences are really serious problems with real estate litigation, predominantly because of ever-escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our courts. If pragmatic approach is adopted, then this problem can be minimised to a large extent."

The Court further observed that wrongdoers must be denied profit from their frivolous litigation, and that they should be prevented from introducing and relying upon, false pleadings and forged or fabricated documents in the records furnished by them to the court.

39. In view of the above, the appellants have disentitled themselves for any equitable relief.

40. Section 16-A has been added to the Act by the State



Amendment Act, 1996, and the same imposes a complete restriction on the sale of acquired land by the tenure holder. In case the land is transferred in contravention of these provisions, the Government may, by way of an order, declare the transfer to be null and void, and on such declaration, the land shall, as penalty, be forfeited to, and vest in, the Revenue Department of the Government, free from all encumbrances.

In view of the above, we are of the considered opinion that the sale deeds in favour of the appellants are void and unenforceable.

41. In such a fact-situation, we fail to understand how the appellants came to possess the suit land which had been vested in the State ages ago, in the years 1983 and 1986. Such a course is not possible without the collusion of the officers of the State/Board.

42. After considering the entire material on record, we reach the following inescapable conclusions:-

(i) The suit land stood notified under Section 4 of the Act as on 15.5.1978. There is nothing on record to show, nor have the appellants made any pleadings to the effect that, the persons interested at the relevant time ever filed any objections whatsoever, in response to the notice issued under Section 5-A of the Act.

(ii) Predecessors-in-interest of the appellants have filed two writ petitions challenging the validity of acquisition of some of their land but they did not raise the issue of validity of the acquisition in respect of the suit land.

(iii) Award no.14/1983 was made on 28.6.1983, in respect of Survey Nos.283/1, 284/1 and 284/3. The amount of compensation, was withdrawn by the original tenure holders/persons-interested, though

of course, under protest, and the same was limited to the extent of quantum of compensation, so that they could approach the Collector for making a reference to the Court under Section 18 of the Act.

(iv) The judgment of the learned Single Judge is subsequent to the aforesaid award. As the compensation related to the land had been withdrawn, and the land stood vested in the State, free from all encumbrances, quashing the declaration under Section 6 in cases filed by others, would not enure any benefit to the original tenure holders/appellants, as has been explained by this Court in the case of *Abhey Ram* (supra), and furthermore, even if the declaration stood quashed in toto, it could not save the suit land, as its possession had already been taken over.

(v) In the instant case, the High Court did not declare the acquisition proceedings to be void, or the purpose for which the land had been acquired not to be a "public purpose" within the meaning of the Act. There has also been no direction whatsoever, to restore the possession of the said land to the tenure holders, upon refund of the compensation amount by them.

(vi) Another award no.11/1986 in respect of Survey No.284/2 was made on 14.8.1986. Compensation awarded in relation to the said piece of land was withdrawn. The land thus, vested in the State, free from all encumbrances.

(vii) In the instant case, as the original vendors i.e. vendors of the first sale were not vested with any title over the said land, the transfer by them, was itself void and all subsequent transfers would also,



as a result, remain ineffective and unenforceable in law. Therefore, sale deeds executed in the years 2004-05 would not confer any title on the appellants.

(viii) The appellants claimed to have made some enquiries in relation to the acquisition proceedings qua the suit land, to which the competent authorities replied, that the land was free from acquisition proceedings and therefore, the appellants proceeded to purchase the said suit land. The letters written by the Authorities dated 4.3.2004, 7.7.2005 and 12.5.2006 do not make any reference to the present appellants, nor was any information sought by any of them in this regard. Some of the said letters had been addressed to the original tenure holders and other were merely found to be inter-departmental communications.

(ix) Letter dated 7.7.2005, filed by the appellants before the Court is admittedly a forged document.

(x) So far as the matter relating to the proceedings issued in R.C. No.8222/95/F-5, it is clearly revealed that the appellants have used unfair means to obtain sanction for their plan of construction of flats.

(xi) The appellants filed an affidavit before the High Court only to mislead the court by furnishing false information.

(xii) The appellants also managed to obtain certain orders from the Department and further have abused the process of the court.

(xiii) The appellants did neither approach the statutory authority nor the court with clean hands.

(xiv) Compensation was paid to the original tenure

holders in 1983 and 1986. The same was refunded by the present appellants in the name of the original tenure holders in 2010 i.e. after 27 years, and the same has not been accepted by the Board and has been duly returned to the appellants.

(xv) The recommendations of the High Level Committee contained in Annexure-P.11 make it clear that the said Committee was constituted, only upon the request of the appellants to consider their grievances. The recommendations suggest that although possession of the suit land was taken, as the land was inaccessible, it remained unutilized for the purpose for which it was acquired. Therefore, reconveyance of the same was suggested.

(xvi) An application for re-conveyance was filed by the original tenure holders and their legal heirs, and not by the appellants with respect to the said part of the suit land, as is evident from the orders dated 18.12.2007 and 7.7.2008. The said letters, in fact, were addressed to Tmt. K. Palaniammal, Tmt. Girija, Tmt. Nagammal, Thiru A.E. Kothandaraman Mudaliar, and Thiru M. Mahalingam in response to an application made by them.

(xvii) It is evident from the record that there was no application for reconveyance of the land in Survey No.284/2, though the appellants have sought relief in relation to this land also.

(xviii) The appellants filed applications for re-conveyance through the original tenure holders/legal heirs. This clearly reveals that the appellants themselves had been of the view that the suit land had already vested in the State, otherwise there could be no question of re-conveyance.



(xix) The land once vested in the State, free from all encumbrances cannot be divested.

(xx) The appellants had attempted to be succeeded in illegally/unauthorisedly encroaching upon public land, by connivance with the officers of the State Govt./Board and raised a huge construction upon the said land, after getting the Plan sanctioned from the competent statutory authority.

(xxi) The State/Board authorities never made an attempt to stop the construction. Nor the Board approached the court to restrain the appellants from encroaching upon its land and construction of the flats. Connivance of the officers of the Board in the scandal is writ large and does not require any proof.

Facts of the case reveal a very sorry state of affairs as how the public property can be looted with the connivance and collusion of the so called trustees of the public properties. It reflects on the very bad governance of the State authorities within a period of six weeks.

43. The aforesaid conclusions do not warrant any relief to the appellants. The appeals are dismissed with the costs of Rupees Twenty Five lacs, which the appellants are directed to deposit with the Supreme Court Legal Services Authority. With in a period of six weeks.

44. In addition thereto, the Chief Secretary of Tamil Nadu is requested to examine the issues involved in the case and find out as who were the officials of the State or Board responsible for this loot of the public properties and proceed against them in accordance with law. He is further directed to ensure eviction of the appellants from the public land forthwith.

K.K.T. Appeals dismissed

V.K. SASIKALA
*v.*
STATE REP. BY SUPERINTENDENT OF POLICE
(Criminal Appeal No. 1497 of 2012)

SEPTEMBER 27, 2012

**[P. SATHASIVAM AND RANJAN GOGOI, JJ.]**

*Criminal Jurisprudence – Criminal Trial – Right of the accused – To demand certified copies/ inspection of unmarked and un-exhibited documents not relied upon by the prosecution but in custody of the court – Held: One of the established facets of a just, fair and transparent investigation is the right of an accused to ask for all such documents that he may be entitled to, under the scheme contemplated by CrPC – Absence of any claim on the part of the accused to the said documents at any earlier point of time cannot have the effect of foreclosing such a right of the accused – If in a given situation the accused comes to the Court contending that some papers forwarded to the Court by the investigating agency have not been exhibited by the prosecution as the same favours the accused, the court must concede a right to the accused to have an access to the said documents, if so claimed – In the case at hand, it was the specific contention of accused-appellant that in course of her examination u/s. 313 CrPC a perception had developed that she may be giving incomplete/incorrect answers in response to the questions put to her by the Court and that she needed copies of the documents or at least an opportunity of inspection of the same to enable her to provide effective answers and to appropriately prepare her defence – Any failure on the part of the appellant to put forward her version of the case in her examination u/ s.313 CrPC may have the effect of curtailing her rights in the event she chooses to take up a specific defence and examine defence witnesses – Besides, answers given by the appellant*





*in her examination, if incorrect or incomplete, may have the effect of strengthening the prosecution case against her – Appellant accordingly directed to be allowed inspection of the unmarked/ un-exhibited documents in custody of the court in the criminal trial pending against her – Code of Criminal Procedure, 1973 – ss. 313, 207 and 173 – Constitution of India, 1950 – Article 21.*

*Criminal Trial – Investigation – Power and duty of the Investigating Officer (IO) – Held: A duty is cast on the IO to evaluate the two sets of documents and materials collected i.e. those in favour of accused and those in support of the prosecution – However, it is not impossible to visualize a situation where the IO ignores the part of the seized documents which favour the accused and forwards to the Court only those documents which support the prosecution.*

*Code of Criminal Procedure, 1973 – s.313 – Examination of an accused under –Held: Has a fair nexus with the defence that the accused may choose to bring, if the need arises – Such examination not only provides the accused an opportunity to explain the incriminating circumstances appearing against him in the prosecution evidence but also permits him to put forward his own version, if he so chooses, with regard to his involvement or otherwise in the crime alleged against him.*

**A criminal case was pending against the appellant and three other accused before the trial court under Section 120B IPC and Section 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988. While the examination of appellant under Section 313 CrPC was midway, she filed an application seeking certified copies of certain unmarked and unexhibited documents in the custody of the court on being so forwarded alongwith the report of investigation under Section 173(5) CrPC. The application was dismissed by the trial court. The order was upheld by the High Court. The appellant then filed**

**another application before the trial court, this time, seeking an inspection of the said unmarked and unexhibited documents. This application too was rejected by the trial court, and again this order was upheld by the High Court.**

**The orders passed by the High Court upholding the rejection of two separate applications made by the appellant for certified copies / inspection of certain unmarked and unexhibited documents in the trial pending against her, were challenged in the instant appeals. The appellant contended that the conduct of the prosecution in not marking and exhibiting certain documents only indicate that the same do not support the prosecution case and in fact may assist the defence of the accused; that the appellant had sought copies/ inspection of such documents so as to be in a position to assess as to which of the documents can come to the aid of her defence so that the answers given by her in her examination under Section 313 CrPC can be projected without reflecting any inconsistency with the defence that may be adduced and that the right of the appellant to copies or, at least, to an inspection of the documents constituted a part of the larger right of the appellant to a fair trial of the charges levelled against her.**

**Disposing of the appeals, the Court**

**HELD:1.1. Section 173(5) CrPC makes it incumbent on the Investigating agency to forward/transmit to the concerned court all documents/statements etc. on which the prosecution proposes to rely in the course of the trial. Section 173(5), however, is subject to the provisions of Section 173(6) which confers a power on the investigating officer to request the concerned court to exclude any part of the statement or documents forwarded under Section 173(5) from the copies to be granted to the accused. [Para 11] [658-D-F]**



**1.2. While the first proviso to Section 207 CrPC empowers the court to exclude from the copies to be furnished to the accused such portions as may be covered by Section 173(6), the second proviso to Section 207 empowers the court to provide to the accused an inspection of the documents instead of copies thereof, if, in the opinion of the court it is not practicable to furnish to the accused, the copies of the documents because of the voluminous content thereof. [Para 12] [659-D-E]**

**1.3. Though it is only such reports which support the prosecution case that are required to be forwarded to the Court under Section 173(5) CrPC in every situation where some of the seized papers and documents do not support the prosecution case and, on the contrary, supports the accused, a duty is cast on the Investigating Officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself. However, it is not impossible to visualize a situation where the Investigating Officer ignores the part of the seized documents which favour the accused and forwards to the Court only those documents which support the prosecution. [Para 14] [660-G-H; 661-A]**

**1.4. In the case herein, evidently the unmarked and unexhibited documents of the case that are being demanded by the accused had been forwarded to the Court under Section 173 (5) but are not being relied upon by the prosecution. The said unmarked and unexhibited documents are presently in the custody of the Court. [Para 14] [661-C-E]**

**2.1. It is the responsibility of the investigating agency as well as that of the courts to ensure that every investigation is fair and does not erode the freedom of an individual except in accordance with law. One of the established facets of a just, fair and transparent**

**investigation is the right of an accused to ask for all such documents that he may be entitled to under the scheme contemplated by the Code of Criminal Procedure. [Para 15] [662-B-D]**

**2.2. A perception of possible prejudice, if the documents or at least an inspection thereof is denied, looms large. The absence of any claim on the part of the accused to the said documents at any earlier point of time cannot have the effect of foreclosing such a right of the accused. Absence of such a claim, till the time when raised, can be understood and explained in several reasonable and acceptable ways. Individual notion of prejudice, difficulty or handicap in putting forward a defence would vary from person to person and there can be no uniform yardstick to measure such perceptions. If the appellant has perceived certain difficulties in answering or explaining some part of the evidence brought by the prosecution on the basis of specific documents and seeks to ascertain if the allegedly incriminating documents can be better explained by reference to some other documents which are in the court's custody, an opportunity must be given to the accused to satisfy herself in this regard. It is not for the prosecution or for the Court to comprehend the prejudice that is likely to be caused to the accused. The perception of prejudice is for the accused to develop and if the same is founded on a reasonable basis it is the duty of the Court as well as the prosecution to ensure that the accused should not be made to labour under any such perception and the same must be put to rest at the earliest. Such a view is an inalienable attribute of the process of a fair trial that Article 21 guarantees to every accused. [Para 16] [666-B-G]**

**2.3. It is not the stage of making of the request; the efflux of time that has occurred or the prior conduct of the accused that is material. What is of significance is if**



**in a given situation the accused comes to the court contending that some papers forwarded to the Court by the investigating agency have not been exhibited by the prosecution as the same favours the accused the court must concede a right to the accused to have an access to the said documents, if so claimed. This is the core issue in the case which must be answered affirmatively. It is difficult to agree with the view taken by the High Court that the accused must be made to await the conclusion of the trial to test the plea of prejudice that he may have raised. Such a plea must be answered at the earliest and certainly before the conclusion of the trial, even though it may be raised by the accused belately. This is how the scales of justice in our Criminal Jurisprudence have to be balanced. [Para 17] [667-B-E]**

*Sidhartha Vashisht alias Manu Sharma vs. State* ***(NCT) of Delhi*** **(2010) 6 SCC 1: 2010 (4) SCR 103 – relied on.**

*Sanatan Naskar and another vs. State of West Bengal* **(2010) 8 SCC 249 – cited.**

**3.1. There is yet another possible dimension of the case. It is the specific contention of the accused in both the applications dated 29.3.2012 (for certified copies of the unmarked documents) and 18.4.2012 (for inspection) that it is in the course of the examination of the accused under Section 313 CrPC that a perception had developed that the accused may be giving incomplete/ incorrect answers in response to the questions put to her by the Court and that she needs copies of the documents or at least an opportunity of inspection of the same to enable her to provide effective answers and to appropriately prepare her defence. The examination of an accused under Section 313 Cr.P.C. not only provides the accused an opportunity to explain the incriminating circumstances appearing against him in the prosecution evidence but such examination also permits him to put forward his**

**own version, if he so chooses, with regard to his involvement or otherwise in the crime alleged against him. Viewed from the latter point of view, the examination of an accused under Section 313 Cr.P.C. does have a fair nexus with the defence that he may choose to bring, if the need arises. Any failure on the part of the accused to put forward his version of the case in his examination under Section 313 Cr.P.C. may have the effect of curtailing his rights in the event the accused chooses to take up a specific defence and examine defence witnesses. Besides, the answers given by the accused in his examination, if incorrect or incomplete, may also jeopardise him as such incorrect or incomplete answers may have the effect of strengthening the prosecution case against the accused. [Paras 18, 19] [667-E-G; 668-A-D]**

**3.2. In view of the avowed purport and object of the examination of an accused under Section 313 CrPC, the appellant cannot be denied access to the documents in respect of which prayers have been made in the applications dated 29.3.2012 (for certified copies of the unmarked documents) and dated 18.4.2012 (for inspection) before the trial Court. While the anxiety to bring the trial to its earliest conclusion has to be shared, it is fundamental that in the process, none of the well entrenched principles of law that have been laboriously built by illuminating judicial precedents is sacrificed or compromised. In no circumstance, the cause of justice can be made to suffer, though, undoubtedly, it is highly desirable that the finality of any trial is achieved in the quickest possible time. In order to balance the need to bring the prosecution in the present case to its earliest conclusion and at the same time to protect and preserve the right of the accused to a fair trial, and to take care of the conflicting interests that had surfaced in the present case, the appellant is directed to be allowed an inspection**



**of the unmarked and unexhibited documents referred to by her in the application dated 29.3.2012. [Para 20] [670-A-E]**

*Manu Sao vs. State of Bihar* **(2010) 12 SCC 310 – relied on.**

**Case Law Reference:**

| | | |
|---|---|---|
| **2010 (4) SCR 103** | **relied on** | **Para 9** |
| **(2010) 8 SCC 249** | **cited** | **Para 9** |
| **(2010) 12 SCC 310** | **relied on** | **Para 19** |

CRIMINAL APPELATE JURISDICTION : Criminal Appeal No. 1497 of 2012.

From the Judgment & Order dated 28.5.2012 of the High Court of Karnataka at Bangalore in Criminal Petition No. 2483 of 2012.

WITH

Crl.A.No. 1498/2012

Shekhar Naphade, V. Giri, Rakesh Dwivedi, R. Venkataramani, T.R. Andhiyarujina, Shunmugasundaram, Senthil, Mani Shankar, A. Ashokan, M.P. Parthiban, S.R. Setia, B. Balaji, V.G. Pragasam, S.J. Aristotle, Prabu Rama Subramanian, Soumik Ghosal for the appearing parties.

The Judgment of the Court was delivered by

**RANJAN GOGOI, J.** 1. Leave granted.

2. Two orders of the High Court of Karnataka dated 16th April, 2012 and 28th May, 2012 upholding the rejection of two separate applications made by the appellant herein for certified copies or in the alternative for inspection of certain unmarked and unexhibited documents in a trial pending against her is the subject matter of challenge in the appeals under consideration.

The facts leading to the applications filed before the learned trial court and the grounds of rejection being largely similar both the appeals were heard analogously.

3. A convenient staring point for the required narration of the relevant facts could be the order of this court dated 18th November, 2003 passed in Transfer Petitions (Criminal) Nos.77-78 of 2003 (*K. Anbazhagan* vs. *Superintendent of Police and others*[1]). By the aforesaid order dated 18th November, 2003 this court had transferred the proceeding in CC No.7 of 1997 from the court of the 11th Additional Sessions Judge (Special Court No.1), Chennai to a Special Court in Bangalore to be constituted by the State of Karnataka in consultation with the Chief Justice of the High Court of Karnataka. The appellant before us is the second accused in the aforesaid transferred proceeding which has been registered as Spl. CC.No.208 of 2004 and is presently pending in the court of the 36th Additional Sessions Judge and Special Judge, Bangalore. It may also be noticed that along with CC No.7 of 1997 there was another proceeding i.e. CC No. 2 of 2001 pending in the file of the same court, i.e. 11th Additional Sessions Judge (Special Court No.1), Chennai against the same accused which was also transferred to the Special Court in Bangalore by the order dated 18th November, 2003. However, the said proceeding would not be of any relevance at the present stage as the chargesheet in the said case has since been withdrawn and the matter stands closed.

4. The transfer of CC No.7 of 1997 and CC No. 2 of 2001 from the court at Chennai was sought by one Shri K. Anbazhagan, General Secretary of DMK Party, a recognised political party in the State of Tamil Nadu. In case No.CC No. 7 of 1997 then pending in the competent court at Chennai allegations of commission of offences under Section 120B of the Indian Penal Code and Section 13(2) read with Section 13(1) (e) of the Prevention of Corruption Act, 1988 were made

1. (2004) 3 SCC 767.



against the present appellant who was arrayed as the second accused in the case and also against one Smt. J. Jayalalitha, who was arrayed as the first accused. There were two other accused in the aforesaid proceeding, namely, accused No.3 and 4, who are relatives of the present appellant, i.e., accused No.2. The offences alleged arose out of certain acts and omissions attributed to the accused during the period 1991-1996 when the first accused was the Chief Minister of the State which office she had demitted after the General Elections held in the State in 1996. According to the petitioner in the Transfer Petitions, chargesheet in the aforesaid case had been filed on 21st October, 1997 and more than 250 prosecution witnesses had been examined by the end of August, 2000. The accused No.1, once again, became the Chief Minister of the State following the General Elections held in May, 2001. Though the appointment of the first accused as the Chief Minister was nullified by this court and the accused ceased to be Chief Minister, w.e.f., 21st September, 2001, she was elected to the State assembly in a by-election held on 21st February, 2002 and was, once again, sworn in as the Chief Minister of the State on 2nd March, 2002. It was stated in the Transfer Petitions that, thereafter, the course of trial of CC.No.7 of 1997 took a peculiar turn and a large number of prosecution witnesses (76 in all) who had been discharged were recalled without any objection of the public prosecutor. 64 of such witnesses resiled from their earlier versions tendered in court. It was also alleged that none of these witnesses were declared hostile by the public prosecutor. Furthermore, according to the petitioner, the presence of the first accused in court for her examination under Section 313 Cr.P.C. was dispensed with and, instead, a questionnaire was sent to the first accused to which she had responded. It is in these circumstances that the Transfer Petitions were filed before this Court.

5. Transfer Petitions Nos.77-78 of 2003 were allowed by the order of this court dated 18th November, 2003 with certain directions. To recapitulate the said directions, Paragraph 34 of

the judgment of this court may be extracted:

> "34. In the result, we deem it expedient for the ends of justice to allow these petitions. The only point that remains to be considered now is to which State the cases should be transferred. We are of the view that for the convenience of the parties the State of Karnataka would be most convenient due to its nearness to Tamil Nadu. Accordingly, the petitions are allowed. CC No. 7 of 1997 and CC No. 2 of 2001 pending on the file of the XIth Additional Sessions Judge (Special Court No. 1), Chennai in the State of Tamil Nadu shall stand transferred with the following directions:
>
> (*a*) The State of Karnataka in consultation with the Chief Justice of the High Court of Karnataka shall constitute a Special Court under the Prevention of Corruption Act, 1988 to whom CC No. 7 of 1997 and CC No. 2 of 2001 pending on the file of the XIth Additional Sessions Judge (Special Court No. 1), Chennai in the State of Tamil Nadu shall stand transferred. The Special Court to have its sitting in Bangalore.
>
> (*b*) As the matter is pending since 1997 the State of Karnataka shall appoint a Special Judge within a month from the date of receipt of this order and the trial before the Special Judge shall commence as soon as possible and will then proceed from day to day till completion.
>
> (*c*) The State of Karnataka in consultation with the Chief Justice of the High Court of Karnataka shall appoint a senior lawyer having experience in criminal trials as Public Prosecutor to conduct these cases. The Public Prosecutor so appointed shall be entitled to assistance of another lawyer of his choice. The fees and all other expenses of the Public Prosecutor and the Assistant shall be paid by the State of Karnataka who will thereafter be entitled to get the same reimbursed from the State of Tamil Nadu. The Public Prosecutor to be appointed within six weeks from today.
>
> (*d*) The investigating agency is directed to render all assistance to the Public Prosecutor and his Assistant.
>
> (*e*) The Special Judge so appointed to proceed with the cases from such stage as he deems fit and proper and in accordance with law.
>
> (*f*) The Public Prosecutor will be at liberty to apply that the witnesses who have been recalled and cross-examined by the accused and who have resiled from their previous statement, may be again recalled. The Public Prosecutor would be at liberty to apply to the court to have these witnesses declared hostile and to seek permission to cross-examine them. Any such application if made to the Special Court shall be allowed. The Public Prosecutor will also be at liberty to apply that action in perjury to be taken against some or all such witnesses. Any such application(s) will be undoubtedly considered on its merit(s).
>
> (*g*) The State of Tamil Nadu shall ensure that all documents and records are forthwith transferred to the Special Court on its constitution. The State of Tamil Nadu shall also ensure that the witnesses are produced before the Special Court whenever they are required to attend that court.
>
> (*h*) In case any witness asks for protection, the State of Karnataka shall provide protection to that witness.

(*i*) The Special Judge shall after completion of evidence put to all the accused all relevant evidence and documents appearing against them whilst recording their statement under Section 313. All the accused shall personally appear in court, on the day they are called upon to do so, for answering questions under Section 313 of the Criminal Procedure Code.

These petitions are allowed in the above terms."

6. Though a detailed recital will not be necessary it appears that notwithstanding the above directions of this court not much progress has been achieved to bring to trial in Special CC No. 208 of 2004 to its logical conclusion. Soon after the proceedings were transferred to the Special Court at Bangalore an order dated 27th June, 2005 was passed by the learned trial court for clubbing of the two cases. This order came to be challenged before this court by the petitioner in the Transfer Petitions, i.e. Shri K. Anbazihagan and until the Special Leave Petition filed (SLP No.3828/2005) was disposed of on 22nd January, 2010 the criminal proceedings had remained stayed. It also appears that from time to time applications had been filed before the learned trial court by one or the accused raising different interlocutory issues and also seeking to vindicate different facets of the right of the accused to a free and fair trial. Such applications, inter alia, were for translation of depositions of prosecution witnesses running into thousands of pages; for corrections in such translations; for appointment or assistance of an interpreter and such are the incidental matters. The orders passed by the trial court on all such applications invariably came to be challenged before the High Court and even before this court. On several of such occasions the trial came to be halted due to interim orders passed by different courts. Consequently, as on date the examination of the appellant (accused No.2) under Section 313 Cr.P.C. is going on, the same having commenced on 18th February, 2012. While such



examination of the appellant was midway and she had answered over 500 questions out of the contemplated double the number, an application dated 16th April, 2012 was filed by the appellant before the learned trial court seeking certified copies of certain unmarked and unexhibited documents which were claimed to be in the custody of the court on being so forwarded alongwith the report of investigation under Section 173(5) Cr.P.C. The learned trial court dismissed the said application by its order 3rd April, 2012, whereafter, the High Court of Karnataka was approached by means of Criminal Petition No.1840 of 2012. The petition having been dismissed by the High Court on 16th April, 2012, the appellant forthwith filed another application before the learned trial court, this time, seeking an inspection of the said unmarked and unexhibited documents in respect of which the earlier application was filed but rejected. This application was also rejected by the learned trial court by its order dated 21st April, 2012 which led to the inception of Criminal Petition No.2483 of 2012 in the High Court which was dismissed on 28th May, 2002 . The said order dated 28th May, 2012 as well as the earlier order dated 16th April, 2012 of the High Court have been challenged before this court in the present appeals.

7. A reading of the orders passed by the learned trial court on the applications filed by the present appellant as well as the two separate orders passed by the High Court affirming the orders of the trial court would go to show that the grounds that found favour with the learned courts to reject the prayer made by the appellant are largely similar. It is the view of the learned trial court as well as the High Court that in the present case the charges against the appellant were framed way back in the year 2007. At the time of the framing of the charge the court is required to satisfy itself that all papers, documents and statements required to be furnished to the accused under Section 207 Cr.P.C. have been so furnished. No grievance in this regard was raised by the appellant or any of the accused. The issue was also not raised at any point of time in the course

of examination of any of the prosecution witnesses (over 250 witnesses had been examined). It has also been expressed by the High Court that though the appellant had answered over 532 questions in her examination under Section 313 Cr.P.C. no grievance was raised or any prejudice claimed by the appellant at any earlier point of time. It is also the view of the High Court that non furnishing of the copies of the documents or not conceding to the prayer for inspection will not automatically render the prosecution bad in law in as much as the effect of such action must result in prejudice to the accused which question can well be decided when the matter is being considered on merits. The High Court also took the view that the documents, copies or inspection of which was sought, being unmarked and unexhibited documents, objections can always be raised if the accused is to be questioned in connection with such documents in her examination under section 313 Cr.P.C. In addition to the above, the High Court was of the view that this court having passed clear directions in its order dated 18th November, 2003 that the criminal proceedings against the accused should be brought to its earliest conclusion by conducting the trial on day to day basis, the filing of the applications for certified copies/inspection of the unmarked and unexhibited documents constitute another attempt on the part of the appellant to over reach the order of this court and delay the trial. It is the correctness of the reasons assigned by the High Court for ultimate conclusions reached by it that has been assailed before us in the present appeals.

8. We have heard Shri Shekhar Naphade and Shri V.Giri, learned senior counsel for the appellant and Shri Rakesh Dwivedi, learned senior counsel for the respondent. We have also heard Shri T.R. Andhiyarujina, learned senior counsel appearing for the applicant Shri K.Anbazhagan, General Secretary, DMK Party, who has sought impleadment in the present proceedings. The learned senior counsel had been heard, primarily, on the prayer for impleadment, in the course of which, naturally, he was permitted to traverse the relevant



facts of the case. Upon hearing the learned senior counsel we do not consider it necessary to pass any specific order on the impleadment application as we are finally disposing both the appeals by the present order.

9. Learned counsel for the appellant have vehemently contended that from the objections filed to the applications seeking certified copies or an inspection of the unmarked and unexhibited documents as well as from the orders of the learned trial courtpassed on the said applications it is clear that out of the papers forwarded to the court under Section 173(5) Cr.P.C. alongwith the report of investigation some documents have been marked and exhibited by the prosecution while some other documents have not been so utilised. As all such documents had been forwarded to the court upon completion of investigation the unmarked and unexhibited documents are in the custody of the court. According to the learned counsel, the appellant in her application to the learned trial court (IA No.711/2012) had set out a complete list of the unmarked documents mentioning the particulars of the search lists by which the documents were seized in the course of investigation. Learned counsel has further argued that the conduct of the prosecution in not marking and exhibiting the said documents can only indicate that the same do not support the prosecution case and in fact may assist the defence of the accused. As the answers to the questions put to the accused under Section 313 are capable of being relied upon against or in favour of the accused, the appellant had sought copies/inspection of such documents so as to be in a position to assess as to which of the documents can come to the aid of her defence so that the answers given by her in her examination under Section 313 Cr.P.C. can be projected without reflecting any inconsistency with the defence that may be adduced. The attention of the court has also been drawn to an affidavit filed by the petitioner pinpointing as to how some of the documents could be relevant to certain specific questions put to the appellant in the course of her examination under Section 313 Cr.P.C. In fact, according

to the learned counsel the right of the appellant to copies or, at least, to an inspection of the documents constitute a part of the larger right of the appellant to a fair trial of the charges levelled against her. Reliance has been placed on the decisions of this court in *Sidhartha Vashisht alias Manu Sharma vs. State (NCT) of Delhi*[2], *Sanatan Naskar and another vs. State of West Bengal*[3] and *Manu Sao vs. State of Bihar*[4].

10. On the other hand, learned counsel for the State has contended that when the documents copies or inspection of which has been sought are not being relied on by the prosecution, in any manner, to bring home the charge against the appellant it is not open for the appellant to insist on any right to the copies of such documents or to inspect the same. It is urged that the documents relevant to the charge had been furnished to the appellant under Section 207at the appropriate stage of the proceeding and also that such documents had been duly considered at the time of framing of charges. No issue in this regard was raised by the appellant at any earlier point of time. In fact, though different objections to various other facets of the trial were raised by the appellant from time to time by filing repeated/successive applications it is only when the examination of the appellant under Section 313 Cr.P.C. had reached a fairly advanced stage that the present applications have been filed. Both the applications, therefore, are in utter abuse of the process of law and being calculated only to delay the trial the same have been rightly rejected by the learned trial courtwhich orders have been affirmed by the High Court. Learned counsel has also pointed out that the contention to the effect that the documents are required to enable the appellant to prepare her defence is wholly untenable as the said stage would arise only after the examination of all the accused under Section 313 Cr.P.C. is complete.

2. (2010) 6 SCC 1.
3. (2010) 8 SCC 249.
4. (2011) 7 SCC 310



11. The parameters governing the process of investigation of a criminal charge; the duties of the investigating agency and the role of the courts after the process of investigation is over and a report thereof is submitted to the court is exhaustively laid down in the different Chapters of the Code of Criminal Procedure, 1973 (Cr.P.C.). Though the power of the investigating agency is large and expansive and the courts have a minimum role in this regard there are inbuilt provisions in the Code to ensure that investigation of a criminal offence is conducted keeping in mind the rights of an accused to a fair process of investigation. The mandatory duty cast on the investigating agency to maintain a case diary of every investigation on a day to day basis and the power of the court under Section 172 (2) and the plenary power conferred in the High Courts by Article 226 the Constitution are adequate safeguards to ensure the conduct of a fair investigation. Without dilating on the said aspect of the matter what has to be taken note of now are the provisions of the Code that deal with a situation/stage after completion of the investigation of a case. In this regard the provisions of Section 173 (5) may be specifically noted. The said provision makes it incumbent on the Investigating agency to forward/transmit to the concerned court all documents/statements etc. on which the prosecution proposes to rely in the course of the trial. Section 173(5), however, is subject to the provisions of Section 173(6) which confers a power on the investigating officer to request the concerned court to exclude any part of the statement or documents forwarded under Section 173(5) from the copies to be granted to the accused. The court having jurisdiction to deal with the matter, on receipt of the report and the accompanying documents under Section 173, is next required to decide as to whether cognizance of the offence alleged is to be taken in which event summons for the appearance of the accused before the court is to be issued. On such appearance, under Section 207 Cr.P.C., the concerned court is required to furnish to the accused copies of the following documents:

(i) The police report;

(ii) The first information report recorded under section 154;

(iii) The statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;

(iv) The confessions and statements, if any, recorded under section 164;

(v) Any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173.

12. While the first proviso to Section 207 empowers the court to exclude from the copies to be furnished to the accused such portions as may be covered by Section 173(6), the second proviso to Section 207 empowers the court to provide to the accused an inspection of the documents instead of copies thereof, if, in the opinion of the court it is not practicable to furnish to the accused the copies of the documents because of the voluminous content thereof. We would like to emphasise, at this stage, that while referring to the aforesaid provisions of the Code, we have deliberately used the expressions "court" instead of the expression "Magistrate" as under various special enactments the requirement of commitment of a case to a higher court (court of Sessions) by the Magistrate as mandated by the Code has been dispensed with and the special courts constituted under a special statute have been empowered to receive the report of the investigation along with the relevant documents directly from the investigating agency and thereafter to take cognizance of the offence, if so required.



13. It is in the context of the above principles of law and the provisions of the Code that the rights of the appellant will have to be adjudicated upon by us in the present case. It is not in dispute that after the appearance of the accused in the Court of the Special Judge a large number of documents forwarded to the Court by the Investigating Officer along with his report, had been furnished to the accused. Thereafter, charges against the accused had been framed way back in the year 2007 and presently the trial has reached the stage of examination of the second accused, i.e. appellant under the provisions of Section 313 Cr.P.C. At no earlier point of time (before the examination of the second accused under Section 313 Cr.P.C.) the accused had pointed out that there are documents in the Court which have been forwarded to it under Section 173 (5) and which have not been relied upon by the prosecution. It is only at such an advanced stage of the trial that the accused, after pointing out the said facts, had claimed an entitlement to copies of the said documents or at least an inspection of the same on the ground that the said documents favour the accused.

14. Seizure of a large number of documents in the course of investigation of a criminal case is a common feature. After completion of the process of investigation and before submission of the report to the Court under Section 173 Cr.P.C., a fair amount of application of mind on the part of the investigating agency is inbuilt in the Code. Such application of mind is both with regard to the specific offence(s) that the Investigating Officer may consider to have been committed by the accused and also the identity and particulars of the specific documents and records, seized in the course of investigation, which supports the conclusion of the Investigating Officer with regard to the offence(s) allegedly committed. Though it is only such reports which support the prosecution case that are required to be forwarded to the Court under Section 173 (5) in every situation where some of the seized papers and documents do not support the prosecution case and, on the contrary, supports the accused, a duty is cast on the

Investigating Officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself. However, it is not impossible to visualize a situation whether the Investigating Officer ignores the part of the seized documents which favour the accused and forwards to the Court only those documents which support the prosecution. If such a situation is pointed by the accused and such documents have, in fact, been forwarded to the Court would it not be the duty of the Court to make available such documents to the accused regardless of the fact whether the same may not have been marked and exhibited by the prosecution? What would happen in a situation where such documents are not forwarded by the Investigating Officer to the Court is a question that does not arise in the present case. What has arisen before us is a situation where evidently the unmarked and unexhibited documents of the case that are being demanded by the accused had been forwarded to the Court under Section 173 (5) but are not being relied upon by the prosecution. Though the prosecution has tried to cast some cloud on the issue as to whether the unmarked and unexhibited documents are a part of the report under Section 173 Cr.P.C., it is not denied by the prosecution that the said unmarked and unexhibited documents are presently in the custody of the Court. Besides, the accused in her application before the learned Trial court(IA 711/2012) had furnished specific details of the said documents and had correlated the same with reference to specific seizure lists prepared by the investigating agency. In such circumstances, it can be safely assumed that what has been happened in the present case is that along with the report of investigation a large number of documents have been forwarded to the Court out of which the prosecution has relied only on a part thereof leaving the remainder unmarked and unexhibited.

15. In a recent pronouncement in *Siddharth Vashisht @ Manu Sharma V. State (NCT of Delhi) (supra)* to which one of us (Sathasivam, J) was a party, the role of a public prosecutor and his duties of disclosure have received a wide and in-depth



consideration of this Court. This Court has held that though the primary duty of a Public Prosecutor is to ensure that an accused is punished, his duties extend to ensuring fairness in the proceedings and also to ensure that all relevant facts and circumstances are brought to the notice of the Court for a just determination of the truth so that due justice prevails. The fairness of the investigative process so as to maintain the citizens' rights under Articles 19 and 21 and also the active role of the court in a criminal trial have been exhaustively dealt with by this Court. Finally, it was held that it is the responsibility of the investigating agency as well as that of the courts to ensure that every investigation is fair and does not erode the freedom of an individual except in accordance with law. It was also held that one of the established facets of a just, fair and transparent investigation is the right of an accused to ask for all such documents that he may be entitled to under the scheme contemplated by the Code of Criminal Procedure. The said scheme was duly considered by this Court in different paragraphs of the report. The views expressed would certainly be useful for reiteration in the context of the facts of the present case:-

> "216. Under Section 170, the documents during investigation are required to be forwarded to the Magistrate, while in terms of Section 173(5) all documents or relevant extracts and the statement recorded under Section 161 have to be forwarded to the Magistrate. The investigating officer is entitled to collect all the material, which in his wisdom is required for proving the guilt of the offender. He can record statement in terms of Section 161 and his power to investigate the matter is a very wide one, which is regulated by the provisions of the Code. The statement recorded under Section 161 is not evidence *per se* under Section 162 of the Code. The right of the accused to receive the documents/statements submitted before the court is absolute and it must be adhered to by the prosecution and the court must ensure supply of

documents/statements to the accused in accordance with law. Under the proviso to Section 162(1) the accused has a statutory right of confronting the witnesses with the statements recorded under Section 161 of the Code thus indivisible.

217. Further, Section 91 empowers the court to summon production of any document or thing which the court considers necessary or desirable for the purposes of any investigation, inquiry, trial or another proceeding under the provisions of the Code. Where Section 91 read with Section 243 says that if the accused is called upon to enter his defence and produce his evidence there he has also been given the right to apply to the court for issuance of process for compelling the attendance of any witness for the purpose of examination, cross-examination or the production of any document or other thing for which the court has to pass a reasoned order.

218. The liberty of an accused cannot be interfered with except under due process of law. The expression "due process of law" shall deem to include fairness in trial. The court (*sic* Code) gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution (prosecution and the Prosecutor) to make fair disclosure. *The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in court or not. That document should essentially be furnished to the accused and even in the cases where during investigation a document is bona fide obtained by the investigating agency and in the opinion of the Prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused.*



219. The role and obligation of the Prosecutor particularly in relation to disclosure cannot be equated under our law to that prevalent under the English system as aforereferred to. But at the same time, the demand for a fair trial cannot be ignored. It may be of different consequences where a document which has been obtained suspiciously, fraudulently or by causing undue advantage to the accused during investigation such document could be denied in the discretion of the Prosecutor to the accused whether the prosecution relies or not upon such documents, however in other cases the obligation to disclose would be more certain. As already noticed the provisions of Section 207 have a material bearing on this subject and make an interesting reading. This provision not only require or mandate that the court without delay and free of cost should furnish to the accused copies of the police report, first information report, statements, confessional statements of the persons recorded under Section 161 whom the prosecution wishes to examine as witnesses, of course, excluding any part of a statement or document as contemplated under Section 173(6) of the Code, any other document or relevant extract thereof which has been submitted to the Magistrate by the police under sub-section (5) of Section 173. In contradistinction to the provisions of Section 173, where the legislature has used the expression "documents on which the prosecution relies" are not used under Section 207 of the Code. Therefore, the provisions of Section 207 of the Code will have to be given liberal and relevant meaning so as to achieve its object. Not only this, the documents submitted to the Magistrate along with the report under Section 173(5) would deem to include the documents which have to be sent to the Magistrate during the course of investigation as per the requirement of Section 170(2) of the Code.

220. *The right of the accused with regard to disclosure of documents is a limited right but is codified and is the*

*very foundation of a fair investigation and trial*. On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report under Section 173(2) as per orders of the court. *But certain rights of the accused flow both from the codified law as well as from equitable concepts of the constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial.* To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the court under Section 91 of the Code to summon documents signifies and provides precepts which will govern the right of the accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely.

221. It will be difficult for the Court to say that the accused has no right to claim copies of the documents or request the Court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. *A document which has been obtained bona fide and has bearing on the case of the prosecution and in the opinion of the Public Prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused*. Then that document should be disclosed to the accused giving him chance of fair defence, particularly when non-production or disclosure of such a document would affect administration of criminal justice and the defence of the accused prejudicially."

(emphasis supplied)

(*Sidhartha Vashisht v. State (NCT of Delhi),* (2010) 6 SCC 1)



16. The declaration of the law in Sidhartha Vashisht (supra) may have touched upon the outer fringe of the issues arising in the present case. However, the positive advancement that has been achieved cannot, in our view, be allowed to take a roundabout turn and the march has only to be carried forward. If the claim of the appellant is viewed in context and perspective outlined above, according to us, a perception of possible prejudice, if the documents or at least an inspection thereof is denied, looms large. The absence of any claim on the part of the accused to the said documents at any earlier point of time cannot have the effect of foreclosing such a right of the accused. Absence of such a claim, till the time when raised, can be understood and explained in several reasonable and acceptable ways. Suffice it would be to say that individual notion of prejudice, difficulty or handicap in putting forward a defence would vary from person to person and there can be no uniform yardstick to measure such perceptions. If the present appellant has perceived certain difficulties in answering or explaining some part of the evidence brought by the prosecution on the basis of specific documents and seeks to ascertain if the allegedly incriminating documents can be better explained by reference to some other documents which are in the court's custody, an opportunity must be given to the accused to satisfy herself in this regard. It is not for the prosecution or for the Court to comprehend the prejudice that is likely to be caused to the accused. The perception of prejudice is for the accused to develop and if the same is founded on a reasonable basis it is the duty of the Court as well as the prosecution to ensure that the accused should not be made to labour under any such perception and the same must be put to rest at the earliest. Such a view, according to us, is an inalienable attribute of the process of a fair trial that Article 21 guarantees to every accused.

17. The issue that has emerged before us is, therefore, somewhat larger than what has been projected by the State and what has been dealt with by the High Court. The question

arising would no longer be one of compliance or non-compliance with the provisions of Section 207 Cr.P.C. and would travel beyond the confines of the strict language of the provisions of the Cr.P.C. and touch upon the larger doctrine of a free and fair trial that has been painstakingly built up by the courts on a purposive interpretation of Article 21 of the Constitution. It is not the stage of making of the request; the efflux of time that has occurred or the prior conduct of the accused that is material. What is of significance is if in a given situation the accused comes to the court contending that some papers forwarded to the Court by the investigating agency have not been exhibited by the prosecution as the same favours the accused the court must concede a right to in the accused to have an access to the said documents, if so claimed. This, according to us, is the core issue in the case which must be answered affirmatively. In this regard, we would like to be specific in saying that we find it difficult to agree with the view taken by the High Court that the accused must be made to await the conclusion of the trial to test the plea of prejudice that he may have raised. Such a plea must be answered at the earliest and certainly before the conclusion of the trial, even though it may be raised by the accused belately. This is how the scales of justice in our Criminal Jurisprudence have to be balanced.

18. There is yet another possible dimension of the case. It is the specific contention of the accused in both the applications dated 29.3.2012 (for certified copies of the unmarked documents) and 18.4.2012 (for inspection) that it is in the course of the examination of the accused under Section 313 Cr.P.C. that a perception had developed that the accused may be giving incomplete/ incorrect answers in response to the questions put to her by the Court and that she needs copies of the documents or at least an opportunity of inspection of the same to enable her to provide effective answers and to appropriately prepare her defence.

19. Any debate or discussion with regard to the purport



and object of the examination of an accused under Section 313 Cr.P.C. is wholly unnecessary as the law in this regard is fairly well settled by a long line of the decisions of this Court. The examination of an accused under Section 313 Cr.P.C. not only provides the accused an opportunity to explain the incriminating circumstances appearing against him in the prosecution evidence but such examination also permits him to put forward his own version, if he so chooses, with regard to his involvement or otherwise in the crime alleged against him. Viewed from the latter point of view, the examination of an accused under Section 313 Cr.P.C. does have a fair nexus with the defence that he may choose to bring, if the need arises. Any failure on the part of the accused to put forward his version of the case in his examination under Section 313 Cr.P.C. may have the effect of curtailing his rights in the event the accused chooses to take up a specific defence and examine defence witnesses. Besides, the answers given by the accused in his examination, if incorrect or incomplete, may also jeopardise him as such incorrect or incomplete answers may have the effect of strengthening the prosecution case against the accused. In this connection it may be appropriate to refer to two paragraphs of the judgment of this Court in *Manu Sao Vs. State of Bihar*[5] which are extracted below:-

> "13. As already noticed, the object of recording the statement of the accused under Section 313 of the Code is to put all incriminating evidence against the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also to permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the court and besides ensuring the compliance therewith the court has

5. 2010 (12) SCC 3100.

to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simpliciter denial or in the alternative to explain his version and reasons for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the court and the accused and to put to the accused every important incriminating piece of evidence and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.

14. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence against the accused in any other enquiry or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this section should not be considered in isolation but in



conjunction with evidence adduced by the prosecution."

20. If the above is the avowed purport and object of the examination of an accused under Section 313 Cr.P.C., we do not see as to how the appellant (second accused) can be denied an access to the documents in respect of which prayers have been made in the applications dated 29.3.2012 (for certified copies of the unmarked documents) and dated 18.4.2012 (for inspection) before the learned trial Court. While the anxiety to bring the trial to its earliest conclusion has to be shared it is fundamental that in the process none of the well entrenched principles of law that have been laboriously built by illuminating judicial precedents is sacrificed or compromised. In no circumstance, the cause of justice can be made to suffer, though, undoubtedly, it is highly desirable that the finality of any trial is achieved in the quickest possible time. In view of what has been stated above and to balance the need to bring the prosecution in the present case to its earliest conclusion and at the same time to protect and preserve the right of the accused to a fair trial we are of the view that the following directions would take care of the conflicting interests that have surfaced in the present case:-

(1) The accused No.2, i.e. the appellant herein, be allowed an inspection of the unmarked and unexhibited documents referred to by her in the application dated 29.3.2012, i.e., IA No. 711 of 2012 in CC No. 2008/2004 filed in the Court of XXXVI Additional City Civil & Sessions Judge, Bangalore;

(2) Such inspection will be completed within a period of 21 days from the date of receipt of this order by the learned trial court. The venue of such inspection and also the persons who will be permitted to be present at the time of inspection will be decided by the learned trial court.

(3) The right of inspection conferred by this order will not affect the validity of any part of the trial till date, including,

the examination of the accused No.1 under Section 313 Cr.P.C. which has since been completed or any part of such examination of the second accused that may have been completed in the meantime.

(4) In the event the third and the fourth accused also desire inspection of the unmarked and unexhibited documents such inspection will be allowed by the learned trial court. In such an event the process of inspection will also be simultaneously carried out and completed within the period of 21 days stipulated in the present order.

21. In the result, both the appeals shall stand disposed of in terms of the directions as above.

B.B.B. Appeals disposed of.



SPEAKER HARYANA VIDHAN SABHA
*v.*
KULDEEP BISHNOI & ORS.
(Civil Appeal No.7125 of 2012)

SEPTEMBER 28, 2012

**[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]**

*Constitution of India, 1950 – Articles 226 & 227 and Article 191 r/w Tenth Schedule – Haryana Vidhan Sabha – Five MLAs of one political party wrote letters to the Speaker expressing their intention to merge their party with another political party – Speaker accepted the merger and recognized the said MLAs as Members of the other political party – Petitions filed before the Speaker under paragraph 6 of the Tenth Schedule to the Constitution for disqualification of the said MLAs – On ground that they had voluntarily given up the membership of their original political party and had joined another party in violation of the provisions of paragraph 4(1) of the Tenth Schedule – Writ Petition also filed – Single Judge of the High Court directed the Speaker to finally decide the disqualification petitions pending before him within four months – Division Bench affirmed the directions given by the Single Judge, and further directed that pending decision by the Speaker, the five MLAs in question would stand disqualified from effectively functioning as members of the Haryana Vidhan Sabha – On appeal, held: Under the scheme of the Tenth Schedule to the Constitution, the Speaker does not have an independent power to decide that there has been split or merger as contemplated by paragraphs 3 and 4 respectively of the Tenth Schedule and such a decision can be taken only when the question of disqualification arises in a proceeding under paragraph 6 of the Tenth Schedule – Restraining the Speaker from taking any decision under paragraph 6 of the Tenth Schedule was beyond the jurisdiction*

*of the High Court, since the Constitution itself has vested the Speaker with the power to take a decision under paragraph 6 and care has also been taken to indicate that such decision of the Speaker would be final – Direction given by the Single Judge, as endorsed by the Division Bench, upheld to the extent it directs the Speaker to decide the petitions for disqualification of the five MLAs within a period of four months – Remaining portion of the order disqualifying the five MLAs from effectively functioning as Members of the Haryana Vidhan Sabha set aside – Said five MLAs entitled to fully function as Members of the Haryana Vidhan Sabha without restrictions, subject to final decision by the Speaker in the disqualification petitions – Haryana Legislative Assembly (Disqualification of Members on Ground of Defection) Rules, 1986.*

**Pursuant to the 12th Legislative Assembly Elections in the State of Haryana, the Indian National Congress Party, ['the INC'] emerged as the single largest party and formed the Government. Subsequently, five MLAs of the Haryana Janhit Congress (BL) Party ['the HJC (BL)'] wrote to the Speaker expressing their intention to merge the HJC (BL) with the INC. The Speaker accepted the merger and recognized the five concerned MLAs as Members of the INC in the Haryana Vidhan Sabha. Challenging the orders passed by the Speaker, Respondent no.1 filed petitions before the Speaker under Article 191 read with the Tenth Schedule to the Constitution of India and the Haryana Legislative Assembly (Disqualification of Members on Ground of Defection) Rules, 1986, on the ground that they had voluntarily given up the membership of their original political party and had joined the INC in violation of the provisions of paragraph 4(1) of the Tenth Schedule. Respondent no.1 also filed a Writ Petition. A Single Judge of the High Court allowed the Writ Petition and directed the Speaker to finally decide the disqualification petitions**



**pending before him within a period of four months. Letters Patent Appeal was filed by the Speaker. The Division Bench not only declined to interfere with the directions given by the Single Judge, but in addition directed that pending decision by the Speaker, the five MLAs in question would stand disqualified from effectively functioning as members of the Haryana Vidhan Sabha. The aforesaid directions were challenged in the instant appeals by the Speaker and the five concerned MLAs.**

**In the aforesaid context, the following substantial questions of law arose for consideration:- (a) Whether the High Court in exercise of its powers under Articles 226 and 227 of the Constitution, has the jurisdiction to issue directions of an interim nature to a Member of the House while a disqualification petition of such Member is pending before the Speaker of a State Legislative Assembly under Article 191 read with the Tenth Schedule to the Constitution of India (b) Whether even in exercise of its powers of judicial review, the High Court, as a constitutional authority, can issue mandatory directions to the Speaker of a State Assembly, who is himself a constitutional authority, to dispose of a disqualification petition within a specified time (c) Can the High Court, in its writ jurisdiction, interfere with the disqualification proceedings pending before the Speaker and pass an order temporarily disqualifying a Member of the State Legislative Assembly (d) When a disqualification petition filed under Article 191 read with the Tenth Schedule to the Constitution of India is pending consideration before the Speaker, can a parallel Writ Petition, seeking the same relief, be proceeded with simultaneously and (e) Did the High Court have jurisdiction to give directions under Order 41 Rule 33 of CPC, despite the express bar contained in the Explanation to Section 141 of CPC, in proceedings under Article 226 of the Constitution.**

**Disposing of the appeals, the Court**

**HELD:1.1. The scheme of the Tenth Schedule to the Constitution indicates that the Speaker is not competent to take a decision with regard to disqualification on ground of defection, without a determination under paragraph 4, and paragraph 6 in no uncertain terms lays down that if any question arises as to whether a Member of the House has become subject to disqualification, the said question would be referred to the Speaker of such House whose decision would be final. The finality of the decisions of the Speaker is in regard to paragraph 6 since the Speaker is not competent to decide a question as to whether there has been a split or merger under paragraph 4. Under the scheme of the Tenth Schedule, the Speaker does not have an independent power to decide that there has been split or merger as contemplated by paragraphs 3 and 4 respectively and such a decision can be taken only when the question of disqualification arises in a proceeding under paragraph 6. It is only after a final decision is rendered by the Speaker under paragraph 6 of the Tenth Schedule to the Constitution that the jurisdiction of the High Court under Article 226 of the Constitution can be invoked. [Para 44] [697-D-F, H; 698-A-B]**

**1.2. Since the decision of the Speaker on a petition under paragraph 4 of the Tenth Schedule concerns only a question of merger on which the Speaker is not entitled to adjudicate, the High Court could not have assumed jurisdiction under its powers of review before a decision was taken by the Speaker under paragraph 6 of the Tenth Schedule to the Constitution. It is in fact in a proceeding under paragraph 6 that the Speaker assumes jurisdiction to pass a quasi-judicial order which is amenable to the writ jurisdiction of the High Court. It is in such proceedings that the question relating to the**



**disqualification is to be considered and decided. Accordingly, restraining the Speaker from taking any decision under paragraph 6 of the Tenth Schedule is beyond the jurisdiction of the High Court, since the Constitution itself has vested the Speaker with the power to take a decision under paragraph 6 and care has also been taken to indicate that such decision of the Speaker would be final. It is only thereafter that the High Court assumes jurisdiction to examine the Speaker's order. [Para 45] [698-D-G]**

**1.3. Order 41 Rule 33 CPC vests the Appellate Court with powers to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or the order, as the case may require. The said power is vested in the Appellate Court by the statute itself, but the principles thereof cannot be brought into play in a matter involving a decision under the constitutional provisions of the Tenth Schedule to the Constitution, and in particular paragraph 6 thereof. [Para 46] [698-H; 699-A-B]**

**1.4. The High Court assumed the jurisdiction which it never had in making the interim order which had the effect of preventing the five MLAs in question from effectively functioning as Members of the Haryana Vidhan Sabha. The direction given by the Single Judge to the Speaker, as endorsed by the Division Bench, is, therefore, upheld to the extent that it directs the Speaker to decide the petitions for disqualification of the five MLAs within a period of four months. The said direction shall, therefore, be given effect to by Speaker. The remaining portion of the order disqualifying the five MLAs from effectively functioning as Members of the Haryana Vidhan Sabha is set aside. The said five MLAs would, therefore, be entitled to fully function as Members of the Haryana Vidhan Sabha without any restrictions, subject to the final**

**decision that may be rendered by the Speaker in the disqualification petitions filed under paragraph 6 of the Tenth Schedule to the Constitution. The Speaker shall dispose of the pending applications for disqualification of the five MLAs in question within a period of three months from the date of communication of this order. [Paras 48, 49] [699-E-H; 700-A-B]**

*Raja Soap Factory vs. V. Shantharaj & Ors.* **1965(2) SCR 800;** *L. Chandra Kumar vs. Union of India* **(1997) 3 SCC 261;** *Banarsi vs. Ram Phal* **(2003) 9 SCC 606: 2003 (2) SCR 22;** *Kihoto Hollohan vs. Zachillhu* **(1992) Supp. (2) SCC 651: 1992 (1) SCR 686;** *Rajendra Singh Rana vs. Swami Prasad Maurya* **(2007) 4 SCC 270: 2007 (2) SCR 591;** *Mayawati vs. Markandeya Chand & Ors.* **(1998) 7 SCC 517: 1998 (2) Suppl. SCR 204;** *Mahant Dhangir & Anr. vs. Madan Mohan & Ors.* **(1987) Supp. SCC 528 and** *Jagjit Singh vs. State of Haryana* **(2006) 11 SCC 1 – referred to.**

**Case Law Reference:**

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|---|---|---|
| **1965 (2) SCR 800** | **referred to** | **Para 5(c), 25** |
| **(1997) 3 SCC 261** | **referred to** | **Para 5(c), 34** |
| **2003 (2) SCR 22** | **referred to** | **Para 17** |
| **1992 (1) SCR 686** | **referred to** | **Para 19,20, 40** |
| **2007 (2) SCR 591** | **referred to** | **Para 24, 25, 39** |
| **1998 (2) Suppl. SCR 204** | **referred to** | **Para 25, 42** |
| **(1987) Supp. SCC 528** | **referred to** | **Para 32** |
| **(2006) 11 SCC 1** | **referred to** | **Para 42** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7125 of 2012.

From the Judgment & Order dated 20.12.2011 of the High



Court of Punjab and Haryana at Chandigarh in Letters Patent Appeal No. 366 of 2011 and CWP No. 14194 of 2010.

WITH

C.A. Nos. 7126, 7127 and 7128 of 2012.

Rohinton F. Nariman, S.G.I, Mukul Rohtagi, Nidhesh Gupta, Sat Pal Jain, Dr Rajeev Dhawan, Alok Sangwan, Shiel Sethi, Devashish Bharuka, Pradeep Dahiya, Jasneet Chandhoke, Charu Sangwan, Ruchi Kohli, Shivendra Dwivedi, Nidhi Gupta, Amit Kumar, Tarun Gupta, Aditya K. Chaudhary, Inderpal Goajat J. Sen, Sanjai Kumar Pathak, Vijendra Kumar, Shaikh Chand Saheb, Meenakshi Arora for the Appearing Parties.

The Judgment of the Court was delivered by

**ALTAMAS KABIR, J.** 1. Leave granted.

2. The subject matter of challenge in these appeals is the final judgment and order dated 20th December, 2011, passed by the Punjab & Haryana High Court in the different Letters Patent Appeals filed by the Appellants herein.

3. The first Civil Appeal, arising out of SLP(C)No.54 of 2012, has been filed by the Speaker of the Haryana Vidhan Sabha against the judgment and order passed by the Punjab and Haryana High Court in his Letters Patent Appeal No.366 of 2011. By the said judgment, the Division Bench not only dismissed the appeal and did not choose to interfere with the directions given by the learned Single Judge to the Speaker to decide the petitions for disqualification of five MLAs within a period of four months, but in addition, directed that pending such decision, the five MLAs in question would stand disqualified from effectively functioning as members of the Haryana Vidhan Sabha. Aggrieved by the interim directions purportedly given under Order 41 Rule 33 of the Code of Civil Procedure (C.P.C.), the Speaker filed SLP(C)No.54 of 2012, challenging the same.

4. The other three Special Leave Petitions (now appeals) were filed by the five MLAs, who were prevented from performing their functions as Members of the Assembly by the directions contained in the impugned judgment and order dated 20th December, 2011. While SLP(C)No.55 of 2012 was filed by Narendra Singh and another, SLP(C)Nos.59 of 2012 and 72 of 2012 were filed by Dharam Singh and another and Zile Ram Sharma, being aggrieved by the impugned judgment and order for the same reasons as contained in the Special Leave Petition filed by Narendra Singh and another. The focal point of challenge in all these appeals, therefore, is the orders passed by the Division Bench of the Punjab and Haryana High Court on 20th December, 2011, while disposing of the Letters Patent Appeals preventing the five named MLAs, who are also Appellants before us, from effectively discharging their functions as Members of the Vidhan Sabha.

5. The facts narrated above give rise to the following substantial questions of law of public importance, namely :-

(a) Whether the High Court in exercise of its powers under Articles 226 and 227 of the Constitution, has the jurisdiction to issue directions of an interim nature to a Member of the House while a disqualification petition of such Member is pending before the Speaker of a State Legislative Assembly under Article 191 read with the Tenth Schedule to the Constitution of India?

(b) Whether even in exercise of its powers of judicial review, the High Court, as a constitutional authority, can issue mandatory directions to the Speaker of a State Assembly, who is himself a constitutional authority, to dispose of a disqualification petition within a specified time?

(c) Can the High Court, in its writ jurisdiction, interfere with the disqualification proceedings pending before the Speaker and pass an order temporarily disqualifying a Member of the State Legislative Assembly, despite the law laid down by this Court in *Raja Soap Factory vs. V. Shantharaj & Ors.* [(1965(2) SCR 800] and in *L. Chandra Kumar vs. Union of India* [(1997) 3 SCC 261], to the contrary?



(d) When a disqualification petition filed under Article 191 read with the Tenth Schedule to the Constitution of India is pending consideration before the Speaker, can a parallel Writ Petition, seeking the same relief, be proceeded with simultaneously? And

(e) Did the High Court have jurisdiction to give directions under Order 41 Rule 33 of the Code of Civil Procedure, despite the express bar contained in the Explanation to Section 141 of the Code of Civil Procedure, in proceedings under Article 226 of the Constitution?

6. In order to provide the peg on which the above questions are to be hung, it is necessary to understand the background in which such substantial questions of law have arisen.

7. The 12th Legislative Assembly Elections in Haryana were held on 13th October, 2009. After the results of the elections were declared on 22nd October, 2009, the Indian National Congress Party, hereinafter referred to as 'the INC', emerged as the single largest party having won in 40 out of the 90 seats in the Assembly. Since it was short of an absolute majority, the INC formed the Government in collaboration with seven independents and one MLA from the Bahujan Samaj Party. Subsequently, on 9th November, 2009, four Legislative Members of the Haryana Janhit Congress (BL) Party, hereinafter referred to as 'the HJC (BL)', wrote to the Speaker of their intention to merge the HJC (BL) with the INC in terms of the provisions of paragraph 4 of the Tenth Schedule to the

Constitution of India. The Speaker was requested to accept the merger and to recognize the applicant legislators as Members of the INC in the Haryana Vidhan Sabha.

8. On hearing the four legislators, namely, Shri Satpal Sangwan, Shri Vinod Bhayana, Shri Narendra Singh and Shri Zile Ram Sharma, who appeared before him, the Speaker by his order dated 9th November, 2009, accepted the merger with immediate effect, purportedly in terms of paragraph 4 of the Tenth Schedule to the Constitution and directed that from the date of his order the said four legislators would be recognized as legislators of the INC in the Haryana Vidhan Sabha. Thereafter, a similar request was made to the Speaker by Shri Dharam Singh, another Member of the Vidhan Sabha elected as a candidate of the HJC (BL) to recognize the merger of the HJC (BL) with the INC and to also recognize him, along with the other four legislators, as Members of the INC in the Haryana Vidhan Sabha. Subsequently, another application was filed by Shri Dharam Singh before the Speaker on 10th November, 2009, requesting him to be recognized as a part of the INC in the Haryana Vidhan Sabha. The Speaker by a separate order dated 10th November, 2009, allowed the said application upon holding that the same was in consonance with paragraph 4(1) of the Tenth Schedule to the Constitution.

9. Challenging the aforesaid orders, the Respondent No.1, Shri Kuldeep Bishnoi, filed five separate petitions before the Speaker under Article 191 read with the Tenth Schedule to the Constitution of India and the Haryana Legislative Assembly (Disqualification of Members on Ground of Defection) Rules, 1986, on the ground that they had voluntarily given up the membership of their original political party and had joined the INC in violation of the provisions of paragraph 4(1) of the Tenth Schedule.

10. On receipt of the said petitions, the Speaker on 22nd December, 2009, forwarded copies thereof to the concerned MLAs, asking them to submit their comments within a period



of three weeks. On 7th April, 2010, applications were received by the Speaker from the concerned MLAs praying for time to file their written statement. The matter was accordingly adjourned and further time was granted to the concerned MLAs to file their explanation. The Respondent No.1, Shri Kuldeep Bishnoi, however, filed a Writ Petition, being C.W.P. No.14194 of 2010, in the Punjab & Haryana High Court, seeking quashing of the orders passed by the Speaker on 9th and 10th November, 2009, and also for a declaration that the five MLAs in question were disqualified from the membership of the Haryana Vidhan Sabha, and, in the alternative, for a direction on the Speaker to dispose of the disqualification petitions within a period of three months. Notice of motion was issued to the Respondents on 16th August, 2010, directing them to enter appearance and to file their written statements, within three days before the next date of hearing fixed on 1st September, 2010, either in person or through a duly-instructed Advocate.

11. On receipt of notice from the High Court, the Speaker by his order dated 30th August, 2010, adjourned the hearing of the disqualification petitions sine die. On 20th December, 2010, the learned Single Judge of the High Court allowed the Writ Petition and directed the Speaker to finally decide the disqualification petitions pending before him within a period of four months from the date of receipt of the certified copy of the order, which direction has given rise to the question as to whether the High Court in its jurisdiction under Articles 226 and 227 of the Constitution was competent to issue such a direction to the Speaker who was himself a constitutional authority.

12. In terms of the order passed by the learned Single Judge, the date of hearing of the five disqualification petitions was fixed for 20th January, 2011, by the Speaker. On the said date, Dharam Singh, one of the Appellants before us, filed his reply before the Speaker along with an application for striking out "the scandalous, frivolous and vexatious" averments made

in the disqualification petition. The matters had to be adjourned on the said date till 4th February, 2011, to enable the Writ Petitioner to file his reply to the said application and for further consideration.

13. On the very next day, Letters Patent Appeal No.366 of 2011 was filed by the Speaker, challenging the order passed by the learned Single Judge of the High Court on 20th December, 2010. On 1st March, 2011, the said LPA was listed before the Division Bench which stayed the operation of the judgment of the learned Single Judge. A submission was also made by the learned Solicitor General of India, appearing on behalf of the Speaker, that every attempt would be made to dispose of the disqualification petitions as expeditiously as possible.

14. Thereafter, the disqualification petitions were taken up for hearing by the Speaker on 1st April, 2011, and the case was adjourned till 20th April, 2011, for further arguments. On 20th April, 2011, counsel for the parties were heard and order was reserved on the application under Order 6 Rules 2 and 16 of the Code of Civil Procedure, which had been filed by Shri Dharam Singh. By his order dated 27th April, 2011, the Speaker dismissed the said application filed by Dharam Singh and Shri Kuldeep Bishnoi was directed to file his list of witnesses along with their affidavits within 15 days from the date of the order. It was also mentioned in the order that counsel for the Respondents would be given an opportunity to cross-examine the Writ Petitioner's witnesses. Thereafter, the Speaker fixed 25th May, 2011, for examination/cross-examination of Shri Kuldeep Bishnoi, MLA, and his witnesses, and on the said date Shri Bishnoi's evidence was tendered and recorded. However, his cross-examination could not be completed and the next date for further cross-examination of Shri Kuldeep Bishnoi was fixed for 6th June, 2011. In between, on 2nd June, 2011, the matter came up before the Division Bench of the High Court when directions were given for hearing



of the petitions at least every week i.e. at least four times in a month. However, on account of the sudden demise of Chaudhary Bhajan Lal, M.P. and former Chief Minister of Haryana, and also the father of Shri Kuldeep Bishnoi, the disqualification petitions were adjourned by the Speaker till 20th June, 2011. On 21st June, 2011, the Speaker fixed all disqualification petitions for hearing on 24th June, 2011 and for further cross-examination of Shri Kuldeep Bishnoi. The cross-examination of Shri Kuldeep Bishnoi was concluded before the Speaker on 7th July, 2011, and 5th August, 2011, was fixed for recording the evidence of the MLAs. On 18th July, 2011, Letters Patent Appeal No.366 of 2011 and other connected matters were listed before the Division Bench of the High Court. The said Appeal was heard on three consecutive days when judgment was reserved.

15. In the meantime, proceedings before the Speaker continued and since the same were not being concluded in terms of the assurances given, the Division Bench of the High Court directed the Speaker to file an affidavit on or before 11th November, 2011. Finally, being dissatisfied with the progress of the pending disqualification petitions before the Speaker, the Division Bench took up the Letters Patent Appeals on 2nd December, 2011, when directions were given for production of the entire records of the matter pending before the Speaker. On 7th December, 2011, the relevant records of the proceedings before the Speaker were submitted to the High Court which adjourned the matter till 19th December, 2011, for further consideration. However, as alleged on behalf of the Appellants, the Bench was not constituted on 19th December, 2011, and without any further hearing or giving an opportunity to the Speaker's counsel to make submissions on the status report, the High Court proceeded to pronounce its judgment on the Letters Patent Appeals. By its judgment which has been impugned in these proceedings, the Division Bench upheld the directions of the learned Single Judge directing the Speaker to decide the disqualification petitions within a period of four

months. However, while disposing of the matter, the Division Bench stayed the operation of the orders passed by the Speaker on the merger of the HJC (BL) with the INC dated 9th November, 2009 and 10th November, 2009. It also declared the five MLAs, who have filed separate appeals before this Court, as being unattached members of the Assembly with the right to attend the Sessions only. It was directed that they would not be treated either as a part of the INC or the HJC(BL) Party, with a further direction that they would not hold any office either. It is the aforesaid directions and orders which have resulted in the filing of the several Special Leave Petitions (now Civil Appeals) before this Court by the Speaker and the five concerned MLAs. As a consequence of the order passed by the Division Bench of the High Court, the five independent Appellants before us have been prevented from discharging their functions as Members of the Haryana Vidhan Sabha, even before the disqualification petitions filed against them by Shri Kuldeep Bishnoi could be heard and decided.

16. Appearing for the Speaker of the Vidhan Sabha, who is the Appellant in the appeal arising out of SLP(C)No.54 of 2012, Mr. Rohington F. Nariman, Solicitor General of India, contended that this was not a case where the survival of the Government depended upon allegiance of the five MLAs under consideration, since the Government was formed with the support of seven Independents and one MLA from the Bahujan Samaj Party. In fact, the five MLAs, against whom disqualification petitions are pending consideration before the Speaker, were not part of the Government when it was initially formed.

17. Mr. Nariman contended that the learned Single Judge decided the issue of merger in terms of paragraph 4 of the Tenth Schedule to the Constitution by holding that the two orders dated 9th and 10th November, 2009, were not final or conclusive and that, in any event, when the disqualification petitions came to be decided, it would be open for the Speaker to reconsider



the issue of merger. The learned Solicitor General emphasized the fact that there was neither any appeal nor any cross-objection in respect of the aforesaid decision of the learned Single Judge and even if the same fell within one of the exceptions indicated in *Banarsi Vs. Ram Phal* [(2003) 9 SCC 606], the judgment must still be held to have become final between the parties. The learned Solicitor General urged that all the decisions which had been cited on behalf of the Respondent No.1, were decisions rendered prior to the judgment in *Banarsi's* case (supra). It was, therefore, submitted that the decision in *Banarsi's* case (supra) is the final view in regard to the provisions of Order 41 Rule 33 of the Code of Civil Procedure.

18. The learned Solicitor General then challenged the orders of the Division Bench of the High Court on the ground of violation of the principles of natural justice. It was contended that while the High Court had concluded the hearing and reserved judgment on 20th July, 2011, by order dated 12th October, 2011, it directed the Speaker to place on record the status of the proceedings relating to the disqualification petitions. Although, the same were duly filed, without giving the parties further opportunity of hearing with regard to the said records, the Division Bench directed the matter to be listed for further consideration on 19th December, 2011. It was submitted that though the Bench did not assemble on 19th December, 2011, the Division Bench delivered the impugned judgment on 20th December, 2011, without any further opportunity of hearing to the parties.

19. The learned Solicitor General submitted that the procedure adopted was contrary to the law laid down in *Kihoto Hollohan vs. Zachillhu* [(1992) Supp. (2) SCC 651], wherein it was stated as under:-

"110. In view of the limited scope of judicial review that is available on account of the finality clause in Paragraph 6 and also having regard to the constitutional intendment and

the status of the repository of the adjudicatory power i.e. Speaker/Chairman, judicial review cannot be available at a stage prior to the making of a decision by the Speaker/ Chairman and a quia timet action would not be permissible. Nor would interference be permissible at an interlocutory stage of the proceedings. Exception will, however, have to be made in respect of cases where disqualification or suspension is imposed during the pendency of the proceedings and such disqualification or suspension is likely to have grave, immediate and irreversible repercussions and consequence."

20. The learned Solicitor General sought to reemphasize the fact that the present case is not a case involving disqualification or suspension of a Member of the House by the Speaker during the pendency of the proceedings, but relates to disqualification proceedings pending before the Speaker, which were not being disposed of for one reason or the other. It was submitted that the fact that the Speaker had not finalized the disqualification petitions for almost a period of two years, could not and did not vest the High Court with power to usurp the jurisdiction of the Speaker and to pass interim orders effectively disqualifying the five MLAs in question from functioning effectively as Members of the House. The learned Solicitor General urged that the facts of this case would not, therefore, attract the exceptions carved out in *Kihoto Hollohan's* case (supra).

21. The learned Solicitor General lastly urged that the single-most important error in the impugned judgment is that it sought to foreclose the right of the Speaker to decide the disqualification petitions under paragraph 4 of the Tenth Schedule. The said decision was also wrong since the Division Bench chose to follow judgments which related to the concept of "split" under paragraph 3 of the Tenth Schedule, which today stands deleted therefrom. The learned Solicitor General submitted that there was a clear difference between matters



relating to the erstwhile paragraph 3 of the Tenth Schedule and paragraph 4 thereof. While paragraph 3 of the Tenth Schedule required proof of two splits, paragraph 4(2) requires proof of only one deemed merger. The learned Solicitor General submitted that there was no concept of deemed split in paragraph 3. It was submitted that paragraph 4(2) is meant only as a defence to a petition for disqualification and the same would succeed or fail depending on whether there was a deemed merger or not.

22. It was further submitted that under paragraph 4 of the Tenth Schedule, the Speaker was not the deciding authority on whether a merger of two political parties had taken place or not. It was urged that the expression used in paragraph 4(2) of the Tenth Schedule "for the purpose of paragraph 4(1)" clearly indicates that the deeming provision is not in addition to, but for the purpose of paragraph 4(1), which is entirely different from the scheme of paragraph 3 which uses the expression "and", thereby indicating that a split takes place only if there is a split in the original political party and at least one-third of the members of the legislature party also joined in. It was further submitted that the use of the expression "if and only if" in paragraph 4 of the Tenth Schedule is to re-emphasize the fact that the Speaker cannot decide whether merger of the original party had taken place, as he is only required to decide whether merger was a defence in a disqualification petition filed under paragraph 6 of the Tenth Schedule.

23. The learned Solicitor General then urged that the submission advanced on behalf of the Respondent No.1 that in view of the delay by the Speaker in disposing of the disqualification petitions, this Court should decide the same, was wholly misconceived, since it pre-supposes the vesting of power to decide such a question on the Court, though the same is clearly vested in the Speaker. Even otherwise, in the absence of any Special Leave Petition by the Respondent No.1, the most that could be done by this Court would be to dismiss the Special Leave Petition.

24. Distinguishing the various decisions cited before the Division Bench on behalf of the Respondent No.1, and, in particular, the decision in *Rajendra Singh Rana vs. Swami Prasad Maurya* [(2007) 4 SCC 270], the learned Solicitor General submitted that in the said case, the life of the Assembly was almost over, whereas in the present case the next election would be held only in October, 2014. Furthermore, the same was a judgment where the final orders passed by the Speaker on the disqualification petitions were under challenge, unlike in the present case where the disqualification petitions are still pending decision with the Speaker.

25. The learned Solicitor General submitted that if the decision in *Rajendra Singh Rana's* case (supra) which, inter alia, dealt with the question relating to the Speaker's powers to decide a question in respect of paragraph 4 of the Tenth Schedule independent of any application under paragraph 6 thereof, is to be made applicable in the facts of this case, the same would be contrary to the decision of this Court in *Raja Soap Factory vs. S.P. Shantharaj* [(1965) 2 SCR 800]. The learned Solicitor General also made special reference to the decision of this Court in *Mayawati vs. Markandeya Chand & Ors.* [(1998) 7 SCC 517], wherein it was, inter alia, held that if the order of the Speaker disqualifying a Member was to be set aside, the matter had to go back to the Speaker for a fresh decision, since it was not the function of this Court to substitute itself in place of the Speaker and decide the question which had arisen in the case.

26. In addition to his aforesaid submissions, the learned Solicitor General also submitted that various substantial questions of law in regard to the interpretation of the Constitution, had arisen in the facts of the present case, namely,

(a) Whether paragraph 4 of the Tenth Schedule to the Constitution, read as a whole, contemplates that when at least two-thirds of the members of the legislature party agree to a merger between one political party and another, only then there is a "deemed merger" of one original political party with another?



(b) Whether in view of the difference in language between paragraphs 3 and 4 of the Tenth Schedule, a deemed merger is the only thing to be looked at as opposed to a "split" which must be in an original political party cumulatively with a group consisting of not less than one third of the members of the legislature party?

(c) Whether post-merger, those who do not accept the merger are subject to the anti-defection law prescribed in the Tenth Scheudle?

(d) Whether there is a conflict between the five-judge Benches in *Rajendra Singh Rana v Swami Prasad Maurya,* (2007) 4 SCC 270 as against Kihoto Hollohan, 1992 Supp (2) SCC 651 and Supreme Court Advocate-on-Record Association case, (1988) 4 SCC 409?

(e) What is the status of an 'unattached' Member in either House of Parliament or in the State Legislature? [already under reference to a larger Bench in *Amar Singh v Union of India,* (2011) 1 SCC 210]?

(f) Whether in view of Article 212(2) of the Constitution of India, if a Speaker of a State Legislature fails to decide a Petition for disqualification, he would not be subject to the jurisdiction of any Court?

(g) Whether the Speaker, while exercising original jurisdiction/powers in a disqualification petition under Para 6(1) of the Tenth Schedule to the Constitution of India, has power to pass interim orders?

27. According to the learned Solicitor General, the aforesaid questions, which involved interpretation of the Constitution, were required to be decided by a Bench of not less than 5 Judges in view of the constitutional mandate in Article 145(3) of the Constitution, before a final decision was taken in these appeals.

28. Appearing for Shri Kuldeep Bishnoi, the Respondent No.1 in the appeals preferred by the Speaker, Haryana Vidhan Sabha, and the five MLAs, against whom disqualification proceedings were pending, Mr. Nidhesh Gupta, learned Senior Advocate, at the very threshold of his arguments submitted that this was a case which clearly demonstrated how the process of law was being misapplied and misused by the Speaker of the Haryana Vidhan Sabha, so as to defeat the very purpose and objective of the anti-defection law as contained in the Tenth Schedule to the Constitution. Mr. Gupta emphasized in great detail the manner in which the Speaker had deferred the hearing of the disqualification petitions filed by the Respondent No.1 against the five MLAs, on one pretext or the other, despite the fact that the applications for disqualification under paragraph 4(2) of the Tenth Schedule to the Constitution had been made as far back as on 9th December, 2009.

29. Mr. Gupta submitted that till today, the said disqualification applications are pending decision before the Speaker and since such delay in the disqualification proceedings was against the very grain and object of the Tenth Schedule to the Constitution, the Division Bench of the High Court had no other option but to pass appropriate orders by invoking jurisdiction under Order 41 Rule 33 of the Code of Civil Procedure. In effect, the entire burden of Mr. Gupta's submissions was directed against the prejudice caused to the Respondent No.1 on account of the inaction on the part of the Speaker in disposing of the pending disqualification petitions within a reasonable time. Mr. Gupta sought to justify the impugned order passed by the Division Bench of the High Court



on the ground that on account of the deliberate delay on the part of the Speaker in allowing the five dissident MLAs from continuing to function as Members of the House despite their violation of the provisions of paragraph 4(4) of the Tenth Schedule to the Constitution, the High Court in exercise of its appellate powers under Order 41 Rule 33 of the Code of Civil Procedure gave interim directions so as to ensure that the Petitioner before the Speaker was non-suited on account of the Speaker's attempts to delay the disqualification of the said five MLAs.

30. Mr. Gupta submitted that by virtue of the interim order passed by the Division Bench of the High Court under Order 41 Rule 33 of the Code of Civil Procedure, hereinafter referred to as "CPC", the High Court merely suspended the said Members from discharging all their functions as Members of the House, without touching their membership. He submitted that such a course of action was the only remedy available to the High Court to correct the deliberate and willful attempt by the Speaker to subvert the very essence of the Tenth Schedule to the Constitution.

31. For all the submissions advanced by Mr. Gupta, the main weapon in his armoury is Order 41 Rule 33 CPC. The same is only to be expected, since no final order had been passed by the Speaker on the disqualification petitions, which would have entitled the High Court to pass interim orders in exercise of its powers under Article 226 and 227 of the Constitution, since it is only the Speaker, who under paragraph 6 of Tenth Schedule to the Constitution, is entitled to decide questions in regard to disqualification of a Member of the House on the ground of defection. Furthermore, all the different cases cited by Mr. Gupta relate to proceedings taken against final orders passed by the respective Speakers and the width of the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

32. Mr. Gupta dealt separately with the law relating to Order

41 Rule 33 CPC in support of his contention that under the said provision, the High Court was competent to pass interim orders effectively disqualifying a Member of the House, notwithstanding the provisions of paragraph 6 of Tenth Schedule to the Constitution. Mr. Gupta has relied heavily on the decision of this Court in *Mahant Dhangir & Anr. vs. Madan Mohan & Ors.* [(1987) Supp. SCC 528] wherein, while considering the width of Order 41 Rule 33 CPC, this Court was of the view that a litigant should not be left without remedy against the judgment of a learned Single Judge and that if a cross-objection under Rule 22 of Order 41 CPC was not maintainable against the co-respondent, the Court could consider it under Rule 33 of Order 41 CPC. This Court held that Rules 22 and 33 are not mutually exclusive, but are closely related to each other. If objection could not be taken under Rule 22 against the co-respondent, Rule 33 could come to the rescue of the objector. It was also observed that "the sweep of the power under Rule 33 is wide enough to determine any question, not only between the appellant and respondent, but also between the respondent and co-respondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case."

33. Mr. Gupta urged that the law, as declared by this Court, indicates that under Order 41 Rule 33 CPC, this Court as an appellate Court, has power to pass any decree or make any order which ought to have been passed or make such further decree or order as the case may require.

34. Mr. Gupta also referred to the Constitution Bench decision of this Court in *L. Chandra Kumar vs. Union of India* [(1997) 3 SCC 261], in which the Bench was considering the question as to whether under clause 2(d) of Article 323-A, the jurisdiction of all Courts, except the jurisdiction of this Court under Article 136 of the Constitution, was excluded.

35. The very foundation of Mr. Gupta's submissions is based upon Order 41 Rule 33 CPC which ordinarily empowers



the Civil Court to pass any interim order in appeal. What we are, however, required to consider in these appeals is whether such jurisdiction could at all have been invoked by the High Court when no final order had been passed by the Speaker on the disqualification petitions.

36. Mr. Gupta lastly urged that the ground relating to the mala fides of the Speaker's inaction in delaying the final decision in the disqualification proceedings, had not been given up finally, as the very conduct of the Speaker revealed such mala fides at almost every stage of the pending proceedings.

37. While adopting the submissions made by the Solicitor General, Mr. K.K. Venugopal and Mr. Mukul Rohatgi, learned senior counsel, appearing for the Appellants in the other appeals, submitted that the order of the Division Bench would have far-reaching consequences since the power to decide all matters relating to disqualification of Members of the Legislative Assembly were vested in the Speaker under paragraph 6 of the Tenth Schedule to the Constitution.

38. During the pendency of the Special Leave Petitions, I.A. Nos.2 and 3 were filed in Special Leave Petition (Civil) No.54 of 2012 by S/Shri Ajay Singh Chautala and Sher Singh Barshami, both MLAs in the Haryana Vidhan Sabha. A further application, being I.A. No.4 of 2012, was filed by one Shri Ashok Kumar Arora, who is also an MLA of the Haryana Vidhan Sabha. The prayer in all the said applications was for leave to intervene in the Special Leave Petition filed by the Speaker of the Haryana Vidhan Sabha. The same were allowed by Order dated 28th February, 2012.

39. Pursuant to the said order, Dr. Rajeev Dhawan, learned senior counsel, appeared for Shri Ajay Singh Chautala and the other interveners and urged that the orders passed by the Speaker on 9th and 10th November, 2009, were void ab-initio and in excess of jurisdiction. However, in the lengthy submissions advanced by Dr. Dhawan in relation to the

provisions of erstwhile paragraph 3 and paragraph 4 of the Tenth Schedule to the Constitution, reference was made to various decisions of this Court, including that in *Rajendra Singh Rana's* case (supra). The same are, however, all based on decisions taken by the Speaker on the question of "split" or "merger", while in the instant case we are concerned with the inaction of the Speaker in disposing of the disqualification petitions filed by the Respondent No.1 and the jurisdiction of the High Court to issue interim orders restraining a Member of the House from discharging his functions as an elected representative of his constituents despite the provisions of paragraph 6 of the Tenth Schedule to the Constitution.

40. Most of the questions raised by Mr. Nidhesh Gupta and Dr. Rajeev Dhawan contemplate a situation where the Speaker had taken a final decision on a disqualification petition. However, in the instant case we are really required to consider whether the High Court was competent to pass interim orders under its powers of judicial review under Articles 226 and 227 of the Constitution when the disqualification proceedings were pending before the Speaker. In fact, even in Kihoto Hollohan's case (supra), which has been referred to in extenso by Dr. Dhawan, the scope of judicial review has been confined to violation of constitutional mandates, mala fides, non-compliance with rules of natural justice and perversity, but it was also very clearly indicated that having regard to the constitutional scheme in the Tenth Schedule, normally judicial review could not cover any stage prior to the making of the decision by the Speaker or the Chairman of the House, nor any quia timet action was contemplated or permissible.

41. From the submissions made on behalf of the respective parties, certain important issues emerge for consideration. One of the said issues raised by Mr. Nidhesh Gupta concerns the competence of the High Court to assume jurisdiction under Order 41 Rule 33 CPC when disqualification petitions were pending before the Speaker and were yet to be



disposed of. Another important issue which arises, de hors the submissions made on behalf of the respective parties, is whether the question of disqualification on account of merger, which had been accepted by the Speaker, could have been entertained by the Speaker under paragraph 4 of The Tenth Schedule, when such powers were vested exclusively in the Speaker under paragraph 6 thereof.

42. Relying on the decisions of this Court in *Kihoto Hollohan's* case (supra), *Jagjit Singh Vs. State of Haryana* [(2006) 11 SCC 1] and *Mayawati's* case (supra), the learned Single Judge came to the conclusion that while passing an order under paragraph 4 of the Tenth Schedule to the Constitution, the Speaker does not act as a quasi-judicial authority and that such order would necessarily be subject to adjudication under paragraph 6.

43. Accordingly, the main challenge to the impugned decision of the Division Bench of the Punjab & Haryana High Court is with regard to the competence of the Speaker of the Assembly to decide the question of disqualification of the Members of the Haryana Janhit Congress (BL) Party on their joining the Indian National Congress Party on the basis of the letters written by the five Members of the former legislature party. Incidentally, the learned Single Judge held that the issue would have to be decided by the Speaker himself while considering the disqualification petitions under paragraph 6 of the Tenth Schedule to the Constitution. What is important, however, is the question as to whether such a decision could be arrived at under paragraph 4 of the Tenth Schedule to the Constitution whereunder the Speaker has not been given any authority to decide such an issue. Paragraph 4 merely indicates the circumstances in which a Member of a House shall not be disqualified under Sub-paragraph (1) of Paragraph 2. One of the circumstances indicated is where the original political party merges with another political party and the Member claims that he and any other Member of his original political party have

become Members of such other political party, or, as the case may be, of a new political party formed by such merger. As stressed by the learned Solicitor General, for the purpose of sub-paragraph (1), the merger of the original political party of a Member of the House, shall be deemed to have taken place if, and only if, not less than two-thirds of the Members of the legislature party concerned agreed to such merger. In other words, a formula has been laid down in paragraph 4 of the Tenth Schedule to the Constitution, whereby such Members as came within such formula could not be disqualified on ground of defection in case of the merger of his original political party with another political party in the circumstances indicated in paragraph 4(1) of the Tenth Schedule to the Constitution.

44. The scheme of the Tenth Schedule to the Constitution indicates that the Speaker is not competent to take a decision with regard to disqualification on ground of defection, without a determination under paragraph 4, and paragraph 6 in no uncertain terms lays down that if any question arises as to whether a Member of the House has become subject to disqualification, the said question would be referred to the Speaker of such House whose decision would be final. The finality of the decisions of the Speaker was in regard to paragraph 6 since the Speaker was not competent to decide a question as to whether there has been a split or merger under paragraph 4. The said question was considered by the Constitution Bench in *Rajendra Singh Rana's* case (supra). While construing the provisions of the Tenth Schedule to the Constitution in relation to Articles 102 and 191 of the Constitution, the Constitution Bench observed that the whole proceedings under the Tenth Schedule gets initiated as a part of disqualification proceedings. Hence, determination of the question of split or merger could not be divorced from the motion before the Speaker seeking a disqualification of the Member or Members concerned under paragraph 6 of the Tenth Schedule. Under the scheme of the Tenth Schedule the Speaker does not have an independent power to decide that there has



been split or merger as contemplated by paragraphs 3 and 4 respectively and such a decision can be taken only when the question of disqualification arises in a proceeding under paragraph 6. It is only after a final decision is rendered by the Speaker under paragraph 6 of the Tenth Schedule to the Constitution that the jurisdiction of the High Court under Article 226 of the Constitution can be invoked.

45. We have to keep in mind the fact that these appeals are being decided in the background of the complaint made to the effect that interim orders have been passed by the High Court in purported exercise of its powers to judicial review under Articles 226 and 227 of the Constitution, when the disqualification proceedings were pending before the Speaker. In that regard, we are of the view that since the decision of the Speaker on a petition under paragraph 4 of the Tenth Schedule concerns only a question of merger on which the Speaker is not entitled to adjudicate, the High Court could not have assumed jurisdiction under its powers of review before a decision was taken by the Speaker under paragraph 6 of the Tenth Schedule to the Constitution. It is in fact in a proceeding under paragraph 6 that the Speaker assumes jurisdiction to pass a quasi-judicial order which is amenable to the writ jurisdiction of the High Court. It is in such proceedings that the question relating to the disqualification is to be considered and decided. Accordingly, restraining the Speaker from taking any decision under paragraph 6 of the Tenth Schedule is, in our view, beyond the jurisdiction of the High Court, since the Constitution itself has vested the Speaker with the power to take a decision under paragraph 6 and care has also been taken to indicate that such decision of the Speaker would be final. It is only thereafter that the High Court assumes jurisdiction to examine the Speaker's order.

46. The submissions made by Mr. Nidhesh Gupta relating to Order 41 Rule 33, in our view, are not of much relevance on account of what we have indicated hereinabove. Order 41 Rule

33 vests the Appellate Court with powers to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or the order, as the case may require. The said power is vested in the Appellate Court by the statute itself, but the principles thereof cannot be brought into play in a matter involving a decision under the constitutional provisions of the Tenth Schedule to the Constitution, and in particular paragraph 6 thereof.

47. The appeal filed by the Speaker, Haryana Vidhan Sabha, against the judgment of the Division Bench of the High Court, is not, therefore, capable of being sustained and the Appeal filed by the Speaker is accordingly dismissed. The other Appeals preferred by the five disqualified MLAs have, therefore, to be allowed to the extent of the directions given by the learned Single Judge and endorsed by the Division Bench that the five MLAs would stand disqualified from effectively functioning as Members of the Haryana Vidhan Sabha till the Speaker decided the petitions regarding their disqualification, within a period of four months.

48. In our view, the High Court had no jurisdiction to pass such an order, which was in the domain of the Speaker. The High Court assumed the jurisdiction which it never had in making the interim order which had the effect of preventing the five MLAs in question from effectively functioning as Members of the Haryana Vidhan Sabha. The direction given by the learned Single Judge to the Speaker, as endorsed by the Division Bench, is, therefore, upheld to the extent that it directs the Speaker to decide the petitions for disqualification of the five MLAs within a period of four months. The said direction shall, therefore, be given effect to by Speaker. The remaining portion of the order disqualifying the five MLAs from effectively functioning as Members of the Haryana Vidhan Sabha is set aside. The said five MLAs would, therefore, be entitled to fully function as Members of the Haryana Vidhan Sabha without any restrictions, subject to the final decision that may be rendered



by the Speaker in the disqualification petitions filed under paragraph 6 of the Tenth Schedule to the Constitution.

49. The Speaker shall dispose of the pending applications for disqualification of the five MLAs in question within a period of three months from the date of communication of this order.

50. Having regard to the peculiar facts of the case, the parties shall bear their own costs.

B.B.B. Appeals disposed of.

BHARAT HEAVY ELECTRICALS LTD.
*v.*
R.S. AVTAR SINGH & CO.
(Civil Appeal No. 7239 of 2012)

OCTOBER 5, 2012

**[DR. B.S. CHAUHAN AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]**

*Code of Civil Procedure, 1908 – Or.21, r.1 and s.34 – Execution of decree – Amount payable under a decree – Connotation of – Decree of Court making award passed by the arbitrator its rule – Part-payment of decretal amount by judgment debtor – Applicability of the rule of appropriation – Payment of interest – Manner of calculation – Held: In stricto sensu, it is the decree which has to be applied in letter and spirit in order to find out whether the stipulations contained therein were duly fulfilled by the judgment debtor – On facts, both the arbitral award as well as the Rule of the Court made a clear distinction between the award amount and the interest payable and it cannot be stated that the award amount and the interest mentioned in the award should be merged together – Respondent-decree holder was entitled to appropriate payments made by the appellant-judgment debtor in the first instance to the interest part of it which was due and payable on the date of the first payment while adjusting whatever balance remained towards principal and calculating the interest payable on the remaining principal amount till the next date of payment.*

**The respondent had undertaken some contract work with the appellant in respect of which dispute arose as regards the payment to be made by the appellant. The dispute went before the sole Arbitrator who passed an award on 15-3-1982 which was made the Rule of Court after protracted litigation in judgment dated 31-5-1985.**





**The award became final and conclusive. Part payments were effected by the appellant (judgment debtor) after the date of the decree i.e. 31-5-1985 on 18-10-1985 and thereafter on 13-12-2000. The respondent (decree holder) filed Execution Petition contending that the appellant did not furnish the award amount in its entirety. The appellant while resisting the Execution Petition, also filed application under Section 47 CPC by taking the stand that entire award amount had been fully paid and, therefore, there was nothing to be granted in the Execution Petition. A Single Judge of High Court dismissed the objections and ordered execution. The order was affirmed by the Division Bench of the High Court and therefore the instant appeal.**

**By referring to Order XXI Rule 1(1), (4) and (5) of CPC, the appellant submitted that after passing of the award by the Arbitrator on 15-3-1982 and it was made as a Rule of the Court in the order dated 31-05-1985, substantial payment towards the decretal amount was made by 18-10-1985 and, that, by virtue of the payments made dated 18-10-1985 and subsequently on 13-12-2000 the payment of entire decretal amount was fully satisfied and nothing more remained payable; and that interest, if any, mandatorily ceased to run i.e. on and after 13-12-2000 and the conclusion to the contrary made by the Single Judge of the High Court and the confirmation of the same by the Division Bench in the impugned order were liable to be set aside. According to the appellant, by 13-12-2000 the entire decretal amount was fully paid and the award of further interest based on the claim of the respondent by the Single Judge as well as by the Division Bench of the High Court was not justified. The appellant also submitted that by virtue of Section 3(3)(c) of the Interest Act and Section 34 of CPC, the Court has no power to award interest upon interest.**

**The issue in question in the instant appeal, therefore, centered around the interpretation of Order XXI Rules 1(1), (4) and (5) of CPC read with Section 34 CPC and Section 3(3)(c) of the Interest Act.**

**Dismissing the appeal, the Court**

**HELD: 1.1. A plain reading of Order XXI, CPC is to the effect that on payment of the amounts payable under a decree, as provided under sub-rule (1) of rule 1, the calculation of interest on such amount payable under the decree would cease to operate from the date of service of notice as stipulated under sub-rule (2) of Order XXI. The words used in sub-rule (1) in different expressions means whatever money that is due and payable under a decree, which could be paid in the manner stipulated in sub-clauses (a), (b) and (c) of the said sub-rule (1). The prime words, which needs deeper scrutiny are "payable under a decree". What is required to be scrutinized is as to how the decree has been made while granting the relief as regards the payment. [Paras 11, 12] [718-E; 719-A-C]**

**1.2. In the instant case, the operative part of the arbitral award in question disclose that the respondent was entitled to a sum of Rs.1,42,24,894/- along with interest at the rate of 12 per cent per annum on the said amount from 06.01.1981 till the date of payment or decree whichever was earlier. The Arbitrator after giving credit to the counterclaim made by the appellant ultimately worked out the actual amount payable to the respondent which worked out to Rs.1,41,68,474/-. The said award of the Arbitrator was accepted by the respondent. When the award was made as the Rule of the Court in the order dated 31.05.1985, the only alteration made was the date of calculation of interest rendered by the Arbitrator. While the Arbitrator directed such calculation of interest to be made from 06.01.1981, the Single Judge directed such**



**calculation to be made from 12.03.1981. The said order of the Court dated 31.05.1985 forms the basis for the respondent to make the claim, inasmuch as the award became the Rule of the Court only pursuant to the said order. Noting the nature of relief granted under the award and the ultimate Rule of the Court together, it is found that Arbitrator directed that the calculation of payment of interest "on the said amount of the award" which should run from 06.01.1981 should now run from 12.03.1981 by virtue of Rule of the Court dated 31.05.1985. As per the direction of the Arbitrator, such payment of interest would be payable till the appellant make the payment or the decree whichever is earlier. The date of the decree, having regard to the applicable provision, would be the date of the Rule of the Court, namely, 31.05.1985. Therefore, a strict construction of the said direction of the Arbitrator as regards the manner of calculation of interest would mean either the date of payment or the date of decree whichever is earlier. Since, the first date of payment in the case on hand was subsequent to the date of the Rule of the Court, namely, 31.05.1985, going by the direction of the Arbitrator, the calculation of interest should be made up to 31.05.1985. Since, the award received the seal of approval only after the same was made as the Rule of the Court, it is the stipulation contained in the said Rule that would ultimately cover the relief really granted in the award as made operative by virtue of the Rule ordered by the Court. Therefore, in the *stricto sensu,* it is the decree dated 31.05.1985 which has to be applied in letter and spirit in order to find out whether the stipulations contained therein were duly fulfilled by the appellant. [Paras 12, 13] [719-C-G; 720-A-F]**

**1.3. The Rule of the Court while approving the award of the Arbitrator did not make any substantive alteration as regards the entitlement of the respondent on the**

**payment to be made, namely, the sum of Rs.1,41,68,474/-. Even the rate of interest granted by Arbitrator was not touched by the Court, which was maintained at the rate of 12 per cent per annum. The Court only directed the calculation of the said interest payable as from 12.03.1981 instead of 06.01.1981. The only other substantive direction contained in the Rule of the Court dated 31.05.1985 was that the respondent was entitled to future interest at the rate of 12 per cent per annum from the date of the decree till realization in case the award amount was not paid within two months from 31.05.1985. From the Rule of the Court, it is clear that the Court made a conscious direction to the specific effect that the entitlement of the respondent for future interest at the rate of 12 per cent per annum from the date of decree, namely, 31.05.1985 till the date of realization would be on the award amount if it was not paid within two months from 31.05.1985. Therefore, the calculation of interest payable up to the date of the decree as well as the time granted therein, namely, two months from 31.05.1985 and what is interest payable subsequent thereto has been clearly set out in the said part of the Rule. If the said Rule is to be understood in the manner in which the Court had directed the calculation of interest to be made it can be only in the following manner, namely, that the interest from 12.03.1981 up to 31.07.1985 at the rate of 12 per cent per annum would be on the award amount, namely, Rs.1,41,68,474/-. If the award amount was not paid, namely, the sum of Rs.1,41,68,474/- on or before 31.07.1985, the future interest again at the rate of 12 per cent per annum can be claimed. Both the award of the Arbitrator as well as the Rule of the Court makes a clear distinction between the award amount and the interest payable. The award having become the Rule of the Court and while making the said Rule it was clearly made known that the award contained an amount which was payable to the respondent quantifying the said amount**



**in a sum of Rs.1,41,68,474/-. After quantification of the said amount, the Arbitrator dealt with the grant of interest independent of the said payment and fixed the rate of such interest at 12 per cent per annum. When such a clear distinction was consciously made by the Arbitrator while passing the award no one can even attempt to state that the award amount and the interest mentioned in the award dated 15.03.1982 should be merged together and state that the award amount would comprise of a sum of Rs.1,41,68,474/- and the interest worked out thereon became payable when once it was made the Rule of the Court and thereby became the decretal amount. Such a construction of the said award cannot be made having regard to the specific terms of the decree dated 31.05.1985. [Paras 14 and 15] [720-F-H; 721-A-C-H; 722-A-C]**

**1.4. Order XXI Rule 1 does not state the decretal amount. The expression used therein is all money payable under a decree. TERSELY stated, the decree dated 31.05.1985 affirms the award amount, the interest payable at the rate of 12 per cent per annum from 12.03.1981 till the date of its realization if not paid within two months from the date of the decree, namely, 31.05.1985. Therefore, the said decree dated 31.05.1985 consisted of the award amount plus interest payable thereon from 12.03.1981 up to the date of the decree, namely, 31.05.1985 to be payable within two months from that date and in the event of non-payment of the said amount within two months from 31.05.1985 to calculate future interest at the very same rate of 12 per cent per annum from the date of the decree till the realization of the award amount. A reading of the opening set of expressions of Order XXI Rule 1 is clear to the above effect. In the case on hand the payment effected by the appellant after 31.05.1985 was once on 18.10.1985 and thereafter on 13.12.2000 when the issue was dealt with**

**by the Court in the order dated 12.07.2002. It is not in dispute that the award amount of Rs.1,41,68,474/- earned interest at the rate of 12 per cent per annum up to the date of first payment, namely, 18.10.1985 which worked out to a sum of Rs.78,30,314/- i.e. for the period from 12.03.1981 to 18.10.1985. The total amount payable as on that date under the decree, both the award amount along with the interest, worked out to Rs.2,19,61,134/-. The said figure, as calculated by the appellant, was not disputed by the respondent. On 18.10.1985, the appellant paid a sum of Rs.1 crore by way of deposit pursuant to the order of the Division Bench dated 13.09.1985 when the appellant challenged the decree dated 31.05.1985. The respondent was also permitted to withdraw the said sum of Rs.1 crore in the said order dated 13.09.1985. [Para 16] [722-E-H; 723-A-D]**

**1.5. Order XXI Rule 4 CPC states that on any amount paid under Clause (a) or Clause (c) of sub-rule 1, interest, if any, shall cease to run from the date of service of the notice referred to in sub-rule 2. In the case on hand since the deposit of the amount pursuant to the order of the Division Bench dated 13.09.1985 came to be made and was also withdrawn by the respondent from the date of service of notice as contemplated in sub-rule 2 the same was deemed to have been effected. Therefore, applying sub-rule 4 to the case on hand in so far as the cessation of interest is concerned, the same should operate upon the sum of Rs.1 crore deposited by the appellant and withdrawn by the respondent. There can be no dispute and in fact it is not disputed by the parties that on and after the deposit of Rs.1 crore, no interest was payable on the said sum. [Para 17] [723-E-H]**

**1.6. In a Constitution Bench judgment of this Court in Gurpreet Singh, the implication of Order XXI Rule 1 vis-à-vis the related provisions under Order XXIV and Order**



**XXXIV has been set out and the general rule of appropriation towards a decretal amount has been stated. Further where there is shortfall in paying the decree amount what will be the mode of appropriation has been explained. From the said decision, the following principles emerge: (i) The general rule of appropriation towards a decretal amount was that such an amount was to be adjusted strictly in accordance with the directions contained in the decree and in the absence of such directions adjustments be made firstly towards payment of interest and cost and thereafter towards payment of the principal amount subject, of course, to any agreement between the parties; (ii) The legislative intent in enacting sub-rules 4 and 5 is clear to the pointer that interest should cease to run on the deposit made by the judgment debtor and notice given or on the amount being tendered outside the Court in the manner provided in Order XXI Rule 1 sub-clause (b); (iii) If the payment made by the judgment debtor falls short of the decreed amount, the decree holder will be entitled to apply the general rule of appropriation by appropriating the amount deposited towards the interest, then towards cost and finally towards the principal amount due under the decree; (iv) Thereafter, no further interest would run on the sum appropriated towards the principal. In other words if a part of the principal amount has been paid along with interest due thereon as on the date of issuance of notice of deposit interest on that part of the principal sum will cease to run thereafter; (v) In cases where there is a shortfall in deposit of the principal amount, the decree holder would be entitled to adjust interest and cost first and the balance towards the principal and beyond that the decree holder cannot seek to reopen the entire transaction and proceed to recalculate the interest on the whole of the principal amount and seek for re-appropriation. [Paras 19, 20, 21, 22, 23 and 24] [724-G; 725-E-G-H; 727-F-H; 728-A-E]**

**1.7. In the case at hand, in the calculation which was sought to be made by the respondent in its statement filed before the Single Judge, interest was calculated for the period subsequent to 06.03.2001 that was the date when the last payment was made by the appellant wherein the calculation of interest for the period from 04.01.2001 to 04.03.2002 was claimed on the entire sum of Rs.1,42,96,318/- instead of calculating the same on the balance principal of Rs.1,19,61,134/-. The Single Judge rightly rejected such a wrong claim made on behalf of the respondent while dismissing the objections filed by the appellant. Inasmuch as, the Single Judge as well as the Division Bench has applied the rule of construction on Order XXI Rule 1 based on the Constitution Bench decision of this Court in Gurpreet Singh wherein the earlier decision of this Court in Prem Nath Kapur, in regard to the rule of appropriation, was also approved, no illegality is found in the said judgment of the Division Bench while affirming the order of the Single Judge dated 12.07.2002. [Paras 26 and 28] [729-D-F; 730-H; 731-A-B]**

**1.8. As far as the contention based on Section 34 of CPC having regard to the general rule of appropriation in cases of this nature where there is a short payment made pursuant to the decree, no conflict is found with the said provision insofar as it related to payment of interest to be payable by the appellant. As far as the submission made, based on Section 3(3)(c) of the Interest Act is concerned, the said provision only states *de hors* the substantive part of said Section 3, Courts are not empowered to award interest upon interest. There is no scope to apply the said section to the case on hand where the controversy is subsequent to the decree where direction for payment of interest on the award amount has been spelt out. The issue related to the correctness of the interest calculated as per the decree of the Court which made the award its rule. The challenge is not to the decree**



**on the footing that it was in violation of Section 3(3)(c) of the Interest Act. [Para 29] [731-C-E]**

*Gurpreet Singh v. Union of India* **(2006) 8 SCC 457: 2006 (7) Suppl. SCR 422 – followed.**

*Central Bank of India v. Ravindra and others* **(2002) 1 SCC 367: 2001 (4) Suppl. SCR 323;** *Leela Hotels Limited v. Housing and Urban Development Corporation Limited* **(2012) 1 SCC 302: 2011 (13) SCR 156 and** *Prem Nath Kapur and another v. National Fertilizers Corporation of India Ltd. and others* **(1996) 2 SCC 71: 1995 (5) Suppl. SCR 790 – referred to.**

**Case Law Reference:**

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|---|---|---|
| **2006 (7) Suppl. SCR 422** | **followed** | **Paras 8,10, 18,19** |
| **2001 (4) Suppl. SCR 323** | **referred to** | **Paras 8, 9** |
| **2011 (13) SCR 156** | **referred to** | **Para 10** |
| **1995 (5) Suppl. SCR 790** | **referred to** | **Paras 18, 28** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7239 of 2012.

From the Judgment & Order dated 3.11.2008 of the High Cour of Delhi at New Delhi in EFA (OS) No. 9 of 2002.

A.S. Chandhiok, ASG, J.C. Seth, B.K. Satija, Yamini Khurana, Smriti Shukla for the Appellant.

Ranjeet Kumar, S.K. Maniktala, Varun Panta, S.R. Setia for the Respondent.

The Judgment of the Court was delivered by

**FAKKIR MOHAMED IBRAHIM KALIFULLA, J.** 1. Leave granted.

2. The judgment debtor is the appellant before us. This appeal is directed against the judgment of the Division Bench of the Delhi High Court dated 03.11.2008 in EFA (OS) No.9 of 2002. The respondent undertook some contract work with the appellant in respect of which the dispute arose as regards the payment to be made by the appellant. The dispute went before the sole Arbitrator who passed an award on 15.03.1982 which was made the Rule of Court after protracted litigation. Thus after the award became final and conclusive, the respondent herein filed Execution Petition No.208/2000 contending that the appellant did not furnish the award amount in its entirety. The appellant while resisting the Execution Petition, also filed EA No.522 of 2000 under Section 47 of the Code of Civil Procedure by taking the stand that entire award amount has been fully paid and, therefore, there was nothing to be granted in the Execution Petition. The learned Single Judge dismissed the objections by order dated 12.07.2002 which was the subject matter of appeal in which the impugned judgment came to be passed by the Division Bench of the High Court of Delhi.

3. The issue centres around the interpretation of Order XXI Rules (1), (4) and (5) of CPC read with Section 34 CPC and Section 3 (3) (c) of Interest Act. Though the legal issue falls within the narrow compass, to appreciate the respective contentions of the parties, certain details about award dated 15.03.1982, the order of the Court which granted the seal of approval to the award dated 31.05.1985 in suit No.594-A/1982, the order of the Division Bench dated 18.07.2000 by which the challenge to the award and the order dated 31.05.1985 came to be rejected and the subsequent order dated 31.07.2000 declining to recall the earlier order dated 18.07.2000, thereafter the order of the learned Single Judge came to be passed on 12.07.2000 in EA No.522 of 2000 in Execution case No.208 of 2000 which was subject matter of challenge in the impugned order of the Division Bench dated 03.11.2008 in EFA (OS) No.9 of 2002, have to be stated. When we refer to the award of the Arbitrator dated 15.03.1982, we find the following relief which was granted in favour of the respondent:



**The Award**

**Claimants claims No. 1,2,3,4,5,6,7,8,10,12,13,14 & 15**

I hold that the claimants M/s R.S. Avtar Singh & Co. are entitled to a sum of Rs.1,42,24,894/- (Rupees one crore forty two lacs twenty four thousand eight hundred and ninety four only) against all their claims and I also hold that the claimants are entitled for interest and, I, therefore, award a sum of Rs.1,42,24,894/- (Rupees one crore forty two lacs twenty four thousand eight hundred and ninety four only) in favour of the claimants with interest @ 12 % per annum on the said amount of the award from 6-1-1981 till the date of payment or decree whichever is earlier.

**Claimants claim No.9**

As this claim was withdrawn by the Claimants in the hearing held on 12/9 and 13/9/81, no award is made against this claim.

Respondents counter-claims Nos. 1,2 & 3:-

I hold that the Respondents M/s. Bharat Heavy Electricals Ltd. are entitled to a sum of Rs.56,420/- (Rupees Fifty Six thousand four hundred & twenty only) against all their counter-claims and I, therefore, award sum of Rs.56,420/- (Rupees fifty six thousand four hundred & twenty only) in favour of the respondents.

The parties are left to bear their own costs. This disposes of claimants claim No.16 regarding costs.

The above award is made and published by me on this day of 15th Marcy, 1982 at Gandhinagar."

4. In the judgment dated 31.05.1985 passed in Suit No.594A/1982 the award was taken on record and made a Rule of the Court and the said order passed in the said suit reads as under:

"This suit coming on this day for final disposal before this Court in the presence of counsel for the parties as aforesaid, it is ordered that the objections (I.A. No. 2830/ 1982) filed by respondents to the award dated 15.3.1982 given by Sh. M.S. Iyengar Arbitrator be and the same are hereby dismissed and the said award appended hereto as Annexure 'A' be and the same is hereby taken on record and made a rule of the Court with the modification that the claimant shall be entitled to interest at the rate of 12 % per annum from March 12,1981 till the date of the decree and a decree is hereby passed in terms thereof which shall form part of the decree.

It is further ordered that the claimant shall be entitled to future interest at the rate of 12 % per annum from the date of the decree till realization, in case the award amount is not paid within two months from today the 31st May, 1985.

It is lastly ordered that suit No.409-A/1982 is hereby disposed of. Given under my hand and the seal of the Court this the 31st day of May, 1985."

5. When the appellant challenged the said decision of the learned Single Judge dated 31.05.1985 in FAO (OS) 188 of 1985, the same came to be dismissed by the order dated 18.07.2000. During the pendency of the suit FAO (OS) No.188 of 1985 by way of an interim order dated 13.09.1985 the recovery under the award was stayed subject to the condition that the respondent paid the sum of Rs.1 crore into the Court which was directed to be withdrawn by the respondent on furnishing Bank guarantee for the purpose of restitution in case the award was set aside. It is not in dispute that in compliance of the said order necessary deposit was made. The respondent also realized the said amount of Rs.1 crore on 13.10.1985. The appellant moved an application for recalling order dated 18.07.2000 of the Division Bench and the same was also dismissed by the Division Bench on 31.07.2000. Thereafter, when the Execution Petition No.208 of 2000 was



moved, the appellant took notice and filed application under Section 47 of the CPC in EA 522 of 2000 and another application under Order XXI Rule 26 in application EA 523 of 2000. The leaned Single Judge of the Execution Court while granting time for final reply, in the EA 522 and 523 of 2000 and rejoinder, if any, before the next date of hearing by order dated 30.01.2001 directed the appellant to deposit in Court a cheque for Rs.1,94,91,077/- being the admitted amount in favour of the respondent subject to deduction of tax at source along with TDS certificate. The execution of the warrant of payment issued on 18.10.2000 was directed to be kept in abeyance. The sum of Rs.1,74,93,835/- after deduction of tax at source in a sum of Rs.19,97,192/- in all a sum of Rs.1,94,91,077/- was realized by the respondent with an undertaking of the respondent that in case the Execution Petition found to be not maintainable, he would refund the amount of Rs.1,74,93,835/- within a period of four weeks from the date of the order passed under the Execution Petition. The said order was passed on 30.01.2001 by the learned Single Judge. By filing an undertaking dated 05.02.2001, the respondent also withdrew the sum of Rs.1,74,93,885/-. Ultimately the execution was ordered by the learned Single Judge by an order dated 12.07.2002 by calculating subsequent interest only in the remaining principal amount and dismissed the objection petition.

6. When the appellant preferred this appeal against the said order dated 12.07.2002, in EFA (OS) No.9/2002, an interim order came to be passed on 23.08.2002 directing the appellant to deposit whatever balance amount due after deduction of TDS as per the final order passed by the learned Single Judge with a further order to realize the said sum subject to restitution and on furnishing security to the satisfaction of the Registrar.

7. According to the learned counsel for the appellant in the light of last order dated 23.08.2002 whatever amount which was ultimately directed to be paid by learned Single Judge in the order dated 12.07.2002 was also paid to the respondent.

Keeping the above factors in mind, counsel for the appellant, Mr. Chandhiok, learned Additional Solicitor General appearing for the appellant raised the following contentions.

8. Mr. Chandhiok, learned ASG for the appellant by referring to Order XXI Rule 1 sub-clauses (1), (4) and (5) submitted that after the passing of the award by the Arbitrator on 15.3.1982 and it was made as a Rule of the Court by the learned Single Judge in the order dated 31.05.1985 substantial payment towards the decretal amount was made by 18.10.1985 and what remained to be paid in satisfaction of the decretal amount was only Rs.41,68,474/- apart from interest which was due and payable in a sum of Rs.1,53,22,603/- in all a sum of Rs.1,94,91,077/-. The learned ASG submitted that after the filing of the Execution Petition and the orders passed thereon when the appellant moved the learned Single Judge pursuant to interim orders dated 01.12.2000, the entire balance amount was also deposited by way of two cheques representing Rs.1,74,93,885/- and T.D.S. amount of Rs.19,97,192/- in all a sum of Rs.1,94,91,077/-. The learned ASG, therefore, contended that by virtue of the payments made, as above, dated 18.10.1985 and subsequently on 13.12.2000 the payment of entire decretal amount was fully satisfied and nothing more remained payable. According to learned ASG when once the balance principal amount was paid, according to appellant's calculation, as on 13.12.2000, along with the interest payable on that amount up to that date on the principal amount by virtue of operation of sub-clauses (4) and (5) of Order XXI Rule 1 interest, if any, mandatorily cease to run i.e. on and after 13.12.2000 and the conclusion to the contrary made by the learned Single Judge in the order dated 12.07.2002 and the confirmation of the same by the Division Bench in the impugned order dated 03.11.2008 are liable to be set aside. The learned ASG also submitted that in this context, by virtue of Section 3(3)(c) of the Interest Act and Section 34 of CPC, the Court has no power to award interest upon interest. According to him a cumulative consideration of



the above provisions show that with the payment of Rs.1,94,91,077/- by 13.12.2000 the entire decretal amount was fully paid and the award of further interest based on the claim of the respondent by the learned Single Judge as well as by the Division Bench was not justified. The learned ASG relied upon the decisions of this Court in the cases of *Gurpreet Singh Vs. Union of India* - reported in (2006) 8 SCC 457 and *Central Bank of India Vs. Ravindra and others* - reported in (2002) 1 SCC 367.

9. As against the above submissions, Mr. Ranjeet Kumar, learned Senior Counsel appearing for the respondent by relying upon sub-rule 1 of Order XXI CPC submitted that all money payable under decree referred to sub-rule would include principal and the interest payable prior to suit as well as interest pendente-lite, post decretal interest and cost. The learned Senior Counsel by relying upon the decision of this Court in the case of *Ravindra* (supra), in this respect, contended that so long as the decretal amount which was due as on 18.10.1985 which included the award amount along with interest calculated at the rate of 12 per cent per annum was due and payable until the entire amount is wiped out, the amount so calculated in the Execution Petition as on that date, remained unpaid. The learned Senior Counsel contended that the payment of decretal amount was not satisfied as stipulated under Order XXI Rule 1 (1) and consequently the operation of sub-clauses (4) and (5) of Order XXI Rule 1 cannot be held to have operated upon until such satisfaction of payment of decretal amount was not made by the appellant. The learned Senior Counsel, therefore, contended that after the award was made as a Rule of the Court after 31.05.1985 and when the first payment of Rs.1 crore was made by the appellant on 18.10.1985, the decretal amount which was due and payable by the appellant as on that date was in a sum of Rs.2,19,61,134/- and after giving credit to the payment of Rs.1 crore a balance amount of Rs.1,19,61,134/- was due and payable as from 19.10.1985. The learned Senior Counsel, therefore, contended that when

the next payment was made by the appellant only on 13.12.2000 in a sum of Rs.1,94,93,885/-, based on the calculation of the respondent, a further sum of Rs.1,42,96,318/- was due and payable which remained unpaid. The learned Senior Counsel, however, fairly admitted that even as per the stand of the respondent a miscalculation was made while working out the interest on principal amount which was not accepted by the learned Single Judge while granting relief in the order dated 12.07.2002 and that in any event whatever calculation ultimately worked out by the learned Single Judge in the order dated 12.07.2002 was just and proper and the confirmation of the same by the Division Bench, therefore, does not call for interference.

10. Learned Senior Counsel further submitted that after the award of the Arbitrator in March 1982 and after it was passed as a Rule of the Court in May 1985, the payments were made by the appellant only pursuant to orders of the Court and the respondent had to seek for the redressal of its grievances only through Court and that the appellant, therefore, does not deserve any indulgence in the payment of interest. Learned Senior Counsel by referring to the decision of this Court in the case of Gurpreet Singh (supra) contended that it was well within the rights of the appellant to appropriate the payments made by the appellant in the first instance to the interest part of it which was due and payable on the date of the first payment while adjusting whatever balance remained towards principal and calculating the interest payable on the remaining principal amount till the next date of payment. The learned Senior Counsel, would contend that the same was in accordance with what has been authoritatively pronounced by this Court in the cases of *Gurpreet Singh* (supra) and *Leela Hotels Limited Vs. Housing and Urban Development Corporation Limited* - reported in (2012) 1 SCC 302 and, therefore, the calculation which was ultimately found as due and payable by the learned Single Judge in the order dated 12.07.2002 was perfectly in order and, therefore, the confirmation of the said order by the Division Bench does not call for interference.



11. We have considered the submissions of the respective counsel and also bestowed our serious consideration to the relevant provisions of law, the orders impugned and the various other materials placed before this Court as well as the decisions relied upon by the respective counsel. At the outset in order to appreciate the question of law that arise for consideration, one needs to understand the specific provision contained in sub-rule (1) of Order XXI before going into the details of the facts involved in this case. The opening words of sub-rule (1) of Order XXI reads as under:

> "All money, payable under a decree shall be paid as follows, namely:-……."

Sub-rule (4) is to the following effect:

> "(4). On any amount paid under clause (a) or clause (c) of sub-rule (1), interest, if any, shall cease to run from the date of service of the notice referred to in sub-rule (2)."

A plain reading of the above clauses in the sub-rule of Order XXI is to the effect that on payment of the amounts payable under a decree, as provided under sub-rule (1), the calculation of interest on such amount payable under the decree would cease to operate from the date of service of notice as stipulated under sub-rule (2) of Order XXI.

12. Leaving aside the intimation by way of service, as regards the payment as provided under sub-rule (2), inasmuch as in the case on hand on different dates the payments were made, such payments were all made after due notice to the respondent. Therefore, there was no controversy relating to the date when the respective payments were made. We are, therefore, only concerned with the implication and application of sub-rule (1) of Order XXI and the consequent effect on whatever payments made, as claimed by the appellant by operation of sub-rule (4). Therefore, in the forefront, we wish to examine as to what extent the prescription contained in sub-

rule (1) of Order XXI was followed by the appellant in making the payments once on 18.10.1985 and subsequently on 13.12.2000. The words used in sub-rule (1) in different expressions means whatever money that is due and payable under a decree, which could be paid in the manner stipulated in sub-clauses (a), (b) and (c) of the said sub-rule (1). The prime words, which needs deeper scrutiny are "payable under a decree". To understand the said set of expressions what is required to be scrutinized is as to how the decree has been made while granting the relief as regards the payment. We, therefore, have to refer to that part of the award of the Arbitrator to understand the nature of relief granted under the said award. The operative part of the award, as extracted earlier, disclose that the respondent was entitled to a sum of Rs.1,42,24,894/- along with interest at the rate of 12 per cent per annum on the said amount from 06.01.1981 till the date of payment or decree whichever was earlier. The Arbitrator after giving credit to the counterclaim made by the appellant ultimately worked out the actual amount payable to the respondent which worked out to Rs.1,41,68,474/-. The said award of the Arbitrator was accepted by the respondent. When the award was made as the Rule of the Court in the order dated 31.05.1985, the only alteration made was the date of calculation of interest rendered by the Arbitrator. While the Arbitrator directed such calculation of interest to be made from 06.01.1981, the learned Single Judge directed such calculation to be made from 12.03.1981. In the said order of the Court dated 31.05.1985 which forms the basis for the respondent to make the claim, inasmuch as the award became the Rule of the Court only pursuant to the said order, it is important to make reference to what the Rule of the Court stated in the said order. In the penultimate paragraph, it has been specifically stated as under:

> "It is further ordered that the claimant shall be entitled to future interest at the rate of 12% per annum from the date of the decree till realization, in case the award amount is not paid within two months from today the 31st May, 1985."



13. Noting the nature of relief granted under the award and the ultimate Rule of the Court together, we find that learned Arbitrator directed that the calculation of payment of interest "on the said amount of the award" which should run from 06.01.1981 should now run from 12.03.1981 by virtue of Rule of the Court dated 31.05.1985. As per the direction of the learned Arbitrator, such payment of interest would be payable till the appellant make the payment or the decree whichever is earlier. The decree, having regard to the applicable provision, would be the date of the Rule of the Court, namely, 31.05.1985. Therefore, a strict construction of the said direction of the learned Arbitrator as regards the manner of calculation of interest would mean either the date of payment or the date of decree whichever is earlier. Since, the first date of payment in the case on hand was subsequent to the date of the Rule of the Court, namely, 31.05.1985, going by the direction of the learned Arbitrator, the calculation of interest should be made up to 31.05.1985. Since, the award received the seal of approval only after the same was made as the Rule of the Court, it is the stipulation contained in the said Rule would ultimately cover the relief really granted in the award as made operative by virtue of the Rule ordered by the Court. Therefore, in the stricto sensu, it is the decree dated 31.05.1985 which has to be applied in letter and spirit in order to find out whether the stipulations contained therein were duly fulfilled by the appellant.

14. The Rule of the Court while approving the award of the Arbitrator did not make any substantive alteration as regards the entitlement of the respondent on the payment to be made, namely, the sum of Rs.1,41,68,474/-. Even the rate of interest granted by learned Arbitrator was not touched by the Court, which was maintained at the rate of 12 per cent per annum. The Court only directed the calculation of the said interest payable as from 12.03.1981 instead of 06.01.1981. The only other substantive direction contained in the Rule of the Court dated 31.05.1985 was that the respondent was entitled to future interest at the rate of 12 per cent per annum from the date of

the decree till realization in case the award amount was not paid within two months from 31.05.1985. Therefore, the said part of the decree requires to be deeply examined by applying the provision contained in Order XXI Rule 1 of CPC read with Section 3 (3)(c) of the Interest Act as well as Section 34 of CPC.

15. With that view when we examine the said part of the Rule of the Court, we wish to specifically note that the Court made a conscious direction to the specific effect that the entitlement of the respondent for future interest at the rate of 12 per cent per annum from the date of decree, namely, 31.05.1985 till the date of realization would be on the award amount if it was not paid within two months from 31.05.1985. Therefore, the calculation of interest payable up to the date of the decree as well as the time granted therein, namely, two months from 31.05.1985 and what is interest payable subsequent thereto has been clearly set out in the said part of the Rule. If the said Rule is to be understood in the manner in which the Court had directed the calculation of interest to be made it can be only in the following manner, namely, that the interest from 12.03.1981 up to 31.07.1985 at the rate of 12 per cent per annum would be on the award amount, namely, Rs.1,41,68,474/-. If the award amount was not paid, namely, the sum of Rs.1,41,68,474/- on or before 31.07.1985, the future interest again at the rate of 12 per cent per annum can be claimed. In our considered opinion, it should be on the award amount which was in a sum of Rs.1,41,68,474/-. We say so because both the award of the learned Arbitrator as well as the Rule of the Court makes a clear distinction between the award amount and the interest payable. The award having become the Rule of the Court and while making the said Rule it was clearly made known that the award contained an amount which was payable to the respondent quantifying the said amount in a sum of Rs.1,41,68,474/-. After quantification of the said amount, the learned Arbitrator dealt with the grant of interest independent of the said payment and fixed the rate of such



interest at 12 per cent per annum. When such a clear distinction was consciously made by the learned Arbitrator while passing the award no one can even attempt to state that the award amount and the interest mentioned in the award dated 15.03.1982 should be merged together and state that the award amount would comprise of a sum of Rs.1,41,68,474/- and the interest worked out thereon became payable when once it was made the Rule of the Court and thereby became the decretal amount. Such a construction of the said award cannot be made having regard to the specific terms of the decree dated 31.05.1985.

16. Once we steer clear of the said position as regards the decree passed by the learned Single Judge, we are posed with the next question as to while applying Order XXI Rule 1 when payments were made towards the satisfaction of the said decree as provided under Order XXI Rule 1 (a), (b) and (c) what would be the implication of sub-rules 4 and 5 of Order XXI. In order to understand the said legal implication of Order XXI Rule 1 read along with sub-rules 4 and 5, in the foremost it will be necessary to understand what is contemplated under Order XXI Rule 1, in particular, the opening set of expressions, namely, "all money, payable under a decree shall be paid as follows, namely:-…" It will be necessary to keep in mind that the said provision does not state the decretal amount. The expression used is all money payable under a decree. TERSELY stated, as pointed out by us in the earlier paragraph, the decree dated 31.05.1985 affirm the award amount, the interest payable at the rate of 12 per cent per annum from 12.03.1981 till the date of its realization if not paid within two months from the date of the decree, namely, 31.05.1985. Therefore, the said decree dated 31.05.1985 consisted of the award amount plus interest payable thereon from 12.03.1981 up to the date of the decree, namely, 31.05.1985 to be payable within two months from that date and in the event of non-payment of the said amount within two months from 31.05.1985 to calculate future interest at the very same rate of 12 per cent per annum from the date of the

decree till the realization of the award amount. In our considered opinion, a reading of the opening set of expressions of Order XXI Rule 1 is clear to the above effect. In the case on hand the payment effected by the appellant after 31.05.1985 was once on 18.10.1985 and thereafter on 13.12.2000 when the issue was dealt with by the Court in the order dated 12.07.2002. It is not in dispute that the award amount of Rs.1,41,68,474/- earned interest at the rate of 12 per cent per annum up to the date of first payment, namely, 18.10.1985 which worked out to a sum of Rs.78,30,314/- i.e. for the period from 12.03.1981 to 18.10.1985. The total amount payable as on that date under the decree, both the award amount along with the interest, worked out to Rs.2,19,61,134/-. The said figure, as calculated by the appellant, was not disputed by the respondent. On 18.10.1985, the appellant paid a sum of Rs.1 crore by way of deposit pursuant to the order of the Division Bench dated 13.09.1985 when the appellant challenged the decree dated 31.05.1985. The respondent was also permitted to withdraw the said sum of Rs.1 crore in the said order dated 13.09.1985.

17. Keeping the above factual position in mind when we examine Order XXI Rule 4 CPC, the said sub-rule states that on any amount paid under Clause (a) or Clause (c) of sub-rule 1, interest, if any, shall cease to run from the date of service of the notice referred to in sub-rule 2. In the case on hand since the deposit of the amount pursuant to the order of the Division Bench dated 13.09.1985 came to be made and was also withdrawn by the respondent from the date of service of notice as contemplated in sub-rule 2 the same was deemed to have been effected. Therefore, applying sub-rule 4 to the case on hand in so far as the cessation of interest is concerned, the same should operate upon the sum of Rs.1 crore deposited by the appellant and withdrawn by the respondent. There can be no dispute and in fact it is not disputed by the parties that on and after the deposit of Rs.1 crore, no interest was payable on the said sum. The only other consideration to be made is in which component the said sum of Rs.1 crore is to be taken. In other words, whether the said sum of Rs.1 crore paid by the appellant should be accounted towards the award amount of Rs.1,41,68,474/- or to the total figure of Rs.2,19,61,134/- as was sought to be applied by the respondent.



18. Before venturing to find out the answer to the said question having regard to the Constitution Bench judgment of this Court in *Gurpreet Singh* (supra), wherein the implication of Order XXI Rule 1 has been elaborately dealt with we deem it appropriate to note the rationale laid therein on this aspect. Though, the question posed for consideration before the Constitution Bench was whether the rule called "different stages of appropriation" set out in *Prem Nath Kapur and another Vs. National Fertilizers Corporation of India Ltd. and others* - (1996) 2 SCC 71, is correct or whether the rule requires to be restated on the scheme of the Land Acquisition Act understood in the context of the general rules relating to appropriation and the rules relating to appropriation in execution of money decrees and mortgage decrees as a concomitant to the said exercise, the Constitution Bench specifically dealt with Order XXI Rules 1, 2, 4 and 5 and has rendered a definite conclusion on the application of the abovesaid provision after a detailed discussion in its elaborate judgment. Since, the issue has been dealt with in extenso in the said decision and the issue has been succinctly clarified by the Constitution Bench, we wish to refer to those relevant portions of the said decision in order to apply the ratio laid down therein to the facts of this case and test the correctness of the judgment impugned in this appeal.

19. In *Gurpreet Singh* (supra) at paragraph 14, the implication of Order XXI Rule 1 vis-à-vis the related provisions under Order XXIV and Order XXXIV have been set out which is to the following effect:

> "14. Now, we may consider the provisions in the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") that have relevance to the issue. The rule of appropriation in respect of amounts deposited in court or

in respect of payment into court, is contained in Order 24 of the Code at the pre-decretal stage and in Order 21 Rule 1 at the post-decretal stage. Though, we are not directly concerned with it, we may notice that special provisions relating to mortgages are found in Order 34 of the Code. Under Order 24 Rule 1, a defendant in a suit for recovery of a debt may at any stage of the suit deposit in court such sum of money as he considers a satisfaction in full of the claim in the plaint. Rule 2 thereof provides for issue of notice of deposit to the plaintiff through the court and for payment out of the amounts to the plaintiff if he applies for the same. Rule 3 specifically states that no interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of such deposit, whether the sum deposited is in full discharge of the claim or it falls short thereof. Rule 4 enables the plaintiff to accept the deposit as satisfaction in part and allows him to pursue his suit for what he claims to be the balance due, subject to the consequences provided for therein regarding costs. It also deals with the procedure when the plaintiff accepts the payment in full satisfaction of his claim."

20. In paragraph 20, the general rule of appropriation towards a decretal amount has been stated as under:

"20.……It was also held that the general rule of appropriation towards a decretal amount was that such an amount was to be adjusted strictly in accordance with the directions contained in the decree and in the absence of such direction, adjustments be made firstly in payment of interest and costs and thereafter in payment of the principal amount, subject of course, to any agreement between the parties."

21. After referring to the general rule of appropriation in cases where there is shortfall in paying the decree amount what will be the mode of appropriation has been explained in paragraph 26 and in the last part of paragraph 27 in the following words:



"26. Thus, in cases of execution of money decrees or award-decrees, or rather, decrees other than mortgage decrees, interest ceases to run on the amount deposited, to the extent of the deposit. It is true that if the amount falls short, the decree-holder may be entitled to apply the rule of appropriation by appropriating the amount first towards the interest, then towards the costs and then towards the principal amount due under the decree. But the fact remains that to the extent of the deposit, no further interest is payable thereon to the decree-holder and there is no question of the decree-holder claiming a reappropriation when it is found that more amounts are due to him and the same is also deposited by the judgment-debtor. In other words, the scheme does not contemplate a reopening of the satisfaction to the extent it has occurred by the deposit. No further interest would run on the sum appropriated towards the principal.

27.……The principle appears to be that if a part of the principal has been paid along with interest due thereon, as on the date of issuance of notice of deposit, interest on that part of the principal sum will cease to run thereafter. In other words, there is no obligation on the judgment-debtor to pay interest on that part of the principal which he has already paid or deposited."

22. The said legal position has been reiterated in paragraph 36 with a little more clarity, which is to the following effect:

"36.……*But if there is any shortfall at any stage, the claimant or decree-holder can seek to apply the rule of appropriation in respect of that amount, first towards interest and costs and then towards the principal, unless the decree otherwise directs."*

(Emphasis added)

23. Ultimately, in paragraph 49, the Constitution Bench decision has summed up the legal position as under:

> "49. Though, a decree-holder may have the right to appropriate the payments made by the judgment-debtor, it could only be as provided in the decree if there is provision in that behalf in the decree or, as contemplated by Order 21 Rule 1 of the Code as explained by us above. The Code or the general rules do not contemplate payment of further interest by a judgment-debtor on the portion of the principal he has already paid. His obligation is only to pay interest on the balance principal remaining unpaid as adjudged either by the court of first instance or in the court of appeal. On the pretext that the amount adjudged by the appellate court is the real amount due, the decree-holder cannot claim interest on that part of the principal already paid to him. Of course, as indicated, out of what is paid he can adjust the interest and costs first and the balance towards the principal, if there is a shortfall in deposit. But, beyond that, the decree-holder cannot seek to reopen the entire transaction and proceed to recalculate the interest on the whole amount and seek a reappropriation as a whole in the light of the appellate decree."
>
> (Emphasis added)

24. From what has been stated in the said decision, the following principles emerge:

> (a) The general rule of appropriation towards a decretal amount was that such an amount was to be adjusted strictly in accordance with the directions contained in the decree and in the absence of such directions adjustments be made firstly towards payment of interest and cost and thereafter towards payment of the principal amount subject, of course, to any agreement between the parties.
>
> (b) The legislative intent in enacting sub-rules 4 and 5 is clear to the pointer that interest should cease to run on the deposit made by the judgment debtor and notice given or on the amount being tendered outside the Court in the manner provided in Order XXI Rule 1 sub-clause (b).
>
> (c) If the payment made by the judgment debtor falls short of the decreed amount, the decree holder will be entitled to apply the general rule of appropriation by appropriating the amount deposited towards the interest, then towards cost and finally towards the principal amount due under the decree.
>
> (d) Thereafter, no further interest would run on the sum appropriated towards the principal. In other words if a part of the principal amount has been paid along with interest due thereon as on the date of issuance of notice of deposit interest on that part of the principal sum will cease to run thereafter.
>
> (e) In cases where there is a shortfall in deposit of the principal amount, the decree holder would be entitled to adjust interest and cost first and the balance towards the principal and beyond that the decree holder cannot seek to reopen the entire transaction and proceed to recalculate the interest on the whole of the principal amount and seek for re-appropriation.



25. Keeping the above principles in mind, when we examine the case on hand, we find from the judgment of the learned Single Judge, which has been affirmed by the Division Bench, that the principal amount due along with the interest thereon on the date of the first payment, namely, 18.10.1985 as well as based on the subsequent payments on the remaining principal amount and the interest due thereon which has been set out in the last part of judgment dated 12.07.2002 of the learned Single Judge, the following summing up:

> "To sum up on 03.01.2001 Rs.1,19,61,134/- was due

towards principal amount and Rs.23,35,134/- was due towards interest. The judgment debtor has further to pay the principal sum of Rs.1,19,61,134/- with 12% interest calculated from 04.01.2002 to the date of final payment minus Rs.23,35,184/- + Rs.19,97,192/- allowed to be deducted as TDS. The contention of the judgment debtor that only a sum of Rs.1,94,93,885/- was due as on 03.01.2001 under the decree is wrong and is rejected. As such the contention of the judgment debtor that the decree holder is charging interest on the amount of interest and contravening section 3(3)(c) of Interest Act is incorrect and is rejected.

Having regard to the above discussion the objections filed by the judgment debtor have no merit the objection application is dismissed."

26. In fact in the calculation which was sought to be made by the respondent in its statement filed before the learned Single Judge, interest was calculated for the period subsequent to 06.03.2001 that was the date when the last payment was made by the appellant wherein the calculation of interest for the period from 04.01.2001 to 04.03.2002 was claimed on the entire sum of Rs.1,42,96,318/- instead of calculating the same on the balance principal of Rs.1,19,61,134/-. In the penultimate paragraph of the order dated 12.07.2002, the learned Single Judge rightly rejected such a wrong claim made on behalf of the respondent while dismissing the objections filed by the appellant.

27. The Division Bench having examined the order of the learned Single Judge by applying the principles culled out from the Constitution Bench decision of this Court ultimately held as under in paragraph 26:

"26. In the present case, it is not in dispute that there was neither any notice under Rule 1 of Order XXI nor any specific direction contained in the decree or given by the Division Bench, while directing making payment of Rs.1 crore as a condition for grant of stay of the execution. In these circumstances, the ld. Single Judge rightly held that the action of the decree holder in adjusting the said amount first against the interest of Rs.78,30,314/-, which had become due as on that date was perfectly in order and only balance amount of Rs.22,07,340/- could be adjusted against principal, thereby, leaving balance amount payable towards principal as on 19.10.1985 at Rs.1,19,61,134/- on which the decree holder was entitled to interest @ 12% p.a. from 19.10.1985 till 6.3.01, when a sum of Rs.1,94,91,077/- was paid in this manner accepted the calculation made by the decree holder, wherein, no arithmetic error or otherwise found. No doubt, in the process the appellant is made to pay substantial amount towards interest. However, that is its own making. The award is of the year 1982, which means it was rendered more than 26 years ago. Even the decree is of the year 1985. After the passing of the decree, the appellant chose to challenge the same by filing appeal and in the meantime, made only part payment of Rs.1 crore. Even when the appeal was dismissed in the year 2000, the appellant did not make any payment, which inaction on the part of the appellant, compelled the respondent to file the execution petition. In the execution petition, also the appellant made payment of Rs.1,94,91,077/- on 10.10.2000 and wanted to contest the execution petition, particularly with regard to the manner in which the amounts paid are to be appropriated. Because of these part payments, which had to be appropriated first against the interest, which kept on mounting, part principal amount always remain payable as a consequence whereof further interest on the balance principal amount also became payable by the appellant. For this, it is the appellant only which is to be blamed."

28. Inasmuch as, we find that the learned Single Judge as

well as the Division Bench has applied the rule of construction on Order XXI Rule 1 based on the Constitution Bench decision of this Court wherein the earlier decision of this Court in *Prem Nath Kapur* (supra), in regard to the rule of appropriation, as set out in paragraph 48, was also approved, we do not find any illegality in the said judgment of the Division Bench while affirming the order of the learned Single Judge dated 12.07.2002.

29. As far as the contention based on Section 34 of CPC having regard to the general rule of appropriation in cases of this nature where there is a short payment made pursuant to the decree, we do not find any conflict with the said provision in so far as it related to payment of interest to be payable by the appellant. As far as the submission made, based on Section 3(3)(c) of the Interest Act is concerned, the said provision only states de hors the substantive part of said Section 3, Courts are not empowered to award interest upon interest. We do not find any scope to apply the said section to the case on hand where the controversy is subsequent to the decree where direction for payment of interest on the award amount has been spelt out. The issue related to the correctness of the interest calculated as per the decree of the Court which made the award its rule. The challenge is not to the decree on the footing that it was in violation of Section 3(3)(c) of the Interest Act. We, therefore, do not find any support in the submission based upon the said Section 3(3)(c) of the Interest Act. The main contention of Mr. Chandhiok, learned ASG for the appellant having been already dealt with by the Constitution Bench decision of this Court referred to above which is binding and applying the ratio laid down therein, we do not find any scope to countenance such a submission made before us while impugning the judgment of the Division Bench dated 03.11.2008 as well as that of learned Single Judge dated 12.07.2002. We do not find any merit in this appeal, the appeal fails and the same is dismissed.

B.B.B. Appeal dismissed.



PARAS NATH RAI AND OTHERS
*v.*
STATE OF BIHAR AND ORS.
(Civil Appeal No. 7234 of 2012)

OCTOBER 5, 2012

**[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]**

*Land Laws – Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 – ss.3 and 4(c) – Partition suit – Dismissed by civil court – Title appeal – During pendency thereof, notification issued u/s.3 of the 1956 Act – Consequence – Held: Once a notification has been published u/s.3, every suit and proceeding in respect of declaration of rights or interest in any land lying in areas or for declaration or adjudication of any other rights in regard to which proceeding can or ought to be taken under the Act pending before any court or authority whether of the first instance or of appeal, reference or revision, shall, on order being passed in that behalf by the court or authority before whom such suit or proceeding is pending shall stand abated with a view to ensure the jurisdiction of the consolidation authorities remains unhampered and the said authorities are not obstructed by the proceedings in civil courts and their decisions are not impeded by the decisions of the civil courts – Nothing remains to be adjudicated before the civil court – In the present case, title appeal was pending when notification was issued u/s.3 of the 1956 Act, whereafter an application u/s.4(c) of the 1956 Act was preferred to the effect that the appeal and the suit had abated by statutory operation of law – It would have been advisable on the part of the appellate court to record a finding that the entire proceeding of the civil suit stood abated – But the appellate court directed abatement because of non-substitution of the legal heirs of one of the respondents – Hence, the suit as well as the appeal abated*

*and resultantly the very commencement of the civil proceeding came to a naught and, therefore, findings recorded in the said proceeding became extinct – High Court did not appreciate the lis in proper perspective and held that reliance on the findings recorded by the civil court by the revisional consolidation authority under the 1956 Act could not be faulted – Said conclusion wholly erroneous – Matter remanded to High Court to decide the matter on merits on basis of the material brought before the Consolidation Authorities.*

*Abatement – Conceptual difference between statutory abatement and abatement under the CPC.*

**Partition suit was filed by the father of the appellant No. 1 and others. The trial court dismissed the suit holding that it was defective for non-joinder of parties and further that the stand of the appellants that 'U' was the daughter of 'A' did not appear to be correct. The appellants preferred title appeals. Meanwhile, the State Government meanwhile issued notification under Section 3 of Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 bringing the area under consolidation scheme. Before the lower appellate court, an application was filed under Section 4 (c) of the Act to the effect that the appeal and the suit had abated by statutory operation of law. The lower appellate court did not consider the application but held that the appeal could not be allowed to proceed as one of the respondents had died during the pendency of the appeal and the application for substitution of legal representative had been rejected. However, it allowed the appeal to be withdrawn. In revision, the single Judge of the High Court returned a finding that the appellant had not made any prayer for withdrawal of the appeal and, therefore, the order passed by the lower appellate court was without jurisdiction and accordingly he remitted the matter to the**



**lower appellate court for disposal of the appeal afresh. Thereafter, Lower Appellate Court disposed of the appeal holding that appellants were not interested to contest appeal and that the title appeal stood abated.**

**Meanwhile, in the consolidation proceedings, the Director, Consolidation held that 'U' was the daughter of 'D' and not of 'A'. The said conclusion was arrived on the basis of the findings recorded by the civil court. The order was affirmed by the single Judge of High Court. In LPA, the Division Bench held that as the title appeal had abated for non-prosecution by the appellants and as the consolidation authorities had taken note of the findings recorded by the civil court, the same was rightly not interfered with by the single Judge.**

**The appellant contended before this Court that the High Court had fallen into error by concurring with the view expressed by the authority below that 'U' was the daughter of 'D' as recorded by the civil court without taking note of the fact that an application for abatement was filed under Section 4 (c) of the Act to the effect that the title appeal had abated after issue of the notification under Section 3 of the Act. It was urged that the High Court committed a grave factual error by expressing the view that the appeal had abated because of the non-substitution of legal representative and further that once appeal as well as the suit stood abated the findings recorded in the suit could not have formed the base of the decision.**

**Allowing the appeal, the Court**

**HELD:1.1. Once a notification has been published under Section 3 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956, every suit and proceeding in respect of declaration of rights or interest**

**in any land lying in areas or for declaration or adjudication of any other rights in regard to which proceeding can or ought to be taken under the Act pending before any court or authority whether of the first instance or of appeal, reference or revision, shall, on order being passed in that behalf by the court or authority before whom such suit or proceeding is pending shall stand abated with a view to ensure the jurisdiction of the authorities under the Consolidation Act remains unhampered and the said authorities are not obstructed by the proceedings in civil courts and their decisions are not impeded by the decisions of the civil courts. The purpose of the scheme of consolidation is to avoid conflict of jurisdiction in order to confer jurisdiction on the consolidation authorities who are required to exclusively examine the rival claims of the parties. Apart from that there is conceptual difference between statutory abatement and abatement under the Code of Civil Procedure. On the basis of a statutory abatement, the whole proceeding from its inception stands abated because the local law has provided an effective alternative remedy to be perused before an exclusive forum to remedy the grievance raised before the court. Nothing remains to be adjudicated before the civil court [Para 30] [751-C-G]**

**1.2. In the case at hand, judgment and decree passed by the trial court was assailed in the title appeal. Though a petition was filed under Section 4(c) of the Act, no order was passed thereon, yet the appeal was permitted to be withdrawn. Challenge being made in the civil revision, the High Court had remanded the matter directing the appeal to be restored to file with a further direction that the matter would be dealt with on merits including the competence of the court to hear the appeal. Despite the remit, the court did not take note of the petition filed by the appellant under Section 4(c) of the Act, but observed**



**that they are not interested to contest the appeal and accordingly directed the appeal stood abated because of non-substitution. This order shows total non application of mind. As is evincible the consolidation proceedings had continued and at one stage the authorities were relying on the findings of civil court and at some other ignoring the same. Eventually, the matter travelled to the High Court in a writ petition. The single Judge ruled that the consolidation authorities were justified in relying on the findings of civil court. [Para 33] [753-C-G]**

**1.3. In the present case, the title appeal was pending against the preliminary decree and an application under Section 4(c) had been preferred. It would have been advisable on the part of the appellate court to record a finding that the entire proceeding of the civil suit stood abated. But the appellate court directed abatement because of non-substitution of the legal heirs of one of the respondents. Hence, the suit as well as the appeal abated and resultantly the very commencement of the civil proceeding came to a naught and, therefore, findings recorded in the said proceeding became extinct. The Judge dealing with the writ petition as well as the Judges deciding the intra-court appeal did not appreciate the lis in proper perspective and opined that the reliance on the findings recorded by the civil court by the revisional authority under the 1956 Act could not be faulted. The said conclusion is wholly erroneous and deserves to be overturned. [Para 36] [755-G-H; 756-A-D]**

**1.4. The orders passed by the single Judge as well as of the Division Bench are set aside and the matter is remanded to the file of the single Judge to decide the matter on merits on the basis of the material brought before the Consolidation Authorities. [Para 37] [756-E]**

*Dr. Jagdish Prasad @ Jagdish Prasad Gupta v. Sardar*

*Satya Narain Singh & Ors.* **1982 BBCJ-1 and** *Raja Mahto and Another v. Mangal Mahto and others* **1982 PLJR 392 – not approved.**

*Srinibas Jena & ors. v. Janardan Jena & ors.* **AIR 1981 Orissa 1 (F.B.) – distinguished.**

*Ram Adhar Singh v. Ramroop Singh and Others* **AIR 1968 SC 714: 1968 SCR 95;** *Chattar Singh and others. v. Thakur Prasad Singh* **(1975) 4 SCC 457;** *Satyanarayan Prasad Sah and others v. State of Bihar* **(1980) Supp SCC 474;** *Mst. Bibi Rahmani Khatoon and others v. Harkoo Gope and others* **(1981) 3 SCC 173; 1981 (3) SCR 553;**

*Nathuni Ram & ors. v. Smt. Khira Devi & ors.* **1981 BBCJ 413;** *Gorakh Nath Dube v. Hari Nath Singh* **AIR 1973 SC 2451: 1974 (1) SCR 339;** *Mahendra Saree Emporium (II)* v. *G.V. Srinivasa Murthy* **(2005) 1 SCC 481: 2004 (3) Suppl. SCR 931;** *Bimal Kumar & Another v. Shakuntala Debi & Others* **(2012) 3 SCC 548;** *Rachakonda Venkat Rao And Others v. R. Satya Bai (D) by L.R. And Another* **AIR 2003 SC 3322: 2003 (3) Suppl. SCR 629;** *Muzaffar Husain v. Sharafat Hussain* **AIR 1933 Oudh 562** *Raghubir Sahu v. Ajodhya Sahu* **AIR 1945 Pat 482 and** *Renu Devi v. Mahendra Singh and others* **AIR 2003 SC 1608: 2003 (1) SCR 820 – referred to.**

**Case Law Reference:**

| | | |
|---|---|---|
| **1968 SCR 95** | **referred to** | **Paras 15,20, 21,23,28,29** |
| **(1975) 4 SCC 457** | **referred to** | **Paras 15,23, 28,29** |
| **1982 PLJR 392** | **not approved** | **Paras 16,20, 31,32,35** |
| **(1980) Supp SCC 474** | **referred to** | **Paras 16,19, 20,24,28,29-32** |
| **1981 (3) SCR 553** | **referred to** | **Paras 16,19, 25, 29,31,32** |
| **1982 BBCJ-1** | **not approved** | **Paras 19,31,32** |
| **1981 BBCJ 413** | **referred to** | **Para 19** |
| **AIR 1981 Orissa 1 (F.B)** | **distinguished** | **Paras 19,31,35** |
| **1974 (1) SCR 339** | **referred to** | **Para 20** |
| **2004 (3) Suppl. SCR 931** | **referred to** | **Para 29** |
| **(2012) 3 SCC 548** | **referred to** | **Para 35** |
| **2003 (3) Suppl. SCR 629** | **referred to** | **Para 35** |
| **AIR 1933 Oudh 562** | **referred to** | **Para 35** |
| **AIR 1945 Pat 482** | **referred to** | **Para 35** |
| **2003 (1) SCR 820** | **referred to** | **Para 35** |



CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7234 of 2012.

From the Judgment & Order dated 02.05.2011 of the High Court of Judicature at Patna in L.P.A.No. 947 of 2002.

Nagendra Rai, Smarhar Singh, Shantanu Sagar, Abhishek Kr. Singh, Gopi Raman, T. Mahipal for the Appellants.

S.B. Sanyal, Akhilesh Kr.Pandey, Sudhanshu Saran, Shalini Chandra, Swati Chandra, Akhilesh Kumar Pandey, Gopal Singh, Chandan Kumar, K.N. Rai for the Respondents.

The Judgment of the Court was delivered by

**DIPAK MISRA, J.** 1. Leave granted.

2. Calling in question the legal acceptability of the order dated 2nd May, 2011 passed by the Division Bench of the High Court of Judicature at Patna in LPA No. 947 of 2002 whereby

stamp of approval has been given to the order dated 9th August, 2002 passed by the learned single Judge in CWJC No. 1851 of 2000 wherein the learned single Judge affirmed the order dated 17th December, 1999 passed by the Director of Consolidation, Bihar, Patna in Revision Suit Nos. 151/75, 152/75 and 624/77 respectively, the present appeal by special leave has been preferred.

3. The facts which are essential to be stated for the adjudication of the present appeal are that Partition suit No. 123 of 1963 was filed by Sesh Nath Rai, father of the appellant No. 1 and others against Kanta Rai and others. The claim in the suit for partition pertained to the house and "Sahan" standing over plot Nos. 593 and 595 under Khata No. 18. The learned Munsif by judgment and decree dated 4th April, 1968 dismissed the suit observing that the plaintiffs' stand that one Umraoti Devi was the daughter of Ananta Rai did not appear to be correct. The learned Munsif further opined that there had been a previous partition and the suit was defective for non-joinder of parties. However, on the determined status, he carved out the shares and concluded that the plaintiffs were not entitled to any relief claimed and accordingly dismissed the suit.

4. Being dissatisfied with the aforesaid judgment and decree the appellants preferred Title Appeal Nos. 30/41 of 1968/71. It is worthy to note that the State Government had issued notification No. 1168 dated 26th November, 1970 under Section 3 of Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (for short 'the Act') bringing the area under consolidation scheme. Before the appellate court a petition was filed under Section 4 (c) of the Act to the effect that the appeal and the suit had abated by statutory operation of law. The appellate court failed to consider the application and decided that the appeal could not be allowed to proceed as one of the respondents had died during the pendency of the appeal and the application for substitution had been rejected. However, he allowed the appeal to be withdrawn observing as follows:-



> "In the present appeal I find that the suit of the plaintiffs-appellants was dismissed by the learned lower Court and a decree was prepared accordingly. Again by the non-substitution of the heirs of Panna Devi the whole appeal has become incompetent and it has abated against those respondents. As such I have no doubt that a vested right has come into existence in favour of the respondents before the petition for withdrawal was made. Relying on the authorities quoted above I find that the appellants cannot be allowed permission to file a fresh suit. However, they are allowed to withdraw the appeal as prayed for."

5. Grieved by the aforesaid order a Civil Revision No. 559 of 1975 was filed whereby the learned single Judge returned a finding that the appellant had not made any prayer for withdrawal of the appeal and, therefore, the order passed by the lower appellate court was without jurisdiction and accordingly he remitted the matter to the lower appellate court for disposal of the appeal in accordance with law. It was further observed that any defect with regard to the competency of the appeal shall be decided by the appellate court at the time of hearing of the appeal itself.

6. After the remit the Title Appeal was revived and eventually on 26th November, 1980 the learned sub-Judge, Bhaubhua took note of the fact that the appellant was not represented and the respondent Nos. 1 and 2 had filed cross objection and had also filed an application for abatement of the appeal. The learned sub-Judge noted that the appellant was not interested to contest the appeal and, accordingly, opined that the Title Appeal No. 30/68 and Title Appeal No. 123/63 stood abated.

7. At this juncture, it is necessary to refer to the consolidation proceedings. The Consolidation Officer vide order dated 23rd March, 1974 arrived at the conclusion that the applicant Umraoti Devi is the daughter of Anant Rai and hence,

claim of the applicant therein deserved to be rejected. Being of this view he directed entry in Khata No. 142 of recent revisional survey of village Lakhanpatti Thana No. 407 which was in the name of the Shesh Nath Rai, the respondent therein, would remain in operation. The appeals preferred from the said order did not render any success to the appellants.

8. Be it noted, there were two revision petitions, namely, Revision Petition Nos. 151/1975 and 152/1975 which were decided ex-parte. The revisional authority by order dated 1.09.1978 confirmed the orders passed by the Consolidation Officer and the Deputy Director, Consolidation.

9. The two orders passed by the Revisional Authority were challenged before the High Court in CWJC Nos. 1638 and 1640 of 1981. The learned single Judge by order dated 15.11.1985 quashed the order impugned and directed the Additional Director to decide the revision petitions along with other pending revisions if mentioned.

10. After the remand, three revisions, namely, Revision Suit Nos. 151/1975, 152/1975 and 624/1977 were disposed of vide order dated 8.10.1987 by the Deputy Director, Consolidation holding that Umraoti Devi was not the daughter of Dhyani Rai and she had no right in the disputed land.

11. The aforesaid common order was assailed in CWJC No. 5610/1987 and the learned single Judge by order dated 14.05.1998 expressed the view that the Deputy Director, Consolidation could not have decided the revisions while in-charge of Director and hence, the order had been passed by an authority who did not have jurisdiction and, accordingly, remanded the matter to be heard afresh and disposed of by the revisional authority.

12. After the remand, the Director, Consolidation dismissed the three revisions by expressing the view that Umraoti Devi was the daughter of Dhyani Rai and not of Anant Rai. The said conclusion was arrived on the base of findings



recorded by the civil court. The said order came to be challenged in C.W.J.C. No. 1851 of 2000. The learned single Judge by order dated 9.08.2002 concurred with view of the appellate authority and the revisional authority and, accordingly, dismissed the writ petition.

13. The decision of the learned single Judge was called in question in LPA No. 947 of 2002 and the Division Bench opined that as the appeal had abated for the non-prosecution by the appellants and as the consolidation authorities had taken note of the findings recorded by the civil court, the same had been rightly not been interfered with by the learned single Judge. Being of this view, the Division Bench dismissed the appeal. The said orders are the subject matters of assail in the present appeal.

14. We have heard Mr. Nagendra Rai, learned senior counsel for the appellants and Mr. S.B. Sanyal, learned senior counsel for the respondents.

15. It is urged by Mr. Nagendra Rai that the High Court has fallen into error by concurring with the view expressed by the revisional authority and the forums below that Umraoti Devi was the daughter of Dhyani Rai as recorded by the civil court without taking note of the fact that an application for abatement was filed under Section 4 (c) of the Act to the effect that the title appeal had abated after issue of the notification under Section 3 of the Act. It is urged by him that the High Court has committed a grave factual error by expressing the view that the appeal had abated because of the non-substitution of legal representative. It is canvassed by him that once appeal as well as the suit stood abated the findings recorded in the suit could not have formed the base of the decision. To buttress the said submission he has commended us to the decisions in *Ram Adhar Singh v. Ramroop Singh and Others*[1]*; Chattar Singh and others. v. Thakur Prasad Singh*[2]*.*

1. AIR 1968 SC 714.
2. (1975) 4 SCC 457.

16. Mr. Sanyal, learned senior counsel appearing for respondents, per contra, would contend that after the suit was decreed and a preliminary decree had been passed, the same would not come within the purview of the suit or appeal or reference or revision and hence, would not abate. It is also urged by him that the decree passed by the civil court could not be nullified and therefore, the findings recorded in the suit could be relied upon. To bolster his proponement, he has placed reliance on Section 4 (c) of the Act and drawn inspiration from *Raja Mahto and Another v. Mangal Mahto and others*[3], *Satyanarayan Prasad Sah and others v. State of Bihar*[4] *and Mst. Bibi Rahmani Khatoon and others v. Harkoo Gope and others*[5].

17. To appreciate the rivalised submission raised at the bar, it is relevant to state here that during the pendency of the appeal a notification under Section 3 of the Act had come into existence. An application under Section 4 (c) was filed for abatement of the appeal. It was misconstrued and treated as an application for abatement of appeal due to non-substitution of the legal representative of the respondents. It is also necessitous to state here that at one point of time it was raised by Mr. Sanyal that the notification was withdrawn but the same was controverted by Mr. Rai that such withdrawal of notification was challenged before the High Court and it was quashed. The said position was accepted by Mr. Sanyal as a matter of fact. This being the factual position we are required to address what would be the effect on issue of notification under Section 3 of the Act.

18. Section 4 of the Act provides the consequences of issuance of notification under sub-Section 1 of Section 3. One significant consequence as set out in Section 4(c) reads as under:-

3. 1982 PLJR 392.
4. (1980) Supp SCC 474.
5. (1981) 3 SCC 173.



> 4(c)- "Every proceeding for the correction of records and every suit and proceedings in respect of declaration of rights or interest in any land lying in the area or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under this Act, pending before any court or authority whether of the first instance or of appeal, reference or revision, shall, on an order being passed in that behalf by the court or authority before whom such suit or proceeding is pending, stand abated".

Be it noted, there are as many as five provisos to Clause (c) of Section 4 of the Act. The proviso relevant for the present purpose reads as follows:-

> "Provided further that such abatement shall be without prejudice to the rights of the persons affected to agitate the right or interest in dispute in the said suits or proceedings before the appropriate consolidation authorities under and in accordance with the provisions of this Act and the rules made thereunder."

19. A Division Bench of the Patna High Court in the case of *Dr. Jagdish Prasad @ Jagdish Prasad Gupta v. Sardar Satya Narain Singh & Ors.*[6], after referring to the decisions in *Nathuni Ram & ors. v. Smt. Khira Devi & ors.*[7], *Srinibas Jena & ors. v. Janardan Jena & ors.*[8], *Ram Adhar Singh* (supra), *Satyanarayan Prasad Sah* (supra), *Mst. Bibi Rahmani Khatoon* (supra) came to hold as follows :-

> "In my opinion, the Supreme Court did not differ with the principle laid down in the former case of *Satyanarayan Prasad Sah*. Hence we are of the opinion that under section 4 (c) a suit, an appeal a reference or a revision

6. 1982 BBCJ-I
7. 1981 BBCJ 413.
8. AIR 1981 Orissa 1 (F.B.)

will abate and neither a preliminary decree nor a final decree will abate. Hence, we dismiss the petition filed by the appellant under section 4 (c) of the Act. Even if it is held that the appeal abates under section 4 (c) of the Act, the effect will be that it will not help the party inasmuch as even if the appeal abates, the final decree remains alive. The suit comes to an end when a preliminary decree is passed for the purpose of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act."

20. In *Raja Mahto and Another* (supra) the learned Judges referred to Section 3 of the Act, scanned the anatomy of Section 4(c), distinguished the decisions in *Ram Adhar Singh* (supra), *Gorakh Nath Dube v. Hari Nath Singh*[9] and placing reliance on *Satyanaryan Prasad Sah* (supra), opined as follows :-

"I am, therefore, of the opinion that under Section 4 (c) of the Act, the suit, appeal, reference or revision abates and not the decree or preliminary or final decree abates."

21. In *Ram Adhar Singh* (supra) a three-Judge Bench of this Court, while dealing with a controversy that had arisen under amended Section 5 of Uttar Pradesh Consolidation of Holdings Act, 1953 (hereinafter referred to as '1953 Act') which provided that after publication of the notification under Section 4 of the 1953 Act all proceedings for correction of the records and all suits for declaration of rights and interests over land, or for possession of land, or for partition, pending before any authority or court, whether of first instance, appeal, or reference or revision, shall stand abated.

22. After scrutinizing the scheme of the Act this Court ruled thus:-

"We have referred only to some of the salient provisions of the Act; and they will clearly show that the subject-matter of the dispute, between the parties in this litigation, are all

9. AIR 1973 SC 2451.



matters falling for adjudication, within the purview of the authorities, constituted under the Act. In fact, clause (b), of sub-section (2) of Section 5 of the Act, as it now stands, also lays down that the abatement of the proceedings, under clause (a), shall be without prejudice to the rights of persons affected, to agitate the right or interest in dispute in the said suits or proceedings, before the appropriate consolidation authorities under the Act and in accordance with the provisions of the Act and the Rules made, thereunder."

23. In *Chattar Singh* (supra) while the appeal was pending before this Court a notification had been issued under Section 4 of the 1953 Act. By virtue of the operation of Section 5(2)(a) of the said Act, there was a statutory abatement of the suit and other proceedings pending therefrom. The three-Judge Bench referred to the decision in *Ram Adhar Singh* (supra) and opined that even appeals pending before this Court would abate consequent upon statutory provision. This Court ruled that the suit and the appeal stood abated and it was open to the parties to work out their rights before the appropriate consolidation authorities.

24. At this juncture, it is relevant to refer to the pronouncement of this Court in *Satyanarayan Prasad Sah* (supra). This Court, while upholding the constitutional validity of Section 4(c) of the 1956 Act, held that the High Court should not have "nullified" the decree of the trial court but should have merely declared that the proceedings stood abated, which of course, means that the civil proceedings came to naught.

25. In *Mst. Bibi Rahmani Khatoon* (supra) a title suit was filed before the learned Additional Subordinate Judge I, Gaya, for declaration of title and for recovery of possession of certain agricultural land. The trial court decreed the suit declaring that the plaintiffs were the owners of certain khatas and were entitled to recover possession of the same. On appeal being preferred the learned District Judge, Gaya, dismissed the appeal and

affirmed the decree of the trial court. In Second Appeal the High Court took note of the fact that one of the defendants had died during pendency of the appeal before the District Court and his legal representatives were neither impleaded nor any one claiming under him came to be substituted in the appeal pending in the District Court. During the pendency of the Second Appeal before the High Court an affidavit was filed stating that a notification under Section 3 of the 1956 Act, had been issued and in view of the language employed in Section 4 of the said Act the suit and the appeals stood abated. The High Court accepted the submission and disposed of the appeal by stating that the proceedings stood abated and resultantly the judgments and decrees of the courts below deserved to be set aside. This Court referred to Section 4 as amended in 1973 and thereafter referred to the material part of the proviso to Clause (c) of Section 4 of the Act.

26. A contention was raised that the High Court had erred in setting aside the judgments and decrees of the trial court as well as of the first appellate court which were in favour of the appellants before this Court on the ground that those proceedings had stood abated. In that context, this Court adverted to the scheme of consolidation and opined thus: -

> **"9.** When a scheme of consolidation is undertaken, the Act provides for adjudication of various claims to land involved in consolidation by the authorities set up under the Act. In order to permit the authorities to pursue adjudication of rival claims to land unhampered by any proceedings in civil courts, a wholesome provision was made that the pending proceedings involving claims to land in the hierarchy of civil courts, may be in the trial court, appeal or revision, should abate. This provision was made with a view to ensuring unhampered adjudication of claims to land before the authorities under the Consolidation Act without being obstructed by proceedings in civil courts or without being hampered or impeded by decisions of the civil courts in



> the course of consolidation of holdings. In order to avoid conflict consequent upon rival jurisdictions the legislature provided that the proceedings involving the claims to land put in consolidation should be exclusively examined by the authorities under the Consolidation Act and all rival jurisdiction would be closed. Simultaneously it was necessary to deal with the pending proceedings and that is why the provision for abatement of such proceedings."

27. It is worthy to note that this Court noticed the conceptual difference of abatement in civil law and in the scheme of the 1956 Act, and observed that if the abatement as conceptually understood in the Code of Civil Procedure is imported to Section 4 of the 1956 Act, it would cause irreparable harm and the party whose appeal is pending would lose the chance of convincing the appellate court which, if successful, would turn the tables against the other party in whose favour the judgment, decree or order would become final on abatement of the appeal. The Bench further proceeded to state that regard being had to the same, the legislature intended that not only the appeal or revision would abate but the judgment, order or decree against which the appeal is pending would also become *non est* as they would also abate and that would leave consolidation authorities free to adjudicate the claims of title or other rights or interest in land involved in consolidation.

28. At this juncture, it is seemly to note that a reference was made to the decisions in *Ram Adhar Singh* (supra) and *Chattar Singh* (supra). After analyzing the ratio laid down therein, this court adverted to the pronouncement in *Satyanarayan Prasad Sah* (supra) and proceeded to state as follows: -

> "Both the aforementioned decisions were noticed in *Satyanarayan Prasad Sah* v. *State of Bihar (supra)*. In that case upon the issue of a notification under Section 3 of the Act at a time when the matter was pending in the High Court an order was made under Section 4(*c*) abating the

proceeding as also the suit from which the proceeding arose. Writ petitions were filed in this Court under Article 32 of the Constitution questioning the constitutional validity of Section 4 of the Act as being violative of Articles 14 and 19 of the Constitution. After repelling the challenge to the vires of Section 4, this Court affirming the decisions in *Ram Adhar Singh (supra)* and *Chattar Singh* (supra) cases, held that may be *that the High Court should not have nullified the decree of the trial court but should have merely declared that the proceeding stood abated which this Court understood to mean that the civil proceeding comes to a naught. In other words, the proceedings from its commencement abate and no decision in the proceeding at any stage would have any impact on the adjudication of claims by the parties under the Act."*

[Emphasis supplied]

After so holding, the Bench ruled thus: -

"Both on principle and precedent it is crystal clear that where a notification is issued bringing the land involved in a dispute in the civil proceeding under a scheme of consolidation, the proceedings pending in the civil court either in the trial Court, appeal or revision, shall abate as a consequence ensuing upon the issue of a notification and the effect of abatement would be that the civil proceeding as a whole would come to a naught. Therefore, the order of the High Court impugned in this appeal is legal and valid so far as it not only directed abatement of the appeal pending before the High Court but also abating the judgments and decrees of the trial Court and the first appellate Court because the entire civil proceeding came to naught."

At this juncture, we may hasten to clarify that we have reproduced the aforesaid passages in extenso as this Court has succinctly stated that not only there is abatement of appeal



pending before the High Court, but also of the proceedings before trial court and of the first appellate court because the entire civil proceeding comes to a naught as that is the effect of Section 4(c) which deals with the effect of the notification under Section 3(1) of the Act.

29. At this juncture, we think it profitable to refer to a three-Judge Bench decision in *Mahendra Saree Emporium (II)* v. *G.V. Srinivasa Murthy*[10]. The Court was dealing with the effect and impact of Sections 69 and 70 of the Karnataka Rent Act, 1999 which had come into force with effect from 31.12.1999 after repeal of the Karnataka Rent Control Act, 1961. This Court addressed to the legislative scheme under Sections 69 and 70 and the applicability of Clauses (b) and (c) of sub-section (2) of Section 70 of the 1999 Act to the proceedings pending before this Court in exercise of the jurisdiction conferred by Article 136 of the Constitution. It was treated to be a plenary power and eventually held that in spite of old 1961 Act having been repealed by the new Act, i.e., 1999 Act, the appeal preferred by special leave under Article 136 of the Constitution does not abate and survives for adjudication on merits. It is apposite to note that as regards the plea of abatement of the appeal certain decisions under the 1956 Act and 1953 Act were placed reliance upon. The Bench referred to the concept of statutory abatement and upon perusal of the decisions in *Ram Adhar (supra), Chattar Singh (supra)*, *Satyanarayan Prasad Sah* (supra) and Mst. *Bibi Rahmani Khatoon* (supra) opined that the said authorities dealt with statutory abatement consequent upon a notification under the State consolidation of holding legislation having been issued. It was ruled that in the said decisions the provisions of the State legislation which came up for consideration of the Court provided for the original case, wherefrom the subsequent proceedings had originated, itself to stand abated on the commencement of such legislation and/or on the issuance of the requisite notification thereunder, without regard to the stage at which the proceedings were

10. (2005) 1 SCC 481.

pending. It was held that appeal was a continuation of the suit and inasmuch as the local law made provision for an effective alternative remedy to be pursued before an exclusive forum to redeem the grievance raised before the court, the local law had the effect of terminating and nullifying the initiation of the proceedings itself and, therefore, nothing remained for the court to adjudicate upon in the appeal which was rendered infructuous.

30. From the aforesaid enunciation of law it is crystal clear that once a notification has been published under Section 3 of the Act, every suit and proceeding in respect of declaration of rights or interest in any land lying in areas or for declaration or adjudication of any other rights in regard to which proceeding can or ought to be taken under the Act pending before any court or authority whether of the first instance or of appeal, reference or revision, shall, on order being passed in that behalf by the court or authority before whom such suit or proceeding is pending shall stand abated with a view to ensure the jurisdiction of the authorities under the Consolidation Act remains unhampered and the said authorities are not obstructed by the proceedings in civil courts and their decisions are not impeded by the decisions of the civil courts. It is also vivid that the purpose of the scheme of consolidation is to avoid conflict of jurisdiction in order to confer jurisdiction on the consolidation authorities who are required to exclusively examine the rival claims of the parties. Apart from that there is conceptual difference between statutory abatement and abatement under the Code of Civil Procedure. On the basis of a statutory abatement, the whole proceeding from its inception stands abated because the local law has provided an effective alternative remedy to be perused before an exclusive forum to remedy the grievance raised before the court. It has been further pronounced by this Court that nothing remains to be adjudicated before the civil court and it is apt to note in the case of *Satyanarayan Prasad Sah* (supra) this Court had held that the High Court should not have nullified the decree of the trial



court but should have declared that the proceedings stood abated which meant that civil proceedings came to a naught, that is to say, the proceedings from its commencement stood abated.

31. It is interesting to note that though the decision in *Raja Mahto and Another* (supra) referred to the decision in *Satyanarayan Prasad Sah* (supra) yet wrongly applied the ratio by giving an opinion that the second appeal pending before the court had abated but the preliminary decree passed in suits and both the appeals had not abated. In *Dr. Jagdish Prasad* (supra) the learned Judge who authored the judgment in *Raja Mahto and Another* (supra) sitting in the Division Bench in a Miscellaneous Appeal which was an appeal under Order XLIII of the Code of Civil Procedure again opined that a suit, appeal, reference or revision would abate neither a preliminary decree nor a final decree would abate. Be it noted, in the said case the Division Bench expressed the view that this Court in *Mst. Bibi Rahmani Khatoon (supra)* had not adverted with the view expressed in *Satyanaryan Prasad Sah (supra)* and on that foundation reiterated that the suit comes to an end when a preliminary decree is passed for the purpose of 1956 Act. It is also stated therein neither a preliminary decree nor a final decree would abate under Section 4 (c). For the said purpose reliance was placed on a Full Bench decision of Orissa High Court in *Srinibas Jena & Ors.* (supra).

32. At this stage, it is condign to clarify that the High Court of Patna in *Dr. Jagdish Prasad* (supra) and *Raja Mahto and Another(supra)* had read the judgment of this Court absolutely erroneously. It has been held by this Court that the entire civil proceeding from its commencement stands abated and it comes to a naught. In *Satynaryan Prasad Sah* (supra) this Court had found an error in the decision of the High Court in nullifying the decree. It was explained in *Mst. Bibi Rahmani Khatoon's (*supra) case that what is the impact when a scheme of a consolidation is undertaken. This Court had referred to the

pronouncement in *Satynaryan Prasad Sah* (supra) and stated both in principle and precedent it is clear that where a notification is issued bringing the land involved in a dispute in the civil proceeding under a scheme of consolidation, the proceeding pending before the civil court either in trial court, appeal or revision shall abate as a consequence ensuing upon the issue of notification and the effect of abatement would be that the civil proceeding as a whole come to a naught. To elaborate not only the judgment and decrees would become extinct but the entire civil proceeding would come to a naught.

33. Thus, the view expressed by the High Court in the aforesaid judgments that appeal may abate but the decree would not abate is not correct, more so, when the preliminary decree is under challenge in appeal. In the case at hand, judgment and decree passed by the trial court was assailed in the title appeal. Though a petition was filed under Section 4(c) of the Act no order was passed thereon, yet the appeal was permitted to be withdrawn. Challenge being made in the civil revision the High Court had remanded the matter directing the appeal to be restored to file with a further direction that the matter would be dealt with on merits including the competence of the court to hear the appeal. Despite the remit the trial court did not take note of the petition filed by the appellant under Section 4(c) of the Act, but observed that they are not interested to contest the appeal and accordingly directed the appeal stood abated because of non-substitution. This order shows total non application of mind and in a way paving the path of travesty of justice. As is evincible the consolidation proceedings had continued and at one stage the authorities were relying on the findings of civil court and at some other ignoring the same. Eventually, as is manifest, the matter travelled to the High Court in a writ petition. The learned single Judge ruled that the consolidation authorities were justified in relying on the findings of civil court.

34. We may hasten to add that some evidence was



adduced and some documents were filed before the consolidation authorities to substitute their respective claims as regards status and their respective shares but the whole issue, as is demonstrable, has turned on reliance on the findings recorded by the civil court.

35. The question that emanates for consideration if the appeal which is a continuation of suit had abated whether findings recorded therein could have been relied upon. We have noted that in the cases of *Raja Mahto and Another*(supra) and *Dr*. *Jagdish Prasad* (supra) the High Court of Patna had taken a view that on issuance of notification under Section 3 of the Act the suit or appeal would abate but neither the preliminary decree nor the final decree would abate. For the said purpose inspiration had been drawn from *Srinibas Jena & Ors*. (supra) a decision rendered by the Full Bench of the High Court of Orissa. In the Full Bench decision of the High Court of Orissa, the preliminary decree was allowed to attain finality and nothing remained to be adjudicated. There is a distinction between preliminary decree and the final decree. Recently in *Bimal Kumar & Another v. Shakuntala Debi & Others*[11] this Court after referring to the decisions in *Rachakonda Venkat Rao And Others v. R. Satya Bai (D) by L.R. And Another*[12]*, Muzaffar Husain v. Sharafat Hussain*[13]*, Raghubir Sahu v. Ajodhya Sahu*[14]*, Renu Devi v. Mahendra Singh and others*[15], has ruled thus:-

> "A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are finally determined and

11. (2012) 3 SCC 548.
12. AIR 2003 SC 3322.
13. AIR 1933 Oudh 562.
14. AIR 1945 Pat 482.
15. AIR 2003 SC 1608.

a decree is passed in accordance with such determination, which is the final decree. Thus, fundamentally, the distinction between preliminary and final decree is that: a preliminary decree merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and conducted pursuant to the directions made in the preliminary decree which inquiry having been conducted and the rights of the parties finally determined a decree incorporating such determination needs to be drawn up which is the final decree."

36. The Full Bench was dealing with an appeal directed against the final decree for partition. The question before the Full Bench was whether under Section 4(4) of the Orissa Consolidation of Holdings and Prevention of Administration of Land Act, 1972 (for short 'the 1972 Act') a final decree stood abated. The Full Bench referred to the notification issued under Section 3(1) of the 1972 Act, scanned the language employed in sub-section (4) of Section 4 and came to hold that a final decree proceeding cannot be characterized as a suit or a proceeding for right, title or interest in respect of any land. It has been opined there that Section 4(4) does not include an appeal arising out of a final decree as the same would not declare any right, title or interest of the parties but deal with certain matters pertaining to what has already been declared. Pendency of an appeal against the final decree cannot take away the finality of the preliminary decree which has already declared the rights, title and interest of the parties. We may repeat for clarity that in the said case, the preliminary decree passed in the suit had become final as it was not challenged by way of an appeal. Thus, the factual matrix was quite different. Suffice it to say that in the present case the title appeal was pending against the preliminary decree and an application under Section 4(c) had been preferred. It would have been advisable on the part of the appellate court to record a finding that the entire proceeding of the civil suit stood abated. Unfortunately, the appellate court directed abatement because



of non-substitution of the legal heirs of one of the respondents. We are conscious that an order is to be passed on an application filed under Section 4 (c) of the Act, but we do not intend to relegate the matter to that stage as it is obvious that in the suit, right, title and interest and status were involved which do come within the scheme of consolidation. Hence, the suit as well as the appeal abated and resultantly the very commencement of the civil proceeding came to a naught and, therefore, findings recorded in the said proceeding became extinct. The learned Judge dealing with the writ petition as well as the learned Judges deciding the intra-court appeal did not appreciate the lis in proper perspective and opined that the reliance on the findings recorded by the civil court by the revisional authority under the 1956 Act could not be faulted. The said conclusion is wholly erroneous and deserves to be overturned and we do so.

37. Consequently, the appeal is allowed, the orders passed by the learned single Judge as well as of the Division Bench are set aside and the matter is remanded to the file of the learned single Judge to decide the matter on merits on the basis of the material brought before the Consolidation Authorities. We repeat at the cost of repetition that none of the findings recorded by the civil court shall be taken aid of. There shall be no order as to costs.

B.B.B. Appeal allowed.

DIPAK KUMAR MUKHERJEE
*v.*
KOLKATA MUNICIPAL CORPORATION AND OTHERS
(Civil Appeal No. 7356 of 2012)

OCTOBER 8, 2012

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

*Kolkata Municipal Corporation Act, 1980 – ss. 396 – Kolkata Municipal Corporation Building Rules, 1990 – r.25(2) – Construction of building – In violation of the plan sanctioned under the Act – Unauthorised construction continued despite the order of Municipal Corporation for demolition of such construction – Writ petition challenging the unauthorized construction – Single Judge of High Court directed demolition of such construction – The builder completed the construction and filed application for regularization thereof – Also filed appeal against order of Single Judge – Division Bench of High Court directing the competent authority to pass appropriate order after giving opportunity of hearing to the builder – On appeal, held: Since construction in violation of sanctioned plan not disputed and the demolition order was passed by the Municipal Corporation, order of Division Bench of High Court not sustainable – Builder cannot take advantage of r.25 for regularization of the unauthorized construction – The builder is also guilty of cheating those who purchased the portions of unauthorized construction – Direction to the builder to compensate the purchasers by refunding the cost of the flat with interest, and to pay cost of Rs. 25,00,000/- for violation of sanctioned plan despite stop work notice.*

*Urban Development – Illegal unauthorized construction – Held: Such construction not only violates the municipal laws*





*and the concept of planned development, but also affects various fundamental and constitutional rights of other persons.*

**Respondent No. 7, the construction company entered into an agreement with respondent No. 8 for development of a plot. Building plan submitted by the construction company was sanctioned by the Municipal Corporation for two storeys. However, the construction was done upto 3rd floor in deviation of the sanctioned plan. The Corporation issued 'stop work notice' u/s. 401 of the Act. The construction company, instead of stopping the work, added one more floor. Thereafter, notice u/s. 400(1) and 401(A) were issued and after considering the issue Mayor-in-Council decided to demolish the unauthorized construction and accordingly the unauthorized construction was demolished.**

**In the meantime, the appellant had filed writ petition before High Court seeking direction to demolish the said construction. Single Judge of High Court directed not to carryout illegal construction. The construction company, despite the order of the High Court and the demolition order of Mayor-in-Council, continued the construction in violation of the sanctioned plan.**

**The appellant filed fresh writ petition for demolition of the unauthorized construction. Single Judge of High Court directed demolition of unauthorized construction. Thereafter the representative of the construction company filed application for regularization of the unauthorized construction. Simultaneously, also filed appeal challenging the order of Single Judge. Division Bench of High Court disposed of the petition directing the Corporation to take appropriate decision in accordance with law after giving opportunity of hearing to the builder. Hence, the present appeal.**

**Allowing the appeal, the Court**

**HELD: 1.1. Illegal and unauthorised constructions of buildings and other structure not only violate the municipal laws and the concept of planned development of the particular area but also affect various fundamental and constitutional rights of other persons. The common man feels cheated when he finds that those making illegal and unauthorised constructions are supported by the people entrusted with the duty of preparing and executing master plan/development plan/zonal plan. The failure of the State apparatus to take prompt action to demolish such illegal constructions has convinced the citizens that planning laws are enforced only against poor and all compromises are made by the State machinery when it is required to deal with those who have money power or unholy nexus with the power corridors. [Para 8] [770-C-G]**

*K. Ramadas Shenoy v. Chief Officers, Town Municipal Council* **(1974) 2 SCC 506*:* 1975 (1) SCR 780*;*** *Virender Gaur v. State of Haryana* **(1995) 2 SCC 577: 1994 (6) Suppl. SCR 78*;*** *Pleasant Stay Hotel v. Palani Hills Conservation Council* **(1995) 6 SCC 127: 1995 (3) Suppl. SCR 588;** *Cantonment Board, Jabalpur v. S.N. Awasthi* **1995 Supp.(4) SCC 595: 1995 (4) Suppl. SCR 739;** *Pratibha Coop. Housing Society Ltd. v. State of* Maharashtra **(1991) 3 SCC 341: 1991 (2) SCR 745;** *G.N. Khajuria (Dr) v. Delhi Development Authority* **(1995) 5 SCC 762: 1995 (3) Suppl. SCR 212;** *Manju Bhatia v. New Delhi Municipal Council* **(1997) 6 SCC 370: 1997 (1) Suppl. SCR 156;** *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu* **(1999) 6 SCC 464: 1999 (3) SCR 1066;** *Friends Colony Development Committee v. State of Orissa* **(2004) 8 SCC 733: 2004 (5) Suppl. SCR 818;** *Shanti Sports Club v. Union of India* **(2009) 15 SCC 705: 2009 (13) SCR 710;** *Priyanka Estates International Pvt. Ltd. v. State of Assam* **(2010) 2 SCC 27: 2009 (16) SCR 80 – relied on.**



**1.2. While preparing master plans/zonal plans, the Planning Authority takes into consideration the prospectus of future development and accordingly provides for basic amenities like water and electricity lines, drainage, sewerage, etc. Unauthorized construction of buildings not only destroys the concept of planned development which is beneficial to the public but also places unbearable burden on the basic amenities and facilities provided by the public authorities. At times, construction of such buildings becomes hazardous for the public and creates traffic congestion. Therefore, it is imperative for the concerned public authorities not only to demolish such construction but also impose adequate penalty on the wrongdoer. [Para 27] [788-F-H]**

**2.1. Since, respondent No.7 has not disputed that the building was constructed in violation of the sanctioned plan and the Mayor-in-Council passed order dated 14.1.2010 for demolition of the disputed construction, the direction given by the Division Bench of the High Court to the competent authority of the Corporation to pass appropriate order after giving opportunity of hearing to respondent No.7 cannot be sustained. In view of the pleadings filed before the High Court and the affidavits filed before this Court, there is no escape from the conclusion that respondent No.7 had raised construction in violation of the plan sanctioned under Section 396 of Kolkata Municipal Corporation Act, 1980 and continued with that activity despite the order of the Mayor-in-Council. [Paras 21 and 23] [781-C-E; 786-G-H]**

**2.2. Respondent No.7 cannot take benefit of Rule 25 of Kolkata Municipal Corporation Building Rules, 1990 for regularizing the unauthorized structure because the disputed construction was in clear violation of the sanctioned plan and the notices issued by the competent authority of the Corporation and also because the**

**application for regularization of the unauthorized construction was made after completion of the construction. [Para 26] [788-B-C]**

**2.3. Respondent No.7 is guilty not only of violating the sanctioned plan and the relevant provisions of the 1980 Act and the Rules framed thereunder, but also of cheating those who purchased portions of unauthorized construction under a *bona fide* belief that respondent No.7 had constructed the building as per the sanctioned plan. With the demolition of unauthorized construction, some of such persons will become shelterless. It is, therefore, necessary that respondent No.7 is directed to compensate them by refunding the cost of the flat, etc., with interest. Respondent No.7 must also pay for raising construction in violation of the sanctioned plan. [Para 27] [788-B-E]**

**3. It is directed that within three months from the date of the judgment, respondent No.7 shall pay the price of the flats etc. to the purchasers with interest @ 18% per annum from the date of payment. The occupiers of illegal/ unauthorized construction shall vacate such portions of the building within next one month. Within next one month, the Corporation shall demolish unauthorized construction after taking adequate precautionary measures. Respondent No.7 shall pay cost of Rs.25,00,000/- for brazen violation of the sanctioned plan and continuance of illegal construction despite 'stop work notice'. The amount of cost shall be deposited with the Kolkata State Legal Service Authority and shall be utilized for providing legal aid in deserving cases. Reports showing compliance of the aforesaid directions be filed by the Corporation and respondent No.7 in the Registry of the High Court within six months. Thereafter, the matter be placed before the Single Judge who had passed order dated 28.7.2010. If the Single Judge finds that any of the aforesaid directions has not been**



**implemented, then he shall initiate proceedings against the defaulting officers and/or respondent No.7 under the Contempt of Courts Act, 1971 and pass appropriate order. [Paras 28 and 29] [789-B-G]**

**Case Law Reference:**

| | | |
|---|---|---|
| **1975 (1) SCR 780** | **Relied on** | **Para 2** |
| **1994 (6) Suppl. SCR 78** | **Relied on** | **Para 2** |
| **1995 (3) Suppl. SCR 588** | **Relied on** | **Para 2** |
| **1995 (4) Suppl. SCR 739** | **Relied on** | **Para 2** |
| **1991 (2) SCR 745** | **Relied on** | **Para 2** |
| **1995 (3) Suppl. SCR 212** | **Relied on** | **Para 2** |
| **1997 (1) Suppl. SCR 156** | **Relied on** | **Para 2** |
| **1999 (3) SCR 1066** | **Relied on** | **Para 2** |
| **2004 (5) Suppl. SCR 818** | **Relied on** | **Para 2** |
| **2009 (13) SCR 710** | **Relied on** | **Para 2** |
| **2009 (16) SCR 80** | **Relied on** | **Para 2** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7356 of 2012.

From the Judgment & Order dated 02.05.2011 of the Division Bench of Calcutta High Court in FMA No. 2320 of 2011.

Bhaskar P. Gupta, Kalyan Bandopadhyay, Partha Sil, L.C. Agrawala, Abhijeet Chatterjee, Abhijit Sengupta for the Appearting parties.

The Judgment of the Court was delivered by

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

2. In last four decades, the menace of illegal and unauthorised constructions of buildings and other structures in different parts of the country has acquired monstrous proportion. This Court has repeatedly emphasized the importance of planned development of the cities and either approved the orders passed by the High Court or itself gave directions for demolition of illegal constructions - (1) *K. Ramadas Shenoy v. Chief Officers, Town Municipal Council* (1974) 2 SCC 506; (2) *Virender Gaur v. State of Haryana* (1995) 2 SCC 577; (3) *Pleasant Stay Hotel v. Palani Hills Conservation Council* (1995) 6 SCC 127; (4) *Cantonment Board, Jabalpur v. S.N. Awasthi* 1995 Supp.(4) SCC 595; (5) *Pratibha Coop. Housing Society Ltd. v. State of Maharashtra* (1991) 3 SCC 341; (6) *G.N. Khajuria (Dr) v. Delhi Development Authority* (1995) 5 SCC 762; (7) *Manju Bhatia v. New Delhi Municipal Council* (1997) 6 SCC 370; (8) *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu* (1999) 6 SCC 464; (9) *Friends Colony Development Committee v. State of Orissa* (2004) 8 SCC 733; (10) *Shanti Sports Club v. Union of India* (2009) 15 SCC 705 and (11) *Priyanka Estates International Pvt. Ltd. v. State of Assam* (2010) 2 SCC 27.

3. In *K. Ramadas Shenoy v. Chief Officers, Town Municipal Council* (supra), the resolution passed by the Municipal Committee authorising construction of a cinema theatre was challenged on the ground that the site was earmarked for the construction of Kalyan Mantap-cum-Lecture Hall and the same could not have been used for any other purpose. The High Court held that the cinema theatre could not be constructed at the disputed site but declined to quash the resolution of the Municipal Committee on the ground that the theatre owner had spent huge amount. While setting aside the High Court's order, this Court observed:

> "An illegal construction of a cinema building materially affects the right to or enjoyment of the property by persons residing in the residential area. The Municipal Authorities



> owe a duty and obligation under the statute to see that the residential area is not spoilt by unauthorised construction. The Scheme is for the benefit of the residents of the locality. The Municipality acts in aid of the Scheme. The rights of the residents in the area are invaded by an illegal construction of a cinema building. It has to be remembered that a scheme in a residential area means planned orderliness in accordance with the requirements of the residents. If the scheme is nullified by arbitrary acts in excess and derogation of the powers of the Municipality the courts will quash orders passed by Municipalities in such cases.
>
> The Court enforces the performance of statutory duty by public bodies as obligation to rate payers who have a legal right to demand compliance by a local authority with its duty to observe statutory rights alone. The Scheme here is for the benefit of the public. There is special interest in the performance of the duty. All the residents in the area have their personal interest in the performance of the duty. The special and substantial interest of the residents in the area is injured by the illegal construction."

4. In *Pratibha Coop. Housing Society Ltd. v. State of Maharashtra* (supra), this Court approved the order passed by the Bombay Municipal Corporation for demolition of the illegally constructed floors of the building and observed:

> "Before parting with the case we would like to observe that this case should be a pointer to all the builders that making of unauthorised constructions never pays and is against the interest of the society at large. The rules, regulations and bye-laws are made by the Corporations or development authorities taking in view the larger public interest of the society and it is the bounden duty of the citizens to obey and follow such rules which are made for their own benefits."

5. In Friends Colony Development Committee v. State of Orissa (supra), this Court noted that large number of illegal and unauthorised constructions were being raised in the city of Cuttack and made the following significant observations:

"……*Builders violate with impunity the sanctioned building plans and indulge in deviations much to the prejudice of the planned development of the city and at the peril of the occupants of the premises constructed or of the inhabitants of the city at large. Serious threat is posed to ecology and environment and, at the same time, the infrastructure consisting of water supply, sewerage and traffic movement facilities suffers unbearable burden and is often thrown out of gear.* Unwary purchasers in search of roof over their heads and purchasing flats/apartments from builders, find themselves having fallen prey and become victims to the designs of unscrupulous builders. The builder conveniently walks away having pocketed the money leaving behind the unfortunate occupants to face the music in the event of unauthorised constructions being detected or exposed and threatened with demolition. Though the local authorities have the staff consisting of engineers and inspectors whose duty is to keep a watch on building activities and to promptly stop the illegal constructions or deviations coming up, they often fail in discharging their duty. Either they don't act or do not act promptly or do connive at such activities apparently for illegitimate considerations. If such activities are to stop some stringent actions are required to be taken by ruthlessly demolishing the illegal constructions and non-compoundable deviations. The unwary purchasers who shall be the sufferers must be adequately compensated by the builder. The arms of the law must stretch to catch hold of such unscrupulous builders……

In all developed and developing countries there is



emphasis on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalisation of laws by way of legislative enactments and rules and regulations framed thereunder. Zoning and planning do result in hardship to individual property owners as their freedom to use their property in the way they like, is subjected to regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the State. The exercise of such governmental power is justified on account of it being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable intermeddling with the private ownership of the property may not be justified.

The municipal laws regulating the building construction activity may provide for regulations as to floor area, the number of floors, the extent of height rise and the nature of use to which a built-up property may be subjected in any particular area. The individuals as property owners have to pay some price for securing peace, good order, dignity, protection and comfort and safety of the community. Not only filth, stench and unhealthy places have to be eliminated, but the layout helps in achieving family values, youth values, seclusion and clean air to make the locality a better place to live. Building regulations also help in reduction or elimination of fire hazards, the avoidance of traffic dangers and the lessening of prevention of traffic congestion in the streets and roads. Zoning and building

regulations are also legitimised from the point of view of the control of community development, the prevention of overcrowding of land, the furnishing of recreational facilities like parks and playgrounds and the availability of adequate water, sewerage and other governmental or utility services.

Structural and lot area regulations authorise the municipal authorities to regulate and restrict the height, number of storeys and other structures; the percentage of a plot that may be occupied; the size of yards, courts and open spaces; the density of population; and the location and use of buildings and structures. All these have in our view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is posed to the occupants of the building."

(emphasis supplied)

6. In *Shanti Sports Club v. Union of India* (supra), this Court approved the order of the Delhi High Court which had declared the construction of sports complex by the appellant on the land acquired for planned development of Delhi to be illegal and observed:

"In the last four decades, almost all cities, big or small, have seen unplanned growth. In the 21st century, the menace of illegal and unauthorised constructions and encroachments has acquired monstrous proportions and everyone has been paying heavy price for the same. Economically affluent people and those having support of the political and executive apparatus of the State have constructed buildings, commercial complexes, multiplexes,



malls, etc. in blatant violation of the municipal and town planning laws, master plans, zonal development plans and even the sanctioned building plans. In most of the cases of illegal or unauthorised constructions, the officers of the municipal and other regulatory bodies turn blind eye either due to the influence of higher functionaries of the State or other extraneous reasons. Those who construct buildings in violation of the relevant statutory provisions, master plan, etc. and those who directly or indirectly abet such violations are totally unmindful of the grave consequences of their actions and/or omissions on the present as well as future generations of the country which will be forced to live in unplanned cities and urban areas. The people belonging to this class do not realise that the constructions made in violation of the relevant laws, master plan or zonal development plan or sanctioned building plan or the building is used for a purpose other than the one specified in the relevant statute or the master plan, etc., such constructions put unbearable burden on the public facilities/ amenities like water, electricity, sewerage, etc. apart from creating chaos on the roads. The pollution caused due to traffic congestion affects the health of the road users. The pedestrians and people belonging to weaker sections of the society, who cannot afford the luxury of air-conditioned cars, are the worst victims of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. It can only be a matter of imagination how much the Government has to spend on the treatment of such persons and also for controlling pollution and adverse impact on the environment due to traffic congestion on the roads and chaotic conditions created due to illegal and unauthorised constructions. This Court has, from time to time, taken cognizance of buildings constructed in violation of municipal and other laws and emphasised that no compromise should be made with the town planning scheme and no relief should be given to the violator of the town planning

scheme, etc. on the ground that he has spent substantial amount on construction of the buildings, etc.

Unfortunately, despite repeated judgments by this Court and the High Courts, the builders and other affluent people engaged in the construction activities, who have, over the years shown scant respect for regulatory mechanism envisaged in the municipal and other similar laws, as also the master plans, zonal development plans, sanctioned plans, etc., have received encouragement and support from the State apparatus. As and when the Courts have passed orders or the officers of local and other bodies have taken action for ensuring rigorous compliance with laws relating to planned development of the cities and urban areas and issued directions for demolition of the illegal/unauthorised constructions, those in power have come forward to protect the wrongdoers either by issuing administrative orders or enacting laws for regularisation of illegal and unauthorised constructions in the name of compassion and hardship. Such actions have done irreparable harm to the concept of planned development of the cities and urban areas. It is high time that the executive and political apparatus of the State take serious view of the menace of illegal and unauthorised constructions and stop their support to the lobbies of affluent class of builders and others, else even the rural areas of the country will soon witness similar chaotic conditions."

7. In *Priyanka Estates International Pvt. Ltd. v. State of Assam* (supra), this Court refused to order regularisation of the illegal construction raised by the appellant and observed:

"It is a matter of common knowledge that illegal and unauthorised constructions beyond the sanctioned plans are on rise, may be due to paucity of land in big cities. Such activities are required to be dealt with by firm hands otherwise builders/colonisers would continue to build or



construct beyond the sanctioned and approved plans and would still go scot-free. Ultimately, it is the flat owners who fall prey to such activities as the ultimate desire of a common man is to have a shelter of his own. Such unlawful constructions are definitely against the public interest and hazardous to the safety of occupiers and residents of multistoreyed buildings. To some extent both parties can be said to be equally responsible for this. Still the greater loss would be of those flat owners whose flats are to be demolished as compared to the builder."

8. What needs to be emphasised is that illegal and unauthorised constructions of buildings and other structure not only violate the municipal laws and the concept of planned development of the particular area but also affect various fundamental and constitutional rights of other persons. The common man feels cheated when he finds that those making illegal and unauthorised constructions are supported by the people entrusted with the duty of preparing and executing master plan/development plan/zonal plan. The reports of demolition of hutments and jhuggi jhopris belonging to poor and disadvantaged section of the society frequently appear in the print media but one seldom gets to read about demolition of illegally/unauthorisedly constructed multi-storied structure raised by economically affluent people. The failure of the State apparatus to take prompt action to demolish such illegal constructions has convinced the citizens that planning laws are enforced only against poor and all compromises are made by the State machinery when it is required to deal with those who have money power or unholy nexus with the power corridors.

9. We have prefaced disposal of this appeal by taking cognizance of the precedents in which this Court held that there should be no judicial tolerance of illegal and unauthorized constructions by those who treat the law to be their sub-servient, but are happy to note that the functionaries and officers of Kolkata Municipal Corporation (for short, 'the Corporation')

have been extremely vigilant and taken steps for enforcing the provisions of the Kolkata Municipal Corporation Act, 1980 (for short, 'the 1980 Act') and the rules framed thereunder for demolition of illegal construction raised by respondent No.7. This has given a ray of hope to the residents of Kolkata that there will be zero tolerance against illegal and unauthorised constructions and those indulging in such activities will not be spared.

10. The appellant is an enlightened resident of Kolkata. He succeeded in convincing the learned Single Judge of the Calcutta High Court to order demolition of unauthorised construction of multi-storied building by respondent No.7 – M/s. Unique Construction on the plot owned by respondent No.8 – Sarjun Prasad Shaw but could not persuade the Division Bench to affirm the order of the learned Single Judge and this is the reason why he has approached this Court.

11. Mohammad Shahid, (the sole proprietor cum attorney of respondent No.7) entered into an agreement with respondent No.8 for development of plot bearing No.8/1F, Gopal Doctor Road, Kolkata. The building plan submitted by respondent No.7 for construction of two storied building was sanctioned by the Corporation on 11.4.1990 and five years time was given for completing the construction. When the site was inspected by the officers of the Corporation in October, 2009, they found that respondent No.8 had raised unauthorised construction by erecting RCC column upto 3rd floor along with staircase in deviation of the sanctioned plan. Thereupon, stop work notice was issued by the Executive Engineer (Civil), Building under Section 401 of the 1980 Act. However, instead of stopping the construction, respondent No.7 added one more floor. This brazen defiance of law by respondent No.7 led to the issuance of notices dated 15.10.2009 and 10.11.2009 under Sections 400(1) and 401(A) respectively. Simultaneously, a report was submitted by Deputy Chief Engineer (Building) to the Director General (Building) – II, for demolition of the unauthorised



construction on the ground that structural stability of the illegal construction was doubtful and existence of the same was dangerous to the lives of the people. The issue was then considered by the Mayor-in-Council on 14.1.2010 and it was decided to demolish the unauthorised construction. Accordingly, about 600 sq. ft. out of the total constructed area measuring 1500 sq. ft. was demolished on 4.2.2010.

12. In the meanwhile, the appellant filed WP No. 23741/2009 in the High Court for issue of a direction to the Corporation to demolish the illegal construction by respondent No.7. The same was disposed of by the learned Single Judge on 3.3.2010 with the direction that the objection raised by the appellant against the unauthorised construction be decided by the competent authority after hearing the affected parties. Simultaneously, it was ordained that no illegal construction be carried out in the premises in question.

13. Notwithstanding the decision of the Mayor-in-Council and the order of the High Court, respondent No.7 continued with the construction of building, albeit in violation of the sanctioned plan. Therefore, the appellant filed fresh writ petition which came to be registered as WP No.13815/2010 for demolition of the unauthorised construction and for issue of a direction to the Corporation not to issue completion certificate in favour of respondent Nos.7 and 8. The second writ petition was disposed of by the learned Single Judge vide order dated 28.7.2010, the relevant portions of which are extracted below:

> "It appears from the submissions that the construction has been raised up to ground plus fourth floor which is beyond the sanctioned plan. It is evident from the photo copies of the records that it was resolved on 14th January, 2010 in the M.I.C. meeting of the Corporation that as the person responsible continued with the unauthorised construction which might lead to an accident, appropriate action towards demolition of the unauthorised construction should be taken forthwith under section 400(8) of the Kolkata

Municipal Corporation Act with the help of the local administration.

Since admittedly, unauthorized construction has been raised, that is, construction has been carried out beyond the sanctioned plan, I direct the Director General (Buildings-II) Kolkata Municipal Corporation and the Executive Engineer (Civil), Building Department, Borough-IX, the respondent nos. 3 and 4 respectively, to demolish the unauthorized structure, as resolved, within eight weeks from the date of communication of this order. During such demolition, if need be the respondent nos. 3 and 4 are at liberty to seek assistance of the Officer-in-Charge, Watgunge Police Station, Kolkata, the respondent no.6 shall render all assistance in implementing the order of this Court."

14. Immediately thereafter, Mohammad Shahid submitted an application dated 13.8.2010 for regularisation of unauthorised portion of the building under Section 400(1) of the 1980 Act. That application reads as under:

Date: 13.08.2010

"To:
The Executive Engineer (Civil)
Building Department Br.-IX,
The Kolkata Municipal Corporation,
11, Belvedere Road, Kolkata-700027.

Sub: Regularisation of additional floor overSanctioned Building.

Re: Pre: No. 8/ 1 F, Gopal Doctor Road, Ward No.76, Br.-IX.

Dear Sir,

I Md. Shahid, attorney of the above mentioned premises, am submitting herewith one copy of ammonia



print of five storied building plan. The said building was sanctioned of two storied, and additional three more storied has been constructed for accommodation of existing tenants and our family members.

Now I do request and pray to your goodself to regularize the unauthorized portion of the said building under section 400(1). For that I am ready to pay the penalty and charges for the same.

Hope your honour would extend your co-operation in this respect and oblige me.

Thanking you.

Yours faithfully,
Sd/-
Md. Shahid."

15. Simultaneously, respondent No.7 challenged the order of the learned Single Judge by filing an appeal. During the pendency of the appeal, Mohammad Shahid filed an additional affidavit dated 16.9.2010, paragraphs 5 to 10 whereof are reproduced below:

"5. I state that a plan dated 11.04.2009 vide building permit no.2009090004 was sanctioned for premises no. 8/1F, Gopal Doctor Road, Kidderpore, Kolkata-700023, by the Kolkata Municipal Corporation, for erection of a two storied building, covering a sanctioned area measuring about 145.82 square meter. The proposed F.A.R for the said plan was 0.99 over land measuring about 145.927 square meter. But the building has been constructed upto five storied. Presently, the total constructed cover area for the five storied building is measuring about 559.57 square meter and the present F.A.R is 3.83.

6. I say that according to Clause (b) Sub-Rule 2 of Rule 25 of the Kolkata Municipal Corporation Building Rules 1990, "if during the erection or execution of work any

external deviation beyond the sanctioned covered space is intended to be made and which does not violate the provisions of the Act or the said Rules, the person erecting such construction, prior to carrying out such erection or execution of works, submit, in accordance with the provisions of the said rules, a revised plan incorporating the deviation intended to be carried out, for obtaining necessary sanction thereof."

7. I further say that Clause (b) Sub-Rule 2 of Rule 25 of the Kolkata Municipal Corporation Building Rules, 1990, empowers the Municipal authorities to allow a person to construct beyond the sanctioned covered area, which means construction exceeding the Floor Area Ratio can be allowed to be carried on.

8. I say that there is no express provision in the Kolkata Municipal Corporation Act 1980 and also in Kolkata Municipal Corporation Building Rules, 1990, stopping a person from constructing beyond the Floor Area Ratio. I further say that though none of the provisions of the Kolkata Municipal Corporation Act, 1980 and Kolkata Municipal Corporation Building Rules, 1990, empowers the Kolkata Municipal Corporation to regularize the construction made in excess of the sanctioned plan, but the Kolkata Municipal Corporation gets the said power of regularization by virtue of the Full Bench Judgment of this Hon'ble Court delivered in the case of Ramesh Prasad Agarwal (Supra) reported in All India Reporter 1972 Calcutta 459. In the said case this Hon'ble Court was pleased to decide that 'even in respect of matters which involve violation of an unrelaxable building rules the Commissioner has discretion not to order demolition if the violation is not of a serious nature.'

9. I say that I, on 13th August, 2010, have already applied before the Kolkata Municipal Corporation for regularization of the construction erected beyond the sanctioned plan and have submitted a revised plan for sanction before the



concerned authority. Copy of the letter dated 13th August, 2010 and the revised plan is collectively annexed hereto and marked with the letter "R-I".

10. I say that the construction erected by me in the present case is not of a serious nature and there is no immediate threat that the building may fall down and the said fact shall be proved from the structural stability certificate issued by Sri Prabir Kumar Mitra, Civil Engineer, after due inspection of the premises in question.

A copy of the structural stability certificate is annexed hereto and marked with the letter "R-2".

16. The appellant filed detailed counter affidavit dated 17.1.2011 reiterating his plea that the construction made by respondent No.7 was illegal. Thereafter, respondent No.8 filed affidavit dated 22.2.2010 and questioned the locus standi of the appellant to file the writ petition. Shri Tapas Chandra and Smt. Asha Devi Shaw, to whom the unauthorised portions of the building are said to have been sold, got themselves impleaded as parties to the appeal filed by respondent No.7. On 1.3.2011, the Division Bench of the High Court suo-motu directed issue of notice under Order 1 Rule 8 of the Code of Civil Procedure and publication thereof in two daily newspapers, one in Bengali and another in English so as to enable other purchasers of the unauthorised portions of the building to present their cause before the Court. The relevant portion of that order reads as under:

"01.03.2011

Mr. Bhaskar Ghosh, learned Advocate, has filed a report of the Officer-in-Charge of the Watgunge Police Station.

Let 1st and 2nd pages of the said report be endorsed by the learned Advocate, Mr. Ghosh

Let the said report be kept on record.

From the said report it appears that in an unauthorized construction without sanction plan above 2nd floor, in terms of the complaint filed by the Kolkata Municipal Corporation, Case No. 320 dated 14.10.2010 under Section 401(A) KMC Act was started and Developer/appellant and the respondent/Owner are accused in the said proceeding.

It is submitted by the learned Advocate, Mr. Chatterjee, appearing for the Developer and Mr. Bhattacharya, learned Advocate appearing for the owner that their clients already have been granted bail in that criminal proceeding and trial is continuing.

It is further submitted by the learned Advocate appearing for the Developer/appellant and the learned Advocate appearing for the respondent/Owner that the concerned premises, as has been constructed, though on breach of the sanction plan of the Kolkata Municipal Corporation but many persons have been provided with occupation in different flats by selling the concerned flats of said property or providing their occupation on considering their earlier tenancy right.

Let affidavits be filed by them disclosing the total number of flats of the concerned premises, the names of the occupants therein, if any, detailing the particulars, namely their right and the instruments executed by the appellant and/or the respondent/ Owner concerned, so that the Court may pass appropriate order was to whether those persons should be heard to not before passing any decision in this appeal.

Let such affidavits be filed within 10 days from date.

The matter is posted for hearing on 15th March,



2011 at 10.30 A.M. as fixed matter.

Since it is the submission of the appellant that there are many occupants above the 2nd floor of the concerned premises upto 5th floor which have been constructed without any sanction plan, for effective adjudication, let notice under Order 1 Rule 8 of the Code of Civil Procedure be published by the appellant within a week in the two daily Newspapers having State-wide publication; one in Bengali and another in English and will submit a Supplementary Affidavit disclosing his action to that effect."

17. On 15.3.2011, the High Court, after taking note of the fact that none of the occupants had come forward to espouse their cause, directed that a fresh notice be published under Order 1 Rule 8 C.P.C. The second opportunity given by the High Court was also not availed by the occupants of the illegally constructed portion of the building. The appeal filed by respondent No.7 was finally disposed of by the Division Bench of the High Court on 2.5.2011 and the competent authority of the Corporation was directed to take appropriate decision in accordance with law after complying with the principles of natural justice. This is evinced from the following extracts of the impugned order:

"Having heard the learned Counsel appearing for the parties and considering the facts and circumstances of the case, We are of the view that the competent authority of the Kolkata Municipal Corporation should take appropriate decision under the provisions of the Kolkata Municipal Corporation Act and Building Rules framed thereunder while dealing with the allegations of unauthorized construction in respect of any building. In the present case, specific allegation has been made to the effect, that two floors of the building in question were constructed even in absence of sanctioned building plan.

In the aforesaid circumstances, the competent authority of

the Kolkata Municipal Corporation must take appropriate decision in respect of the building in question upon complying with the provisions of the Kolkata Municipal Corporation Act and the Building Rules framed thereunder.

The Court cannot usurp the authority of the Kolkata Municipal Corporation in this regard. The validity and/or legality of the decision of the Kolkata Municipal Corporation authorities regarding demolition and/or retention of any unauthorized structure can be challenged before this Court but this Court under normal circumstances should not dictate the Kolkata Municipal Corporation authorities to take any specific decision regarding demolition or retention of any structure without allowing the competent authority to take appropriate decision in this regard.

The Kolkata Municipal Corporation authorities should take appropriate decision in respect of the fate of an illegal structure at the first instance and the Court will thereafter adjudicate the correctness of such decision. The Court under normal circumstances should not either direct retention of any illegal structure or demolition of the same before allowing the competent authority of the concerned Kolkata Municipal Corporation to take appropriate decision in accordance with law.

For the aforementioned reasons, we direct the competent authority of Kolkata Municipal Corporation to consider the nature and magnitude of the unauthorised construction at the premises in question and take specific decision regarding retention or demolition of the same or any part thereof.

Needless to mention that the competent authority of the Kolkata Municipal Corporation will take appropriate decision strictly in accordance with law and upon observing



the principles of natural justice without any further delay but positively within a period of two months from date."

18. Shri Bhaskar P. Gupta, learned senior counsel appearing for the appellant argued that the direction given by the Division Bench is legally unsustainable because while deciding the appeal preferred by respondent No.7, the Division Bench of the High Court overlooked the fact that the Mayor-in-Council had, after giving notice and opportunity of hearing to the representative of respondent No.7, already passed order on 14.1.2010 for demolition of the unauthorised construction. Learned senior counsel emphasised that respondent No.7 had defied the 'stop work notice', decision taken by Mayor-in-Council and continued with the construction of building even after demolition of unauthorised portion thereof and argued that the Division Bench of the High Court committed serious error by ordaining compliance of the rule of *audi alteram partem* ignoring that respondent No.7 had never contested the factum of unauthorised construction. Shri Bhaskar P. Gupta relied upon the judgments of this Court in *Friends Colony Development Committee v. State of Orissa* (supra) and *Priyanka Estates International (P) Ltd. v. State of Assam* (supra) and argued that the Division Bench of the High Court committed serious error by interfering with the direction given by the learned Single Judge for demolition of the construction which was raised by respondent No.7 in violation of the sanctioned plan and by showing total contempt for the notices issued by the Corporation under Sections 400 and 401 of the 1980 Act.

19. Shri Kalyan Bandopadhyay, learned counsel for the Corporation extensively referred to the pleadings of the parties to show that the representative of respondent No.7 had admitted construction of building in violation of the sanctioned plan and argued that such construction cannot be regularised under Rule 25 (2) of the Kolkata Municipal Corporation Building Rules, 1990 (for short, 'the Rules').

20. Learned counsel for respondent No.7 fairly conceded

that the construction raised by his client is contrary to the sanctioned plan but argued that the Corporation is duty bound to pass appropriate order on the application filed for regularisation of such construction. Learned counsel submitted that even though Rule 25(2) of the Rules may not be strictly applicable to the case of his client, the Corporation possesses inherent power to regularise the illegal construction and there is no justification to demolish the unauthorised portion of the building without deciding the application submitted on 13.8.2010.

21. We have considered the respective arguments and carefully perused the record. Since, respondent No.7 has not disputed that the building was constructed in violation of the sanctioned plan and the Mayor-in-Council passed order dated 14.1.2010 for demolition of the disputed construction, the direction given by the Division Bench of the High Court to the competent authority of the Corporation to pass appropriate order after giving opportunity of hearing to respondent No.7 cannot be sustained. It appears that attention of the Division Bench was not drawn to the notices issued by the competent authority of the Corporation under Sections 400, 401 and 401A of the 1980 Act and order dated 14.1.2010 passed by the Mayor-in-Council, else it would not have decided the appeal by assuming that the competent authority had not passed an order for demolition of the illegal construction. The factum of illegal construction having been raised by respondent No.7 is also evinced from the counter affidavits filed on behalf of respondent Nos.1 to 5 and respondent No.7 respectively. In paragraphs 4 (a) to (c), (e) to (h), (j) and (k), Shri Amitava Roy Chaudhary, Executive Engineer (Civil), Building Department, Kolkata Municipal Corporation has explained the Corporation's stand in the following words:

> " 4. I crave leave of this Hon'ble Court to set out the following facts in connection with the present S.L.P. :-
>
> (a) A Building plan being Building Sanction Plan No. 200909004 was sanctioned on 11.04.2009 by the concerned authority of the Corporation in favour of one Md. Sahid for construction of two storied residential building in respect of the premises No.8/1F, Gopal Doctor Road, Kolkata-700023 (hereinafter referred to as the said premises) and the same to be completed within five years from the date of sanction i.e. 10.04.2014 as per the said sanction.
>
> (b) On or about October, 2009 the concerned officers of the Corporation inspected the said premises after receiving a complaint over telephone about the unauthorized construction being made in the said premises. Upon the said complaint the concerned officials inspected the said premises and found that R.C.C. columns were erected upto 3rd floor level with projections of some columns above 3rd floor level and casting of R.C.C. slab were made upto 3rd floor level along with staircase in deviation from the said sanction plan for which a notice under section 401 of the K.M.C. Act, 1980 was served on 08.10.2009 to Md. Shahid, the person responsible, to stop forthwith further progress of construction work and the same was received by the person responsible. Moreover, an intimation was sent to the Officer-in-charge, Watgunge Police Station, Kolkata, requesting him for follow up action in the prevention of unauthorized construction at the said premises which was in deviation and beyond sanction plan.
>
> A true copy of Notice u/s. 401 of the K.M.C. Act and a copy of the intimation given to Officer in-charge Watgunge Police Station, Kolkata, are annexed as Annexures P-l & P-2 at pages 23-27 of the SLP Paper Book.
>
> (c) It appeared from the records of the K.M.C. that inspite of service of notice u/s. 401 of the K.M.C. Act, 1980 to stop construction forthwith, the person responsible continued

with the construction works defying the said stop-work notice for which first time Municipal guard watch was posted from 12.10.2009 in respect of the said premises and an intimation of the said posting of guard watch was given to the person responsible for prevention of the continuance of unauthorized construction thereon.

(e) On or about November, 2009 the concerned officers of the Building Department of the Corporation further inspected the said premises and found that the construction works were going on up to 4th floor level in spite of posting of guard watch. Accordingly, considering the gravity of the situation and safety of the adjoining structure as well as the safety of the public in general the concerned authority suggested that action under section 401-A of the K.M.C. Act, 1980 may be taken against the said person responsible and a proposal was made by the concerned officials of the Corporation, besides to it the same was sent to Watgunge Police Station for taking action against the person responsible or any other person who has conspired to make the said unauthorized construction. A true copy of the said proposal dated 10.11.2009 is annexed as Annexure P-4 at pg. 30 of the S.L.P. Paper Book.

(f) After considering the said statement and the demolition sketch the Deputy Chief Engineer (Building) submitted a report to the Director General (Building)-II, K.M.C. In the said report the Deputy Chief Engineer (Building) mentioned that since the nature of the unauthorized construction works are massive and there was defiant attitude of the person responsible and since the premises is situated in congested area, the construction had been done in a haphazard manner without following the norms and practice of Civil Engineering. It was felt that the structural stability of the impugned construction is doubtful which would create several hazards like traffic congestion,



fire hazards, environmental hazards etc. Accordingly, it was recommended that action under section 400(8) of the K.M.C. Act, 1980 may be taken against the said unauthorized construction in the said premises to cause such building or work to be demolished forthwith, and the same was placed before the Member, Mayor-in-Council for approval.

(g) The Member, Mayor-in-Council approved the said recommendation. On 14.01.2010, upon such approval the Mayor-in-Council resolved that unauthorized construction/ structures at the said premises be demolished forthwith under section 400 (8) of the K.M.C. Act, 1980 with the help of the local administration. A true copy of the said proposal of the said premises and the resolution of the Mayor-in-Council dated 14.10.2010 is annexed as Annexure P-5 (Colly) at pages 31-32 of the S.L.P. Paper Book.

(h) In accordance with the said resolution of the Mayor-in-Council the demolition squad of the Corporation went to the said premises on 04.02.2010 and was able to demolish a portion of the unauthorized construction about 600 sq. ft. approx. out of approx. 1500 sq. ft. of the said unauthorized construction in the said premises. The demolition squad also submitted a report of the said structure in the said premises. In the said report the reason for not being able to demolish the entire un-authorized structure was also stated. A true copy of the demolition report and the demolition sketch is annexed as Annexure P-6 at page 33 of the S.L.P. Paper Book.

(j) Pursuant to the directions of the Calcutta High Court, the concerned Executive Engineer gave a hearing on 08.04.2010 to the petitioner and the respondent, M/s. Unique Constructions represented by its Proprietor - Md. Shahid, the person responsible for making unauthorized constructions and on 16.04.2010 the concerned Executive Engineer passed an order and communicated the same

to the respective parties. A true copy of the said Order dated 16.04.2010 is annexed as Annexure P-8 (at pages 36-37) of the S.L.P. Paper Book.

(k) Thereafter, on the basis of the said order of the Executive Engineer, on 20.07.2010 the concerned Assistant Engineer along with the Sub-Assistant Engineer inspected the said premises and found that the demolished portion of the said building has been repaired by the said person responsible and also found that the said building is full of occupancy."

22. In paragraphs 4, 5 and 6 of his affidavit, Mohammad Shahid has averred as under:

"4. That since the Premises No. 8/1F, Gopal Doctor Road, Police Station Watgunge, Kolkata having an area of about 2 Cottahs 11 Chittacks 33 Square feet was covered with temporary structures and some of which were tiles and asbestos etc. The said structures were occupied by various tenants and partly by the landlord. Therefore the owner/landlord decided to enter into an agreement with the answering respondent for undertaking necessary construction works since the property became uninhabitable. Thus necessary agreements were executed by and between the answering respondent and owner/ landlord for the construction work in the premises in question.

Accordingly, thereafter a Plan dated 11.04.2009 vide Building Permit No. 2009090004 was sanctioned for premises No. 8/1F, Gopal Doctor Road, Kidderpore, Kolkata- 700 023, by the Kolkata Municipal Corporation for erection of a two storied building, covering a sanctioned area measuring about 145.82 Square Meter. The proposed F.A.R. for the said plan was 0.99 over land measuring about 145.927 Square Meter. But the building has been constructed upto five storied. Presently the total



constructed cover area for the five storied building is measuring about 55.57 square meter and the present F.A.R. is 3.83.

5. That subsequent thereto as per the requirement of the owner and tenants in the said premises construction upto the floor more than sanctioned was constructed. Upon construction the answering respondent filed an application with the Kolkata Municipal Corporation under Rule 25(2)(b) of the Building Rules on 13.08.2010 for regularization of the construction erected beyond sanctioned plan and a revised plan was submitted for sanction before the competent authority.

6. That according to Clause (b) Sub-Rule 2 of Rule 25 of the Kolkata Municipal Corporation Building rules 1990 it is provided that if during the erection or execution of work any external deviation beyond the sanctioned covered space is intended to be made and which does not violate the provisions of the Act or the said Rules, the person erecting such construction, prior to carrying out such erection or execution of works, submit, in accordance with provisions of the said rules, a revised plan incorporating the deviation intended to be carried out, for obtaining necessary sanction thereof. Further the Clause (b) Sub-Rule 2 of Rule 25 of the Kolkata Municipal Corporation Building Rules, 1990, empowers the Municipal authorities to allow a person to construct the sanctioned covered area, which means construction exceeding the floor area ratio can be allowed to be carried on."

23. In view of the pleadings filed before the High Court and the affidavits filed before this Court, there is no escape from the conclusion that respondent No.7 had raised construction in violation of the plan sanctioned under Section 396 of the 1980 Act and continued with that activity despite the order of the Mayor-in-Council. In the prevailing scenario, the representative of respondent No.7 might have thought that he will be able to

pull strings in the power corridors and get an order for regularisation of the illegal construction but he did not know that there are many mortals in the system who are prepared to take the bull by horn and crush it with iron hand.

24. Rule 25 of the Rules, on which reliance was placed by respondent No.7 for seeking regularisation of the illegal construction, reads as under:

> **"25. Deviation during execution of works**.—(1) No deviation from the sanctioned plan shall be made during erection or execution of any work.
>
> (2) Notwithstanding anything contained in sub-rule (1), if during erection or execution of work any internal alterations or external additions which do not violate the provisions of the Act or these rules is made, the Municipal Commissioner may without prejudice to any action that may be taken against the person at whose instance such alteration or additions have been made, allow the person referred to in sub-rule (1) of rule 4 to submit, in accordance with the provisions of these rules, a revised plan showing the deviation and may sanction such plan.
>
> (3) Any departure made during the execution of any work or at any time thereafter without sanction shall be deemed to be in contravention of the provisions of the Act and these rules and shall be dealt with accordingly."

25. A reading of the plain language of Rule 25(1) makes it clear that a person, who erects any structure or executes any work is not entitled to deviate from the sanctioned plan. Rule 25(2) which contains a non-obstante clause and provides for sanction of revised plan to be submitted by the person engaged in erection of building or execution of work lays down that if during erection or execution of work, any internal alterations or external additions which do not violate the provisions of the Act or the Rules is made, the Municipal Commissioner can, at an application made in that behalf sanction the revise plan showing



the deviation. Rule 25(3) is declaratory in nature. It lays down that any departure made during the execution of any work or at any time thereafter without sanction shall be deemed to be in contravention of the Act and the Rules shall be dealt with accordingly.

26. In our view, respondent No.7 cannot take benefit of Rule 25 because the disputed construction was in clear violation of the sanctioned plan and the notices issued by the competent authority of the Corporation and also because the application was made after completion of the construction.

27. Before parting with the case, we consider it necessary to observe that respondent No.7 is guilty not only of violating the sanctioned plan and the relevant provisions of the 1980 Act and the Rules framed thereunder but also of cheating those who purchased portions of unauthorized construction under a bona fide belief that respondent No.7 had constructed the building as per the sanctioned plan. With the demolition of unauthorized construction some of such persons will become shelterless. It is, therefore, necessary that respondent No.7 is directed to compensate them by refunding the cost of the flat, etc., with interest. Respondent No.7 must also pay for raising construction in violation of the sanctioned plan. It must be remembered that while preparing master plans/zonal plans, the Planning Authority takes into consideration the prospectus of future development and accordingly provides for basic amenities like water and electricity lines, drainage, sewerage, etc. Unauthorized construction of buildings not only destroys the concept of planned development which is beneficial to the public but also places unbearable burden on the basic amenities and facilities provided by the public authorities. At times, construction of such buildings becomes hazardous for the public and creates traffic congestion. Therefore, it is imperative for the concerned public authorities not only to demolish such construction but also impose adequate penalty on the wrongdoer.

28. In the result, the appeal is allowed and the impugned judgment is set aside. With a view to ensure that the illegal construction raised by respondent No.7 is pulled down without delay, we issue the following directions:

1. Within three months from today, respondent No.7 shall pay the price of the flats etc. to the purchasers with interest @ 18% per annum from the date of payment.

2. The occupiers of illegal/unauthorized construction shall vacate such portions of the building within next one month.

3. Within next one month, the Corporation shall demolish unauthorized construction after taking adequate precautionary measures.

4. Respondent No.7 shall pay cost of Rs.25,00,000/- for brazen violation of the sanctioned plan and continuance of illegal construction despite 'stop work notice'. The amount of cost shall be deposited with the Kolkata State Legal Service Authority within three months and the same be utilized for providing legal aid in deserving cases.

29. Reports showing compliance of the aforesaid directions be filed by the Corporation and respondent No.7 in the Registry of the Kolkata High Court within six months. Thereafter, the matter be placed before the learned Single Judge who had passed order dated 28.7.2010. If the learned Single Judge finds that any of the aforesaid directions has not been implemented then he shall initiate proceedings against the defaulting officers and/or respondent No.7 under the Contempt of Courts Act, 1971 and pass appropriate order.

K.K.T. Appeal allowed.



AVTAR SINGH

*v.*

STATE OF HARYANA

(Criminal Appeal No. 1475 of 2010)

OCTOBER 10, 2012

**[DR. B.S. CHAUHAN AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]**

*Penal Code, 1860 – ss. 302, 325, 326, 148 and 149 – Murder – Common object – Allegation that armed assault by accused party on members of the complainant party led to death of PW10's father and extensive cut injuries to number of other persons – Evidence of injured witnesses, PWs 10, 11 and 13 – Conviction of accused-appellants – Justification – Held: Justified – The whole edifice of the crime related to a land dispute between DW2 and PW11 – The incident occurred while the accused party was on way to the disputed land in question to harvest crop raised by PW11 – The accused party was the aggressor – Every member of the accused party must have been fully aware that having regard to the fact that dangerous weapons were in their possession, and that they had an axe to grind against PW-11, there was every likelihood of the offence of that magnitude being the ultimate outcome – The manner of causing injury on PW10's father also goes to show that all of them were determined to ensure that he and the other injured persons did not escape from their assault – PW10's father was hit on his head and every vital part of the body – Chopping of the torso of both his legs was only to ensure that he had no way to escape from the gruesome attack – When appellants proceeded towards the disputed land with arms such as gandasi and kirpans it amply disclosed their mindset to deal with the complainant party sternly against whom they had a definite grudge relating to the disputed land – Interim stay order passed against the accused party (by the*

*civil Court in the suit filed by PW11) was extended on that very date, which was a cause for prejudice against the complainant party – Everyone amongst the accused party was standing at the spot with a clear mindset to assault the members of the complainant party – It was a clear case of pre-meditation and there was common object – Plea of self-defence was wholly a make-believe version – Offence found proved against the appellants squarely fell u/s.302 – Punishment imposed on the appellants for the said offence as well as the other charges levelled against them was fully established.*

*Witnesses – Large number of witnesses – All witnesses need not be examined – Held: Where there were several persons stated to have witnessed the incident and the prosecution examined those witnesses who were able to depose the nature of offence committed more accurately leaving no room for doubt about the involvement of the accused in the occurrence and the extent of their involvement with specific overt act and also were able to withstand the cross-examination by maintaining the sequence and the part played as originally stated, it would be wholly irrelevant and unnecessary to multiply the number of witnesses to repeat the same version.*

**The prosecution case was that the accused persons attacked members of the complainant party with various dangerous weapons thereby causing the death of PW10's father and serious injuries to number of other persons. The trial court convicted all the accused under ss.302, 325, 326, 148 and 149 IPC and sentenced them to rigorous imprisonment for three years. In appeal, the High Court acquitted three of the accused, A-1, A-3 and A-10 but confirmed the conviction of the other accused (A-2, A-4 to A-9) i.e. the appellants, and therefore the instant appeals.**

**Dismissing the appeals, the Court**



**HELD:1.1. The whole edifice of the crime related to a land dispute between DW2 and PW11. According to DW-2 at the behest of PW-11 he purchased the property, that he had perfected the title over it, yet PW-11, under the guise of his continued right to possession was causing hindrance to the ownership of DW-2. As the issue was brewing over a considerable length of time, prior to the year 2003, that on the fateful date it transpired that in the Civil Suit preferred by PW-11, the interim order granted earlier in favour of PW-11 by way of stay was extended by the Civil Court. As per the narration of events, it was disclosed that the parties returned back to their respective homes in the village in the evening while PW-10, PW-11 and PW10's father were discussing about the issue, one uncle of PW-10 arrived there and gave the information that the accused party was proceeding towards the disputed land with the idea of harvesting the crops raised by PW-11. Since there was an order of stay existing in favour of PW-11, it was quite apparent that the information furnished by uncle of PW10 prompted the complainant party to proceed towards the land in question with a view to protect their crops. The said conduct displayed by the complainant party who were all related was quite natural. Nowhere it was brought out in evidence that while they were proceeding towards the disputed land they were all armed with any dangerous weapons, except *lathis* in the hands of two persons as stated by PW-11 in his oral evidence. [Paras 8, 9] [805-C-H; 806-A-B]**

**1.2. A reading of the evidence of PWs-10, 11 and 13 read along with the version of DW-2 as regards the manner of infliction of injuries amply establish to a considerable extent the fact about the happening of the occurrence on way to the disputed land in question. The evidence of the doctor who attended on the injured**

**witnesses PWs-10, 11 and 13 as well as the other injured persons disclosed that everyone of them suffered cut injuries with the aid of dangerous weapon such as *gandasa, kirpan* and sword. This was the sum and substance of the manner in which the occurrence took place where PW10's father was murdered while the other injured persons were inflicted with severe injuries. [Para 10] [806-E-F; 807-A-B]**

**2.1. The non-inclusion of DW-2 in the array of accused by the prosecution cannot be taken so very seriously in order to doubt the whole genesis of the case alleged against the appellant and the other accused. Except referring to the name of DW-2 in the rukka, there was no specific overt act alleged against him in regard to his participation in the actual crime of assault or inflicting of injuries or use of any weapon against either the deceased or any other person. [Para 11] [808-A-B]**

**2.2. In order to prove the guilt of the accused, the prosecution should take earnest effort to place the material evidence both oral and documentary which satisfactorily and truthfully demonstrate and fully support the case of the prosecution. Where there were several persons stated to have witnessed the incident and the prosecution examined those witnesses who were able to depose the nature of offence committed more accurately leaving no room for doubt about the involvement of the accused in the occurrence and the extent of their involvement with specific overt act and also were able to withstand the cross-examination by maintaining the sequence and the part played as originally stated, it will be wholly irrelevant and unnecessary to multiply the number of witnesses to repeat the same version. [Para 12] [809-B-E]**

*Tej Prakash v. The State of Haryana* **JT 1995 (7) SC 561 – relied on.**



**3. As rightly pointed out by the trial Court as well as the High Court, if really the case sought to be pleaded at the instance of DW-2 as against the complainant party were true and he really suffered any injury at the hands of the complainant party, it was not known why he did not pursue his complaint of such a serious nature by taking appropriate recourse to law. Though according to DW-2 as well as the doctor who is alleged to have examined him who was examined as DW-3, he suffered extensive injuries (viz) as many as five, of which one was an incised wound, there is considerable doubt and suspicion as regards the version spoken to by both the witnesses in particular about the nature of injuries sustained and its truthfulness. The Courts below rightly did not give credence to the claim of DW-2 as regards the injuries alleged to have been sustained by him at the hand of the complainant party. The whole evidence read with the evidence of DW-2 only goes to show that the prosecution story as placed before the trial Court which was appreciated while finding the appellant guilty of the offence alleged against them is fully justified. The role played by the accused in causing the serious injuries on the deceased as well as on the other injured witnesses and other persons as found proved does not call for any interference. [Paras 13, 14] [809-E-H; 810-E, G-H; 811-A]**

**4. The ultimate conclusion of the Courts below in holding the accused were squarely responsible and by calling them as the party who indulged in the aggression cannot be found fault with. The evidence of DW-2 was clear to the effect that the persons who accompanied him carried *gandasi* and *sottas*, that three were holding *gandasis* and three were holding *sottas*. He also admitted in categorical terms that none of the five persons who accompanied him received any injuries except himself. Therefore, even going by the version of DW-2 himself they were armed with dangerous weapons. Therefore,**

**when they proceeded towards the disputed land with arms such as *gandasi* and *kirpans* it amply disclosed their mindset to deal with the complainant party sternly against whom they had a definite grudge relating to the land with reference to which the dispute was brewing for quite a long period of time prior to the date of occurrence. More so, as established before the trial Court, the interim order passed against them by the Civil Court was extended on that very date, which was a cause for prejudice against the complainant party. On the other hand, the very fact that there were extensive injuries sustained by the complainant party and the death of the deceased in the process of assault inflicted upon them only goes to show that the plea of self-defence was wholly a make believe version which had no legs to stand and was rightly rejected by trial Court as well as the High Court. [Paras 15, 16] [811-E-H; 812-A-C]**

**5. In view of the conclusion that the accused party was the aggressor and having regard to the possession of dangerous weapons it was amply demonstrated that the game play was preplanned to deal with the complainant party when they were proceeding towards the disputed land in question. The subsequent conduct of the appellants in having inflicted the severe injuries and causing death of PW10's father only go to show that it was a clear case of pre-meditation. The contention that it was a sudden fight and was without pre-meditation has, therefore, no basis at all. It is relevant to note that at least three types of dangerous weapons apart from *Lathis* were in the possession of the accused party. The very fact that the death of PW10's father was due to the cut injuries inflicted upon him and the other injuries as noted in the body of PWs-10, 11 and 13, as well as, other injured persons of the complainant party was clear proof of the fact that the accused party was present at the place of occurrence, fully prepared to attack the complainant**



**party which they were able to successfully carry out. The admission of DW-2 that none of the accused party was injured also goes to show that everyone of the accused party was standing at the spot with a clear mindset to assault the members of the complainant party. Therefore, it is a futile attempt on the side of the appellants now to contend that it was a sudden fight without any pre-meditation. For the very same reason the contention that in a heat of passion in a group fight the injuries were inflicted cannot also be accepted. The further contention that the accused party did not act in a cruel manner is again a fact contrary to the true state of affairs which prevailed at the place of occurrence. Therefore, it was too much for the appellants to expect and contend that the case would fall under Exception IV to Section 300 IPC. The said contention has to be stated only to be rejected. [Para 18] [812-F-H; 813-A-E]**

**6. Even if the accused party had a motive as against PW-11 (and not PW10's father) that very fact was sufficient enough to bring the action of the accused party in having caused injuries on the witnesses and other persons as well as the cause for the death of PW10's father to squarely rope them in the process of their common object. Section 149 IPC provides that if offence is committed by a member of an unlawful assembly in commission of the object of that assembly then every person who at the time of committing of that offence is a member of that assembly would be guilty of that offence. It is not necessary that there should be preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the**

**accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149 if it can be held that the offence was such as the members knew was likely to be committed. Therefore, applying the above said principle, it can be safely held that everyone of the members of the accused party must have been fully aware that having regard to the fact that dangerous weapons were in their possession, that they had an axe to grind against PW-11, that there was every likelihood of the offence of that magnitude would be the ultimate outcome and the factum of such grave offence ultimately brought them within the four corners of the said Section and there was no escape from it. Therefore, the argument that there was no common object to murder PW10's father also stands rejected. The manner of causing injury on the person of PW10's father also goes to show that all of them were determinative of showing their might by ensuring that he and other injured persons did not escape from their assault and PW10's father ultimately succumbed to the injuries inflicted upon him. The assailants ensured that the deceased was hit on his head and every vital part of the body and the chopping of the torso of both the legs was only to ensure that there was no way to escape for the person from the gruesome attack. The totality of the manner in which the assailants acted at the place of occurrence while inflicting the injuries on the deceased as well as others only displayed their united mind and effort in the fulfillment of their objective at the spot and, therefore, there was no scope to individualize the conduct of the assailants in order to mitigate the gravity of the charges found proved against the appellants. Therefore, the submission that at best A-4 can alone be found guilty of the offence under Section 302, IPC or under Section 304 Part I while others may be guilty of the lesser offence falling under Section 323, IPC**



**cannot be accepted. Having regard to the gravamen of the charges found proved against the appellants, there is no scope to bring it under Section 304 Part I IPC based on the submission made on behalf of the appellants. [Paras 19, 20] [813-F-H; 814-A-H; 815-A-E]**

*Mizaji and Anr. v. State of U.P.* **AIR 1959 SC 572: 1959 Suppl. SCR 940 – relied on.**

**7. The offence found proved against the appellants squarely fall under Section 302, IPC and the punishment imposed on the appellants for the said offence as well as the other charges levelled against them was fully established, the conviction and sentence imposed on the appellants, therefore, do not call for any interference. [Para 21] [815-F-G]**

**Case Law Reference:**

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| **JT 1995 (7) SC 561** | **relied on** | **Para 12** |
| **1959 Suppl. SCR 940** | **relied on** | **Para 19** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1475 of 2010

From the Judgment & Order dated 27.03.2009 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 916-DB of 2006.

WITH

Criminal Appeal No. 1476 of 2010.

Jaspal Singh, Vipin Gogia, Jaspreet Gogia for the Appellant.

Kamal Mohan Gupta, Gaurav Teotia, Mohd. Zahid Hussain, R.V. Kameshwaran for the Respondent.

The Judgment of the Court was delivered by

**FAKKIR MOHAMED IBRAHIM KALIFULLA, J.** 1. These two appeals arise out of the common judgment dated 27.03.2009 passed in Criminal Appeal No.916-DB/2006 of the High Court of Punjab & Haryana at Chandigarh. The second accused is the appellant in Criminal Appeal No.1475/2010. Accused Nos. 4 to 9 are the appellants in Criminal Appeal No.1476 of 2010.

2. According to the case of prosecution, there was a civil suit pending as between Hansa Singh (PW-11) and Surjit Singh S/o Kundan Singh (DW-2) at Samana (Punjab), that there was also an interim order granted by the Civil Court in favour of Hansa Singh (PW-11) as against Surjit Singh, that after hearing was over on 09.04.2003 in the Civil Court, the complainant party returned back home and were present at the house of PW-10 Harmesh Singh s/o Amarjit Singh in the evening. At that time, one Desa Singh, uncle of Harmesh Singh (PW-10) came and informed that some persons had gathered near the land with reference to which the litigation was pending in the Court at Samana and that they might harvest the crops belonging to Hansa Singh (PW-11). On hearing the said information, Harmesh Singh (PW-10) along with his father the deceased Amarjit Singh, his uncle Hansa Singh, Ujagar Singh s/o Chuman Singh, Paramjit Singh s/o Surjit Singh, Karnail Singh s/o Phuman Singh, Surjit Singh s/o Atma Singh, Darshan Singh s/o Surjeet Singh, Teja Singh s/o Karta Singh, Ranjit Singh s/o Phuman Singh all residents of Bhatian village proceeded towards the field of Hansa Singh at about 7.30 p.m., that when they reached the bandh of Bhatian Dam near the lands of Darshan Singh, the accused, namely, Kirpal Singh, Raminder Singh s/o Arjun Singh, Mitt Singh, Resham Singh with swords in their hands, Balbir Singh, Jagtar Singh, Fateh Singh armed with gandasis, Raghbir Singh, Avtar Singh armed with barchhis all residents of Dera Amritsaria, Shiv Majra and Kulwant Singh s/o Surjit Singh also with a sword rushed towards them raising a lalkara, that Kirpal Singh gave a sword blow upon the head



of Amarjit Singh, father of Harmesh Singh (PW-10) while Raminder Singh gave a blow of sword on the left arm of the deceased Amarjit Singh and Kulwant Singh attacked the deceased on his feet and Balbir Singh, Jagtar Singh and Fateh Singh also attacked the deceased with their weapons. Raghbir Singh with his barchhi, Mitt Singh with his sword, Resham Singh also with a sword and Avtar Singh with a barchhi attacked Paramjit Singh, Ujagar Singh, Surjit Singh, Hansa Singh and Karnail Singh and inflicted injuries upon them. Due to the injuries the deceased Amarjit Singh fell down, that when the complainant went running towards the place of occurrence, the accused party fled away from the spot with their respective weapons. The deceased was stated to have been taken to the civil hospital where he was declared dead by the doctor. The other injured persons were also treated at the very same hospital, and that the statement of PW-10 was recorded at 10.35 p.m. which was forwarded to the police station at PHG, Guhla which came to be registered as FIR No. 51 dated 09.04.2003. Thereafter PW-15 Sub-Inspector took up the investigation, inspected the place of occurrence recorded the statement of witnesses, collected the opinion of doctors, prepared the draft sketch, collected blood stained earth from the place of occurrence, took steps for the arrest of the accused and based on the admissible portion of their confessional statement recovered the weapons and filed the final report before the Court. The case was committed to the Court of Sessions where the appellants along with three other accused came to be charge sheeted for the offences punishable under Sections 148, 302, 326, 325, 324,323 read with Section 149 IPC.

3. On the side of the prosecution as many as 16 witnesses were examined and 87 Exhibits were marked. In the 313 questioning, the accused denied all the allegations against them. DWs-1 to 7 were examined on the defence side. Based on the evidence placed before the trial Court, all the accused

were found guilty of the offences alleged against them and they were convicted and sentenced to rigorous imprisonment for six months and pay a fine of Rs.1000/- each for the offences under Section 148 IPC and in default of payment of fine to undergo simple imprisonment for a period of two months each, life imprisonment for each for the offence under Section 302 IPC, RI for three years and to pay fine of Rs.2000/- each and in default of payment of fine to undergo simple imprisonment for a period of three months for the offence under Section 326 IPC, rigorous imprisonment for a period of two years along with a fine of Rs.2000/- each and in default to undergo simple imprisonment for a period of two months each and for the offence under Section 325 IPC rigorous imprisonment for a period of one year along with a fine of Rs.2000/- each and in default to undergo simple imprisonment for a period of two months each. All the sentences were to run concurrently.

4. Aggrieved by the conviction and sentence imposed, all the appellants preferred an appeal and the High Court while confirming the conviction and sentence imposed on the appellants held that the offence alleged against Raghbir (A1), Mitt Singh (A-3) and Resham Singh (A-10) was doubtful and on that ground acquitted them of all the charges levelled against them. Being aggrieved of the above conviction and sentence imposed on the appellants and the confirmation of the same by the High Court, the appellants have come forward with this appeal.

5. Learned counsel at the very outset fairly submitted that the appellants go along with the story of the prosecution to considerable extent in the sense that the filing of the Civil Suit by PW-11 as against Surjit Singh in the Court at Samana was true, that it related to the lands in village Marori, that the suit was admittedly pending on the date of occurrence, namely, 09.04.2003, that on that evening the occurrence took place. Learned counsel also contended that the presence of three of the accused as well as Surjit Singh at the place of occurrence



was true. The said three accused were Kirpal Singh (A-4), Raminder Singh (A-5) and Kulwant Singh (A-9). Learned counsel would, however, strongly urge that the prosecution tampered with the records inasmuch as in the complaint itself, which was preferred by PW-10, there was a specific reference to the presence of Surjit Singh, nevertheless there was no reference to him in the FIR and he was not charge-sheeted and the injuries sustained by him were not specifically explained. According to the learned Senior counsel the Civil Suit preferred by PW-11 ended in a failure, that the name of Surjit Singh (DW-2) was duly recorded in the revenue records as owner of the lands in question and that the accused party were the sufferers at the hands of the complainant party and though a complaint was preferred at the instance of Surjit Singh (DW-2), the prosecution failed to take appropriate action in that regard.

6. According to learned Senior counsel, the accused party when tried to defend themselves from the attack of the complainant party they might have suffered the injuries and the prosecution failed to project the case in the proper direction. By referring to the non-examination of the other injured persons, namely, Jagtar Singh, Paramjit Singh, Surjit Singh and Karnail Singh, the learned senior counsel submitted that there was not enough evidence to support the case of the prosecution. Learned senior counsel argued that when Harmesh Singh (PW-10) met Investigation officer PW-15 at the hospital at 9 p.m. when he was by the side of the dead body, there was no proper explanation for the registration of the FIR after 1 hour and 35 minutes, inasmuch as, the police station is just across the hospital. Learned Senior counsel also contended that when there was no reference to the name of the accused, namely, Raghbir Singh (A-1), Mitt Singh (A-3) and Resham Singh (A-10) in the record and specific reference to Surjit Singh (DW-2) the inclusion of A-1, A-3 and A-10 in the FIR and non-arraying of DW-2 as the accused would only go to show that it is a clear case of tampering of the records and consequently the case of the prosecution should not be believed. Learned senior

counsel ultimately submitted that it was a sudden fight without any pre-meditation, that in a group clash there were 11 persons on the side of the complainant party and six on the side of accused party in a heat of passion and as there was no cruel attack and in the circumstances when the above factors were proved or at least probabilized there is a great doubt whether Section 149 would apply. The learned Senior counsel would contend that there was no pre-meditation and there was no motive and if at all there was any motive, it might be against PW-11 while the deceased Amarjit Singh was totally unconnected to the dispute relating to the land and any attack on the said deceased Amarjit was so sudden, there was no common object in the alleged murder of the deceased Amarjit Singh. As far as the injuries caused on others are concerned, it was contended that those injuries were all minor injuries and in the circumstances, the conviction could at best be for an offence under Section 304 Part I IPC as against Kirpal Singh (A-4) and under Section 323, IPC as against others. Learned senior counsel would, therefore, contend that whatever sentence has been suffered by the appellants would be sufficient punishment and they are entitled to be released forthwith.

7. As against the above submissions learned counsel for the State pointed out that the names of Raghbir Singh (A-1), Mitt Singh (A-3), Resham Singh (A-10) do find a place in the record as could be seen from Page 3 Volume III, that rukka was written at 10.30 p.m. and FIR was registered at 10.35 p.m. and, therefore, there was no question of false case or any delay in the registration of the FIR. The learned counsel drew our attention to the order of the Civil Court extending the stay on 09.04.2003 available at pages 207 to 213 of the original records to contend that the dispute with regard to the land and its right of possession was very much in controversy on the date of occurrence as between the parties and as per the version of PW-10 the issue relating to the land was as between his uncle PW11 and Surjit Singh who were fighting for the land in



the Civil Court and the deceased Amarjit Singh being the father of Harmesh Singh (PW-10) was closely related to Hansa Singh (PW-11) and consequently he was also fully interested in the claim of Hansa Singh (PW-11) over the land in question and that the submission of the counsel for the appellant to the contrary cannot, therefore, be accepted. Learned counsel for the State contended that immediately after the occurrence at 7.30 p.m. the deceased was taken to the hospital where he was declared dead by the doctor and the version found in the rukka was found in the FIR and, therefore, there was no question of any falsification in the case of the prosecution. Learned counsel submitted that the case of the prosecution was supported by the injured eye witnesses and, therefore, it was not necessary for the prosecution to multiply witness when the eye witnesses fully supported the case of the prosecution. It was, therefore, contended that the non-examination of Desa Singh, the uncle of Harmesh Singh (PW-10) who gave the information that the accused party were proceeding towards the disputed land with an idea to harvest the crops never caused any dent in the case of the prosecution. In other words, according to the learned counsel even in the absence of Desa Singh's evidence, the case of the prosecution stood proved. Learned counsel further contended that the injuries inflicted upon the deceased as found proved based on the evidence of the doctor in the post mortem report established the intention of the accused to cause the death of the deceased and the injuries sustained by others were also severe though they survived the attack. Learned counsel pointed out that none of the accused party sustained any injuries and, therefore, the theory of private defence was a futile stand. According to the learned counsel, the complainant party were unarmed while the accused were armed heavily, that the complainant party were not the aggressors while the accused party were found to be aggressors by the Courts below was true and in those circumstances when the plea of self defence failed, the charge under Sections 148 and 149, IPC stood fully proved. He also contended that the very fact that the appellants were armed with deadly weapons and caused the death of the

deceased, the offence under Sections 148 and 149 were made out and there was no requirement of pre-medication and pre-planning for the offence under Sections 148 and 149 to be made out. The common object as made out on the spot was sufficient to support the conviction imposed on the appellants for the offence under Section 302 IPC as well as under Sections 323, 324 and 325 read with Sections 148 and 149 IPC. The learned counsel, therefore, contended that no interference is called for.

8. Having heard learned counsel for the appellant as well as counsel for the State and having bestowed our serious consideration to the judgment impugned in these appeals, as well as, that of the trial Court and the material papers placed before us, at the outset, when we examine the whole edifice of the crime, we find that it related to the disputed land situated in village Marori (Punjab) as between Surjit Singh (DW-2) and Hansa Singh (PW-11). According to DW-2 at the behest of PW-11 he purchased the property, that he has perfected the title over it, yet PW-11, under the guise of his continued right to possession was causing hindrance to the ownership of DW-2. As the issue was brewing over a considerable length of time, prior to the year 2003, that on the fateful date it transpired that in the Civil Suit preferred by PW-11 in the Court of Samana, the interim order granted earlier in favour of PW-11 by way of stay was extended by the Civil Court. As per the narration of events, it was disclosed that the parties returned back to their respective homes in the village in the evening while Harmesh Singh (PW-10), Hansa Singh (PW-11) and the deceased Amartjit Singh were discussing about the issue, one Desa Singh, the uncle of Harmesh Singh (PW-10) arrived there and gave the information that the accused party was proceeding towards the disputed land with the idea of harvesting the crops raised by Hansa Singh (PW-11). Since there was an order of stay existing in favour of PW-11, it was quite apparent that the information furnished by Desa Singh prompted the complainant



party to proceed towards the land in question with a view to protect their crops.

9. The said conduct displayed by the complainant party who were all related was quite natural. Nowhere it was brought out in evidence that while they were proceeding towards the disputed land they were all armed with any dangerous weapons, except lathis in the hands of Teja Singh and Ranjit Singh as stated by PW-11 in his oral evidence. On the other hand, even according to Surjit Singh, DW-2 he along with his son Kulwant Singh and other son Tarsem Singh, Amar Singh, cousin Kirpal Singh and other accused were going towards the said land and thereby admitted the factum of the correctness of the information alleged to have been received by the complainant party about their proceeding towards the land for harvesting the crops. He further went on to depose that when they had gone on Killa towards the West through the bandh, the complainant party pounced upon the whole lot of them but caused injuries only to him. There is further admission to the effect that their party also caused injuries to the complainant party with the rider that such causing of injuries was by way of self defence. He fairly admitted that while he received lot of injuries, the complainant party also received injuries.

10. A reading of the evidence of PWs-10, 11 and 13 read along with the version of DW-2 as regards the manner of infliction of injuries amply establish to a considerable extent the fact about the happening of the occurrence on the way to the disputed land in question near the bandh apparently referring to Bhatian bandh which has been specifically mentioned by the prosecution witnesses. While on the one hand, according to the prosecution, the complainant party was proceeding towards the land with a view to protect the crops from being harvested by the accused party, as per the version of DW-2, at the point where both the parties met at Bhatian bandh, a clash occurred in which casualties were the death of the deceased Amarjit Singh apart from injuries sustained by Hansa Singh (PW-11),

Jagtar Singh, Paramjit Singh Surjit Singh S/o Atma Ram, Karnail Singh and Harmesh Singh son of the deceased Amarjit Singh. The evidence of the doctor who attended on the injured witnesses PWs-10, 11 and 13 as well as the other injured persons disclosed that everyone of them suffered cut injuries with the aid of dangerous weapon such as *gandasa, kirpan* and sword. This was the sum and substance of the manner in which the occurrence took place where Amarjit Singh was murdered while the other injured persons were inflicted with severe injuries. In that process, none of the assailants suffered any injuries except DW-2 whose grievance was quite independent of the genesis of the crime alleged against the appellants.

11. Learned counsel for the appellant in the forefront submitted that having regard to the specific reference made in the rukka about the presence of Surjit Singh but yet not being made a party to the crime and non-consideration of the grievance of the said Surjit Singh with reference to the extent of injuries sustained by him which according to him were inflicted upon him by the complainant party, the prosecution case was not truthful, tampering of the whole case with a view to pin down the appellants and the other accused by fabricating the evidence. Learned counsel for the State in his submission, however, pointed out that there could not have been any false case fastened on the appellants inasmuch as the rukka which was prepared at 10.30 p.m. at the hospital was received at the police station and thereafter the law was set in motion by registering the FIR without any loss of time. According to learned counsel, the rukka was written at 10.30 p.m. and the FIR was registered at 10.35 p.m. wherein the entire allegations brought out in the rukka were duly carried out and in the said circumstances, there was no basis at all for submission made on behalf of the appellants alleging false case foisted against the appellant. We find force in the said submission of learned counsel for the State. As far as non-inclusion of Surjit Singh (DW-2) as an accused or as a witness is concerned, though in the first blush, it may appear as though some deliberate



attempt was made at the instance of the prosecution to suppress certain vital factors, on a close scrutiny, we find that except referring to the name of Surjit Singh in the rukka, there was no specific overt act alleged against him in regard to his participation in the actual crime of assault or inflicting of injuries or use of any weapon against either the deceased or any other person. Therefore, the non-inclusion of Surjit Singh in the array of accused by the prosecution cannot be taken so very seriously in order to doubt the whole genesis of the case alleged against the appellant and the other accused.

12. Learned counsel further submitted that though the prosecution would claim injuries on several persons of the complainant party, the other persons who were stated to have been injured or were present at the place of occurrence were not examined. In this context, it will be relevant to refer to the decision of this Court reported in *Tej Prakash v. The State of Haryana* [JT 1995 (7) SC 561] wherein this Court held that all the witnesses of the prosecution may not be called and it is sufficient if witnesses who were essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution. The legal position has been stated in paragraph 18 as under:

> "18. In support of his contention that serious prejudice was caused to the appellant by non-examination of Phool Singh who, had been cited by the prosecution as one of the witness, Mr. Ganesh relied upon *Stephen Senivaratne v. The King,* AIR 1936 P.C. 289, *Habeeb Mohammad v. The State of Hyderabad,* 1954 (5) SCR 475 and the *State of UP and another v. Jaggo Alias Jagdish and others* 1971 (2) SCC 42. The aforesaid decisions can be of little assistance to the appellant in the present case. *What was held by the Privy Council and this Court was that witnesses who were essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution whether the effect of their*

*testimony is for or against the case for the prosecution and that failure to examine such a witness might affect a fair trial. It was also observed that all the witnesses of the prosecution need not be called. In the present case, the witnesses who were essential to the unfolding of the narrative had been examined."*

(Emphasis added)

The law on this aspect can be succinctly stated to the effect that in order to prove the guilt of the accused, the prosecution should take earnest effort to place the material evidence both oral and documentary which satisfactorily and truthfully demonstrate and fully support the case of the prosecution. Where there were several persons stated to have witnessed the incident and the prosecution examined those witnesses who were able to depose the nature of offence committed more accurately leaving no room for doubt about the involvement of the accused in the occurrence and the extent of their involvement with specific overt act and also were able to withstand the cross-examination by maintaining the sequence and the part played as originally stated, it will be wholly irrelevant and unnecessary to multiply the number of witnesses to repeat the same version.

13. As rightly pointed out by the trial Court as well as the High Court, if really the case sought to be pleaded at the instance of DW-2 as against the complainant party were true and he really suffered any injury at the hands of the complainant party, it was not known why he did not pursue his complaint of such a serious nature by taking appropriate recourse to law. Though according to DW-2 as well as the doctor who is alleged to have examined him who was examined as DW-3, he suffered extensive injuries (viz) as many as five, of which one was an incised wound, we find considerable doubt and suspicion as regards the version spoken to by both the witnesses in particular about the nature of injuries sustained and its truthfulness. We say so because admittedly while the



occurrence had taken place on 09.04.2003 between 7 to 7.30 p.m. according to the doctor (viz) DW-3, DW-2 approached the hospital at Guhla only at 4.10 p.m. on 10.04.2003 where he stated to have subjected himself for medical examination. DW-3 in his evidence admitted that on 10.04.2003 he was posted at PHC, Guhla on emergency duty. The photocopy of MLR is Exhibit DX along with X-ray dated 12.04.2003 by way of Exhibit DA and intimation alleged to have been sent to Guhla Police station on 10.04.2003 as Exhibit DY placed before the Court to support the claim of medical evidence. In the cross examination, DW-3 tacitly admitted that he had no document to show that he was on emergency duty at Guhla hospital on 10.04.2003. He, however, claimed that the assignment of duty by way of roster would be available in the office of SMO Guhla but no steps were taken at the instance of DW-2 or DW-3 to exhibit the said document in order to show that DW-3 was really on duty on 10.04.2003 at PHC Guhla which was not his regular place of duty as a doctor. Therefore, the cumulative consideration of the factum of DW-2 stated to have gone to the hospital only on the next day evening, namely, 10.04.2003 at 4.10 p.m. the extent of doubt about the factum of such medical examination held on the person of DW-2 by DW-3 rightly persuaded the Courts below not to give credence to the claim of DW-2 as regards the injuries alleged to have been sustained by him at the hand of the complainant party. Therefore, the submission made on behalf of the appellants by making reference to the said factor in order to doubt the case of the prosecution to hold that the whole case was fabricated by tempering the records does not appeal to this Court.

14. Once we steer clear of the said hurdle relating to the case projected against the appellants and the other accused and when we see the whole evidence read with the evidence of DW-2 himself, it only goes to show that the prosecution story as placed before the trial Court which was appreciated while finding the appellant guilty of the offence alleged against them is fully justified. In the result, therefore, the role played by the

accused in causing the serious injuries on the deceased as well as on the other injured witnesses and other persons as found proved does not call for any interference.

15. If once that conclusion is irresistible, the only other question to be considered is the plea of self-defence which was argued on behalf of the appellant. In this context, the conclusion of the trial Court in holding that it was the accused party who had attacked the complainant party and thereby the complainant party cannot be held to be aggressors was perfectly justified. The trial Court has also noted that the issue was relating to the land situated at place Marori. The trial Court also noted that when the two groups happened to clash and from among the two groups, the members of the group of the complainant party were only the sufferers inasmuch as several of them sustained injuries and everyone of them suffered cut injuries which injuries were demonstrated before the Court by the medical evidence in uncontroverted terms that they were caused by either gandasi or kirpan or sword and the injuries sustained by the deceased Amarjit Singh which was the cause for his death as opined by the medical evidence while at the same time none of the persons in the accused party sustained any injury, the ultimate conclusion of the Court below in holding the accused were squarely responsible and by calling them as the party who indulged in the aggression cannot be found fault with. The evidence of DW-2 was clear to the effect that the persons who accompanied him carried gandasi and sottas, that three were holding gandasis and three were holding sottas. He also admitted in categorical terms that none of the five persons who accompanied him received any injuries except himself. Therefore, even going by the version of DW-2 himself they were armed with dangerous weapons. Therefore, when they proceeded towards the disputed land with arms such as gandasi and kirpans it amply disclosed their mindset to deal with the complainant party sternly against whom they had a definite grudge relating to the land with reference to which the dispute was brewing for quite a long period of time prior to the



date of occurrence, namely, 09.04.2003. More so, as established before the trial Court, the interim order passed against them by the Civil Court was extended on that very date, namely, 09.04.2003 which was a cause for prejudice against the complainant party.

16. On the other hand, the very fact that there were extensive injuries sustained by the complainant party and the death of the deceased in the process of assault inflicted upon them only goes to show that the plea of self-defence was wholly a make a belief version which had no legs to stand and was rightly rejected by trial Court as well as the High Court. We, therefore, do not find any substance in the said submission of the learned counsel.

17. Learned counsel was stressing to a very great extent that it is a case of extending self-defence and, therefore, the case would fall under first part of 304, that Section 149, IPC would not apply to any of the appellants while they may be liable for their individual offences.

18. We have considered the plea of self-defence in detail and have found that there was no acceptable basis for the said claim and once the theory of self-defence stands rejected, we find no scope to apply the submission that the case would fall under Section 304 Part I and that too exclusively as against A-4 Kirpal Singh alone and not others. Having regard to our conclusion that the accused party was the aggressor and having regard to the possession of dangerous weapons it was amply demonstrated that the game play was preplanned to deal with the complainant party when they were proceeding towards the disputed land in question while meeting them at the bandh at Bhatian. The subsequent conduct of the appellants in having inflicted the severe injuries and causing death of the deceased Amarjit Singh only go to show that it was a clear case of pre-meditation. The contention that it was a sudden fight and was without pre-meditation has, therefore, no basis at all. It is relevant to note that at least three types of dangerous weapons

apart from Lathis were in the possession of the accused party. The very fact that the death of the deceased Amarjit Singh was due to the cut injuries inflicted upon him and the other injuries as noted in the body of PWs-10, 11 and 13, as well as, other injured persons of the complainant party was clear proof of the fact that the accused party was present at the place of occurrence, namely, the Bhatian bandh fully prepared to attack the complainant party which they were able to successfully carry out. The admission of DW-2 that none of the accused party was injured also goes to show that everyone of the accused party was standing at the spot with a clear mindset to assault the members of the complainant party. Therefore, it is a futile attempt on the side of the appellants now to contend that it was a sudden fight without any pre-meditation. For the very same reason the contention that in a heat of passion in a group fight the injuries were inflicted cannot also be accepted. The further contention that the accused party did not act in a cruel manner is again a fact contrary to the true state of affairs which prevailed at the place of occurrence. Therefore, it was too much for the appellants to expect and contend that the case would fall under Exception IV to Section 300 IPC. The said contention has to be stated only to be rejected.

19. Once the claim of absence of pre-meditation is rejected, only other submission was that the appellants, if at all they were aggrieved, it was only against PW-11 Hansa Singh and the deceased Amarjit Singh unfortunately fell a prey in the process and, therefore, there was no common object involved in order to attract Section 149, IPC. Again this was a submission which was one in desperation. Even going by the submission of the learned counsel if the accused party had a motive as against Hansa Singh (PW-11) that very fact was sufficient enough to bring the action of the accused party in having caused injuries on the witnesses and other persons as well as the cause for the death of the deceased Amarjit Singh to squarely rope them in the process of their common object. Section 149 provides that if offence is committed by a member



of an unlawful assembly in commission of the object of that assembly then every person who at the time of committing of that offence is a member of that assembly would be guilty of that offence. In this context, it will be worthwhile to refer to the earliest decision on this subject reported in *Mizaji and Anr. v. State of U.P.* - AIR 1959 SC 572 wherein this Court has held as under:-

> "6. This section has been the subject matter of interpretation in the various High Courts of India, but every case has to be decided on its own facts. The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. *It is not necessary that there should be preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149 if it can be held that the offence was such as the members knew was likely to be committed……."*
>
> (Emphasis added)

20. Therefore, applying the above said principle, it can be safely held that everyone of the members of the accused party must have been fully aware that having regard to the fact that dangerous weapons were in their possession, that they had an axe to grind against Hansa Singh (PW-11), that there was every likelihood of the offence of that magnitude would be the ultimate outcome and the factum of such grave offence ultimately brought them within the four corners of the said Section and there was no escape from it. Therefore, the

argument that there was no common object to murder Amarjit Singh also stands rejected. The manner of causing injury on the person of Amarjit Singh also goes to show that all of them were determinative of showing their might by ensuring that the deceased and other injured persons did not escape from their assault and the deceased ultimately succumbed to the injuries inflicted upon him. The assailants ensured that the deceased was hit on his head and every vital part of the body and the chopping of the torso of both the legs was only to ensure that there was no way to escape for the person from the gruesome attack. The totality of the manner in which the assailants acted at the place of occurrence while inflicting the injuries on the deceased as well as others only displayed their united mind and effort in the fulfillment of their objective at the spot and, therefore, there was no scope to individualize the conduct of the assailants in order to mitigate the gravity of the charges found proved against the appellants. Therefore, the submission made by learned senior counsel that at best Kirpal Singh (A-4) can alone be found guilty of the offence under Section 302, IPC or under Section 304 Part I while others may be guilty of the lesser offence falling under Section 323, IPC cannot be accepted. Having regard to the gravamen of the charges found proved against the appellants, we do not find any scope to bring it under Section 304 Part I IPC based on the submission made on behalf of the appellants.

21. As held by us earlier the offence found proved against the appellants squarely fall under Section 302, IPC and the punishment imposed on the appellants for the said offence as well as the other charges levelled against them was fully established, the conviction and sentence imposed on the appellants, therefore, do not call for any interference. The impugned judgment cannot be assailed, the appeals fail and the same are dismissed.

B.B.B. Appeals dismissed.



STATE OF GUJARAT AND ANR.

*v.*

GUJARAT REVENUE TRIBUNAL BAR ASSOCIATION AND ANR.

(Civil Appeal No. 7208 of 2012)

OCTOBER 16, 2012

**[DR. B.S. CHAUHAN AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]**

*Tribunal – Gujarat Revenue Tribunal – Appointment of President – Held: Gujarat Revenue Tribunal is akin to a court and performs similar functions – Consequently, consultation/ concurrence of the High Court required in appointment of the President of the Gujarat Revenue Tribunal – The consultation must be conscious, effective, meaningful and purposeful and not empty formality – Bombay Revenue Tribunal Act, 1957 – s.3(2) – Gujarat Revenue Tribunal Rules, 1982 – r.3(1)(iii)(a) – Constitution of India, 1950 – Article 234.*

*Tribunal – Creation of – Purpose – Tests to determine whether a tribunal is a court or not – Discussed.*

*Words and Phrases – "court" and "tribunal" – Meaning of – Held: The terms 'court' and 'tribunal' are not inter-changeable.*

*Words and Phrases – "judicial office" – Meaning of.*

**The State Government of Gujarat, in exercise of its powers under the Bombay Revenue Tribunal Act, 1957 and the Gujarat Revenue Tribunal Rules, 1982 appointed appellant no.2 as the President of the Gujarat Revenue Tribunal. The respondents filed a writ petition challenging the appointment on the ground that the office concerned, being a "judicial office" could not be usurped by**

**appellant no.2, who had been an Administrative officer all his life. The High Court allowed the writ petition and struck down Rule 3(1)(iii)(a) of the Gujarat Revenue Tribunal Rules 1982, which conferred upon the State Government the power to appoint the Secretary to the Government of Gujarat, as the President of the Revenue Tribunal constituted under the Bombay Revenue Tribunal Act, 1957. The High Court held that the Revenue Tribunal was in the strict sense, a "court" and the President, who presided over such Tribunal could therefore, only be a "Judicial Officer", a District Judge etc., for which concurrence of the High Court was necessary under Article 234 of the Constitution. Hence the instant appeal.**

**Dismissing the appeal, the Court**

**HELD: 1.1. Although, the term 'court' has not been defined under the Bombay Revenue Tribunal Act, 1957, it is indisputable that courts belong to the judicial hierarchy and constitute the country's judiciary, as distinct from the executive or legislative branches of the State. Judicial functions involve the decision of rights and liabilities of the parties. An enquiry and investigation into facts is a material part of the judicial function. The legislature, in its wisdom has created tribunals and transferred the work which was regularly done by the civil courts to them, as it was found necessary to do so in order to provide efficacious remedy and also to reduce the burden on the civil courts and further, also to save the aggrieved person from bearing the burden of heavy court fees etc. Thus, the system of tribunals was created as a machinery for the speedy disposal of claims arising under a particular Statute/Act. Most of the Tribunals have been given the power to lay down their own procedure. In some cases, the procedure may be adopted by the Tribunal and the same may require the approval of the competent authority/government. However, in each case,**



**the principles of natural justice are required to be observed. Such tribunals therefore, basically perform quasi-judicial functions. The system of tribunals is hence, unlike that of the regularly constituted courts under the hierarchy of the judicial system, which are not authorised to devise their own procedure for dealing with cases. Under certain statutes, Tribunals have been authorised to exercise certain powers conferred under certain provisions of the Code of Civil Procedure or the Code of Criminal Procedure, but not under the whole Code, be it Civil or Criminal. However, in a regular court, the said Codes, in their entirety, civil as well as criminal, must be strictly adhered to. Therefore, the terms 'court' and 'Tribunal' are not inter-changeable. [Para 9] [834-A-G]**

**1.2. A Tribunal may not necessarily be a court, inspite of the fact that it may be presided over by a judicial officer, as other qualified persons may also possibly be appointed to perform such duty. One of the tests to determine whether a tribunal is a court or not, is to check whether the High Court has revisional jurisdiction so far as the judgments and orders passed by the Tribunal are concerned. Supervisory or revisional jurisdiction is considered to be a power vesting in a superior court or Tribunal, enabling it to satisfy itself as regards the correctness of the orders of the inferior Tribunal. This is the basic difference between appellate and supervisory jurisdiction. Appellate jurisdiction confers a right upon the aggrieved person to make a complaint in the prescribed manner, to a higher forum whereas, supervisory/revisional power has a different object and purpose altogether as it confers the right and responsibility upon the higher forum to keep the subordinate Tribunals within the limits of the law. It is for this reason that revisional power can be exercised by the competent authority/court *suo motu,* in order to see that subordinate Tribunals do not transgress the rules of law**

**and are kept within the framework of powers conferred upon them. Such revisional powers have to be exercised sparingly, only as a discretion in order to prevent gross injustice and the same cannot be claimed, as a matter of right by any party. Even if the person heading the Tribunal is otherwise a "judicial officer", he may merely be *persona designata,* but not a court, despite the fact that he is expected to act in a quasi-judicial manner. In the generic sense, a court is also a Tribunal. However, courts are only such Tribunals as have been created by the concerned statute and belong to the judicial department of the State as opposed to the executive branch of the said State. The expression 'court' is understood in the context of its normally accepted connotation, as an adjudicating body, which performs the judicial functions of rendering definitive judgments having a sense of finality and authoritativeness to bind the parties litigating before it. Secondly, it must be in the course of exercise of the sovereign judicial power transferred to it by the State. Any Tribunal or authority therefore, that possesses these attributes, may be categorized as a court. [Para 9] [834-H; 835-A-H]**

**1.3. Tribunals have primarily been constituted to deal with cases under special laws, and to hence provide for specialised adjudication alongside the courts. Therefore, a particular Act/set of Rules will determine whether the functions of a particular Tribunal are akin to those of the courts, which provide for the basic administration of justice. Where there is a lis between two contesting parties and a statutory authority is required to decide such dispute between them, such an authority may be called as a quasi-judicial authority, i.e., a situation where, (a) a statutory authority is empowered under a statute to do any act (b) the order of such authority would adversely affect the subject and (c) although there is no lis or two contending parties, and the contest is between**



**the authority and the subject and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is a quasi judicial decision. An authority may be described as a quasi-judicial authority when it possesses certain attributes or trappings of a 'court', but not all. In case certain powers under C.P.C. or Cr.P.C. have been conferred upon an authority, but it has not been entrusted with the judicial powers of the State, it cannot be held to be a court. [Para 10] [836-A-E]**

*The Bharat Bank Ltd., Delhi v. The Employees of Bharat Bank & Anr.* **AIR 1950 SC 188: 1950 SCR 459;** *Virindar Kumar Satyawadi v. The State of Punjab,* **AIR 1956 SC 153: 1955 SCR 1013;** *Engineering Mazdoor Sabha & Anr. v. Hind Cycles Ltd.* **AIR 1963 SC 874: 1963 Suppl. SCR 625;** *Associated Cement Companies Ltd. v. P.N. Sharma & Anr.* **AIR 1965 SC 1595: 1965 SCR 366;** *Ramrao & Anr. v. Narayan & Anr.* **AIR 1969 SC 724: 1969 (3) SCR 185;** *State of Himachal Pradesh & Ors. v. Raja Mahendra Pal & Anr.* **AIR 1999 SC 1786: 1999 (2) SCR 323;** *Keshab Narayan Banerjee v. State of Bihar & Ors.* **AIR 2000 SC 485: 1999 (5) Suppl. SCR 394;** *Indian National Congress (I) v. Institute of Social Welfare & Ors.* **AIR 2002 SC 2158: 2002 (3) SCR 1040;** *K. Shamrao & Ors. v. Assistant Charity Commissioner* **(2003) 3 SCC 563: 2003 (2) SCR 523;** *Trans Mediterranean Airways v. Universal Exports* **(2011) 10 SCC 316: 2011 (14) SCR 47;** *Namit Sharma v. Union of India* **JT 2012 (9) SC 166 and** *Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjunwala & Ors.* **AIR 1961 SC 1669: 1962 SCR 339 – relied on.**

*Shell Co. of Australia v. Federal Commissioner of Taxation* **(1931) A.C. 275 – referred to.**

**2.1. The present case is also required to be examined in the context of Article 227 of the Constitution of India, with specific reference to the 42nd Constitutional**

**Amendment Act 1976, where the expression 'court' stood by itself, and not in juxtaposition with the other expression used therein, namely, 'Tribunal'. The power of the High Court of judicial superintendence over the Tribunals, under the amended Article 227 stood obliterated. By way of the amendment in the sub-article, the words, "and Tribunals" stood deleted, and the words "subject to its appellate jurisdiction" have been substituted, after the words, "all courts". In other words, this amendment purports to take away the High Court's power of superintendence over Tribunals. Moreover, the High Court's power has been restricted to have judicial superintendence only over the judgments of inferior courts, i.e. judgments in cases where against the same, appeal or revision lies with the High Court. A question does arise as regards whether the expression 'courts' as it appears in the amended Article 227, is confined only to the regular civil or criminal courts that have been constituted under the hierarchy of courts and whether all Tribunals have in fact been excluded from the purview of the High Court's superintendence. Undoubtedly, all courts are Tribunals but all Tribunals are not courts. [Para 12] [838-C-G]**

**2.2. The High Court's power of judicial superintendence, even under the amended provisions of Article 227 is applicable, provided that two conditions are fulfilled; firstly, that such Tribunal, body or authority must perform judicial functions of rendering definitive judgments having finality, which bind the parties in respect of their rights, in the exercise of the sovereign judicial power transferred to it by the State, and secondly, that such Tribunal, body or authority must be subject to the High Court's appellate or revisional jurisdiction. [Para 13] [838-H; 839-A-B]**

**3. A person holds 'judicial office' if he is performing**



**judicial functions. The scheme of Chapters V and VI of the Constitution deal with judicial office and judicial service. The expression, 'judicial office' in the generic sense, may include a wide variety of offices which are connected with the administration of justice in one way or another. The holder of a judicial office under Article 217(2)(a), means a person who exercises only judicial functions, determines cases *inter-se* parties, and renders decisions in purely judicial capacity. 'Judicial office' means a subsisting office with a substantive position, which has an existence independence from its holder. [Paras 18, 19] [840-E-F; 841-A-C]**

*Statesman (Private) Ltd. v. H.R. Deb & Ors.* **AIR 1968 SC 1495: 1968 SCR 614 – followed.**

*Shri Kumar Padma Prasad v. Union of India & Ors.* **(1992) 2 SCC 428: 1992 (2) SCR 109 – relied on.**

*S.P. Sampath Kumar v. Union of India* **AIR 1987 SC 346;** *L. Chandra Kumar v. Union of India & Ors.* **AIR 1997 SC 1125: 1997 (2) SCR 1186;** *V.K. Majotra & Ors. v. Union of India & Ors.* **AIR 2003 SC 3909: 2003 (3) Suppl. SCR 483 – referred to.**

**4.1. Upon an examination of the functions and powers of the Gujarat Revenue Tribunal, it is crystal clear that the Tribunal does not deal only with revenue matters as provided under the Schedule I of the Bombay Revenue Tribunal Act, 1957, but has also been conferred appellate/revisional powers under various other statutes. Most of those statutes provide that the Gujarat Revenue Tribunal, while dealing with appeals, references, revisions, would act giving strict adherence to the procedure prescribed in the CPC, for deciding a matter as followed by the Civil Court and certain powers have also been conferred upon it, as provided in the Cr.P.C.**

**and IPC. The Gujarat Revenue Tribunal has been conferred the power to adjudicate disputes, which may arise from the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948. Section 75(1) of the said Act provides that an appeal against the award of the Collector, made under Section 66 may be filed before the Tribunal. Sub-section (2) of Section 75 provides, that in deciding appeals preferred under sub-section (1), the Tribunal shall exercise all the powers which a court has and subject to the regulations framed by the Tribunal under the Act 1957, follow the same procedure which a court follows, in deciding appeals from the decree or order of an original court under the CPC. Section ?80 of the Act provides that all inquiries and proceedings before the Tribunal shall be deemed to be judicial proceedings within the meaning of Sections 193, 219 and 228 of the IPC. The Gujarat Agricultural Lands Ceiling Act, 1960, was enacted to fix a ceiling on holdings of agricultural lands, and to provide for the acquisition and disposal of surplus agricultural lands. Chapter VI of the said Act deals with procedure, appeals and revision. Section 36 provides that any person aggrieved by an award made by the Tribunal under Section 24, or by the Collector under Section 28, may appeal to the Tribunal. Sub-section (3) of Section 36 provides that in deciding such appeal the Tribunal shall exercise all the powers which a Court has, and must follow the same procedure which the Court follows in deciding appeals from the decree or order of the original court under the CPC. Section 48 provides that all inquiries and proceedings before the Tribunal shall be deemed to be 'judicial proceedings', within the meaning of Sections 193, 219 and 228 of the lPC. The Bombay Public Trust Act, l950, has been enacted to regulate, and to make better provision for the administration of public religious and charitable trusts in the State of Bombay, which also extends to the State of Gujarat. Section 74 of the Act**



**provides that all inquiries and appeals shall be deemed to be judicial proceedings within the meaning of Sections 193, 219 and 228 of the IPC. Section 76 provides that, save, in so far as they may be inconsistent with anything contained in the Act, the provisions of the CPC will apply to all proceedings before the court under this Act. Section 13(1) of the Act, 1957, provides that in exercising the jurisdiction conferred upon the Tribunal, the Tribunal shall have all the powers of a civil court as enumerated therein and shall be deemed to be a civil court for the purposes of Sections 195, 480 and 482 of the Cr.P.C., and that its proceedings shall be deemed to be judicial proceedings, within the meaning of Sections 193, 219 and 228 of the IPC. Thus, the Gujarat Revenue Tribunal is akin to a court and performs similar functions. [Paras 23, 24, 25, 26 and 27] [843-B-H; 844-A-E; 845-A-G]**

**4.2. The High Court has supervisory control over the Gujarat Revenue Tribunal, to the extent that it can revise and correct the judgments and orders passed by it. In such a fact-situation, the consultation/concurrence of the High Court, in the matter of making the appointment of the President of the Gujarat Revenue Tribunal is required. [Para 27] [846-A-B]**

**4.3. The object of consultation is to render the consultation meaningful to serve the intended purpose. It requires the meeting of minds between the parties involved in the process of consultation on the basis of material facts and points, to evolve a correct or at least satisfactory solution. If a power can be exercised only after consultation, such consultation must be conscious, effective, meaningful and purposeful. It means that the party must disclose all the facts to other party for due deliberation. The consultee must express his opinion after full consideration of the matter upon the relevant facts and quintessence. Evidently the procedure to be**

**observed under Article 234 of the Constitution goes to the extent of the true meaning of consultative process and not an empty formality. [Paras 28, 29] [846-C-D; G]**

*UOI v. Sankalchand Himatlal Sheth* **AIR 1977 SC 2328: 1978 (1) SCR 423;** *Subhash Sharma & Ors. v. UOI* **AIR 1991 SC 631: 1990 (2) Suppl. SCR 433;** *Justice K.P Mohapatra v. Sri Ram Chandra Nayak and Ors.* **(2002) 8 SCC 1: 2002 (3) Suppl. SCR 166;** *Gauhati High Court & Anr. v. Kuladhar Phukan & Anr.* **AIR 2002 SC 1589: 2002 (2) SCR 808;** *High Court of Judicature for Rajasthan v. P.P Singh* **AIR 2003 SC 1029: 2003 (1) SCR 593;** *UOI v. Kali Dass Batish,* ***AIR 2006 SC 789*** **and** *Andhra Bank v. Andhra Bank Officers* **AIR 2008 SC 2936: 2008 (7) SCC 203 – relied on.**

**Case Law Reference:**

| | | |
|---|---|---|
| **1950 SCR 459** | **relied on** | **Para 10** |
| **1955 SCR 1013** | **relied on** | **Para 10** |
| **1963 Suppl. SCR 625** | **relied on** | **Para 10** |
| **1965 SCR 366** | **relied on** | **Para 10** |
| **1969 (3) SCR 185** | **relied on** | **Para 10** |
| **1999 (2) SCR 323** | **relied on** | **Para 10** |
| **1999 (5) Suppl. SCR 394** | **relied on** | **Para 10** |
| **2002 (3) SCR 1040** | **relied on** | **Para 10** |
| **2003 (2) SCR 523** | **relied on** | **Para 10** |
| **2011 (14) SCR 47** | **relied on** | **Para 10** |
| **JT 2012 (9) SC 166** | **relied on** | **Para 10** |
| **1962 SCR 339** | **relied on** | **Para 11** |
| **(1931) A.C. 275** | **referred to** | **Para 13** |



| | | |
|---|---|---|
| **AIR 1987 SC 346** | **referred to** | **Para 14** |
| **1997 (2) SCR 1186** | **referred to** | **Para 15** |
| **2003 (3) Suppl. SCR 483** | **referred to** | **Para 16** |
| **1968 SCR 614** | **followed** | **Paras 17-18** |
| **1992 (2) SCR 109** | **relied on** | **Para 19** |
| **1978 (1) SCR 423** | **relied on** | **Para 28** |
| **1990 (2) Suppl. SCR 433** | **relied on** | **Para 28** |
| **2002 (3) Suppl. SCR 166** | **relied on** | **Para 28** |
| **2002 (2) SCR 808** | **relied on** | **Para 28** |
| **2003 (1) SCR 593** | **relied on** | **Para 28** |
| **AIR 2006 SC 789** | **relied on** | **Para 28** |
| **2008 (7) SCC 203** | **relied on** | **Para 28** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7208 of 2012.

From the Judgment and Order dated 14.09.2009 of the High Court of Gujarat at Ahmedabad in Special Civil Application No. 8209 of 1988.

Preetesh Kapur, Hemantika Wahi, S. Panda for the Appellants.

Yashank Adhyaru, Laxmi Abhichandani, Vimal Chandra S. Dave for the Respondents.

The Judgment of the Court was delivered by

**DR. B.S. CHAUHAN, J.** 1. This appeal has been preferred against the impugned judgment and order dated 14.9.2009, passed by the High Court of Gujarat at Ahmedabad in Special

Civil Application No.8209 of 1988, by way of which the High Court has allowed the writ petition filed by the respondents striking down Rule 3(1)(iii)(a) of the Gujarat Revenue Tribunal Rules 1982 (hereinafter referred to as 'Rules 1982'), which conferred power upon the State Government to appoint the Secretary to the Government of Gujarat, as President of the Revenue Tribunal (hereinafter referred to as 'Tribunal') constituted under the Bombay Revenue Tribunal Act, 1957 (hereinafter referred to as the 'Act, 1957').

2. The facts and circumstances giving rise to this appeal are mentioned hereunder:

A. The Government of Gujarat, in exercise of its power under the Act of 1957 and the Rules, 1982 appointed appellant no.2 as the President of the Gujarat Revenue Tribunal vide order dated 16.4.1988. His appointment was challenged by the respondents herein, on the ground that the office of the Chairman, being a "judicial office" could not be usurped by a person who had been an Administrative Officer all his life. The validity of Sections 4 and 20 of the Act 1957 and Rule 3(1)(iii)(a) of the Rules 1982 was challenged. The appellants contested the writ petition, submitting that in exercise of the power conferred under Section 20 of the Act 1957 and the Rules 1982, a notification was issued on 8.2.1983, making the Secretary to the Government eligible for appointment as Chairman of the Revenue Tribunal, and as he had acted as a Revenue Officer while holding the posts of Sub Divisional Officer, District Collector, and Divisional Commissioner, it could not be held that he was ineligible to hold the said post of President of the Tribunal.

B. During the pendency of the aforementioned writ petition before the High Court, the Government of Gujarat made the appointment of Shri A.D. Desai, a retired I.A.S. Officer on 27.2.2007 to the post of President of the Tribunal, however, the operation of his appointment order was stayed by the High Court. This Court, while entertaining Special Leave Petition (C)



No.4924 of 2007, vide order dated 26.3.2007, stayed the operation of the order of the High Court. The said S.L.P. was finally disposed of vide order dated 16.4.2008 observing that, the petition had been filed only against the interim order passed by the High Court. However, the said interim order dated 26.3.2007 passed by this Court, by which it stayed the order of the High Court, as mentioned earlier, would continue till the disposal of the Special Civil Application No.8209 of 1988 by the Gujarat High Court. Subsequently, State of Gujarat vide order dated 29.7.2009, appointed Mr. A.J. Shukla as the President of the Tribunal.

C. The High Court then, vide impugned judgment and order dated 14.9.2009 held that the Tribunal was in the strict sense, a "court" and that the President, who presides over such Tribunal could therefore, only be a "Judicial Officer", a District Judge etc., for which, concurrence of the High Court is necessary under Article 234 of the Constitution of India. Hence, the present appeal.

3. Shri Preetesh Kapur, learned counsel appearing on behalf of the appellants, submitted that the High Court committed an error by striking down the aforesaid rule, holding that the Secretary to the Government of Gujarat cannot be appointed as President of the Tribunal. It erred in holding that the Tribunal was a court and only a "Judicial Officer", i.e., a Judicial Officer holding such equivalent post as is referred to in Rule 3(iii) of the Rules 1982 can be appointed as President of the said Tribunal. The Secretary to the Government had already worked as a Revenue Officer for a prolonged period of time and, hence, has acquired the requisite experience to deal with all types of revenue matters, in spite of the fact that the Tribunal has the trappings of a court, he is eligible for the said post in terms of qualifications. An Administrative Officer, who is a member of the Tribunal under Rule 3(1)(iii)(g) can still be appointed as the President of the Tribunal as the validity of clause (g) was not under challenge. But on that count there will

be no illegality. The Tribunal cannot be held to be a 'court' within the meaning of the Constitutional provisions. The Act 1957 and Rules 1982, do not even suggest consultation with the High Court, while appointing the President of the Tribunal. Therefore, the appeal deserves to be allowed.

4. On the contrary, Shri Yashank Pravin Adhyaru, learned Senior counsel appearing on behalf of the respondents has vehemently opposed the appeal contending that, no error can be found with the impugned judgment and order of the High Court. This is because the earlier Acts, which stood repealed by the Act of 1957, did not contain any provision enabling the State Government to appoint an Administrative Officer as the President of the Tribunal. Under the old Act, the person who is eligible to hold such post was a retired Judge of the High Court. Moreover, Rule 3(iii) of the Rules 1982 enables the State Government to appoint a Judicial Officer, a District Judge, the President of the Court of Small Causes, Bombay and the Principal Judge of the City Civil Court to the aforementioned post. In case they are still in service, the question of their appointment as President of the Revenue Tribunal, would never arise, without the effective consultation/concurrence of the High Court. The provisions of Articles 233 to 236 of the Constitution of India are attracted. In fact, this is the ratio of the impugned judgment. In the facts and circumstances of the case, no interference is warranted. The appeal lacks merit and is liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

6. The High Court itself has taken note of the previous statutory provisions, observing that the Bombay Revenue Tribunal Act, 1939 (hereinafter referred to the 'Act 1939'), did not provide for the post of President as such, and that this power was conferred upon the rule making authority. Rule 4(1) of the Bombay Revenue Tribunal Rules 1939, (hereinafter



referred to 'Rules 1939') prescribed the qualifications for the post of President, as a person who has officiated as a Judge of the High Court, or has served as such, or has exercised the powers of, a District Judge, or the Chief Judge of the Court of Small Causes, Bombay, for a period of not less than 10 years and has retired from service of the Crown in India.

7. In the year 1941, Rule 4(1) of the Rules 1939 was amended vide Notifications dated 5.12.1940 and 22.9.1941. As per the amended Rules, the President could be a person who had either officiated as a Judge of the High Court, or had served as, or exercised the powers of a District Judge, or of the Chief Judge of the Court of Small Causes, Bombay, for a period of not less than 10 years, and had retired from the service of the Government of India or the Government of any State. In 1957, Rule 4(1) was substituted, enabling the rule making authority, *inter-alia*, to appoint the Secretary to the Government of Bombay, Legal Department and the Legal Remembrancer of Legal Affairs as President of the Tribunal. Later, the Act of 1939 was substituted by the Act, 1957.

**Relevant Statutory Provisions** :

8. Section 3(2) of the Act 1957, provides for the appointment of the President and Members of the Tribunal. Section 9 thereof, provides for the jurisdiction of the Tribunal to entertain and decide appeals from, and revise decisions and orders in respect of cases arising under the provisions of the enactments specified in the First Schedule. Schedule 1 includes the Bombay Land Revenue Code, 1879, the Bombay Land Revenue Code, 1874 as extended to the Kutch area of State of Bombay, the Indian Forest Act, 1927 etc.

Section 9(4) of the Act reads as under:

"Notwithstanding anything contained in any other law for the time being in force, when the Tribunal has jurisdiction to entertain and decide appeals from and revise decisions

and orders of, any person, officer or authority to any matter aforesaid, no other person, officer or authority shall have jurisdiction to entertain and decide appeals from and revise decisions or orders of such person, officer or authority in that matter."

Section 13(1) of the Act reads as under:

"In exercising the jurisdiction conferred upon it by or under this Act, the Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath, affirmation or affidavit, of summoning and enforcing the attendance of witnesses, of compelling discovery and the production of documents and material objects, requisitioning any public record or any copy thereof from any Court or office, issuing commissions for the examination of witnesses or documents, and for such other purposes as may be prescribed and the Tribunal shall be deemed to be a Civil Court for all the purposes of sections 195, 480 and 482 of the Code of Criminal Procedure, 1898, and its proceedings shall be deemed to be judicial proceedings within the meaning of sections 193, 219 and 229 of the Indian Penal Code."

Section 15 empowers the Tribunal to entertain question of interpretation regarding laws of public importance which can only be decided after hearing the State Government on the matter. Section 16 provides that no appeal shall lie to the State Government against the order passed by the Tribunal. Section 17 of the Act confers upon the Tribunal the power to review its own decision, on grounds similar to the ones mentioned in Order 47 Rule 1 CPC. Such review application may be filed before it within a period of 90 days from the date of the said decision of the Tribunal. The Tribunal has further been given the power to condone delay in making applications for review.

**Section 20 reads as under**:



"20(1) The State Government may, by notification in the Official Gazette, make rules consistent with the provisions of this Act for carrying into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing provision, such rules may provide for the following matters, namely:-

**(a) the qualifications of the President and other members of the Tribunal;**

(b) the period of office and the terms and conditions of service of the President and other members of the Tribunal;

(c) the qualifications of the Registrar and Deputy Registrars;

(d) any other powers of a Civil Court which may be vested in the Tribunal."

(Emphasis added)

Rule 3 of the Rules 1982 reads as under :

**"3. Qualification of President and members of Tribunal-**

(1) The President shall be a person who has not attained the age of 65 years, and

(i) Who is or has been a judge of a High Court, or

(ii)Who is an advocate qualified to be a judge of a High Court, or

(iii) Who has, for a period of not less than three years, held the office, or as the case may be, exercised the powers of –

(a) **The Secretary to the Government of Gujarat**;

(b) The Principal Judge of the City Civil Court, Ahmedabad;

(c) A District Judge;

(d) The Chief Judge, Small Cause Court, Ahmedabad;

(e) A member of the Industrial Court constituted under the Bombay Industrial Relations Act, 1946;

(f) A member of the Industrial Tribunal constituted under the Industrial Disputes Act, 1957; or

(g) A member of the Gujarat Revenue Tribunal constituted under the Bombay Revenue Tribunal Act, 1957." (Emphasis added)

(2) A member shall be a person who has not attained the age of 65 years and-

(a) Who is holding or has held an office not lower in rank than that of -

(i) A Collector;

(ii) A Deputy Secretary to the Government of Gujarat;

(iii) A District Judge;

(iv) An Assistant Judge, or a Civil Judge (Senior Division) appointed under the Bombay Civil Courts Act, 1869, or a Civil Judge holding an equivalent office under any other law for the time being in force; or

(b) Who is an advocate or attorney of the High Court, or a legal practitioner entitled to practice before courts other than the High Court under any law relating to legal practitioners for the time being in force in this State, has practiced for not less than five years in any Civil Courts or



before the Tribunal, and is, in the opinion of the State Government, well versed in revenue and tenancy laws."

9. Although, term 'court' has not been defined under the Act, it is indisputable that courts belong to the judicial hierarchy and constitute the country's judiciary as distinct from the executive or legislative branches of the State. Judicial functions involve the decision of rights and liabilities of the parties. An enquiry and investigation into facts is a material part of judicial function. The legislature, in its wisdom has created tribunals and transferred the work which was regularly done by the civil courts to them, as it was found necessary to do so in order to provide efficacious remedy and also to reduce the burden on the civil courts and further, also to save the aggrieved person from bearing the burden of heavy court fees etc. Thus, the system of tribunals was created as a machinery for the speedy disposal of claims arising under a particular Statute/Act. Most of the Tribunals have been given the power to lay down their own procedure. In some cases, the procedure may be adopted by the Tribunal and the same may require the approval of the competent authority/government. However, in each case, the principles of natural justice are required to be observed. Such tribunals therefore, basically perform quasi-judicial functions. The system of tribunals is hence, unlike that of the regularly constituted courts under the hierarchy of judicial system, which are not authorised to devise their own procedure for dealing with cases. Under certain statutes Tribunals have been authorised to exercise certain powers conferred under some provisions of the Code of Civil Procedure (hereinafter referred to as the 'CPC') or the Code of Criminal Procedure (hereinafter referred to as the 'Cr.P.C.'), but not under the whole Code, be it Civil or Criminal. However, in a regular court, the said Codes, in their entirety, civil as well as criminal, must be strictly adhered to. Therefore, from the above, it is evident that the terms 'court' and 'Tribunal' are not inter-changeable.

A Tribunal may not necessarily be a court, in spite of the

fact that it may be presided over by a judicial officer, as other qualified persons may also possibly be appointed to perform such duty. One of the tests to determine whether a tribunal is a court or not, is to check whether the High Court has revisional jurisdiction so far as the judgments and orders passed by the Tribunal are concerned. Supervisory or revisional jurisdiction is considered to be a power vesting in any superior court or Tribunal, enabling it to satisfy itself as regards the correctness of the orders of the inferior Tribunal. This is the basic difference between appellate and supervisory jurisdiction. Appellate jurisdiction confers a right upon the aggrieved person to complain in the prescribed manner, to a higher forum whereas, supervisory/revisional power has a different object and purpose altogether as it confers the right and responsibility upon the higher forum to keep the subordinate Tribunals within the limits of the law. It is for this reason that revisional power can be exercised by the competent authority/court *suo motu,* in order to see that subordinate Tribunals do not transgress the rules of law and are kept within the framework of powers conferred upon them. Such revisional powers have to be exercised sparingly, only as a discretion in order to prevent gross injustice and the same cannot be claimed, as a matter of right by any party. Even if the person heading the Tribunal is otherwise a "judicial officer", he may merely be *persona designata,* but not a court, despite the fact that he is expected to act in a quasi-judicial manner. In the generic sense, a court is also a Tribunal, however, courts are only such Tribunals as have been created by the concerned statute and belong to the judicial department of the State as opposed to the executive branch of the said State. The expression 'court' is understood in the context of its normally accepted connotation, as an adjudicating body, which performs judicial functions of rendering definitive judgments having a sense of finality and authoritativeness to bind the parties litigating before it. Secondly, it should be in the course of exercise of the sovereign judicial power transferred to it by the State. Any Tribunal or authority therefore, that possesses these attributes, may be categorized as a court.



10. Tribunals have primarily been constituted to deal with cases under special laws and to hence provide for specialised adjudication alongside the courts. Therefore, a particular Act/ set of Rules will determine whether the functions of a particular Tribunal are akin to those of the courts, which provide for the basic administration of justice. Where there is a lis between two contesting parties and a statutory authority is required to decide such dispute between them, such an authority may be called as a quasi-judicial authority, i.e., a situation where, (a) a statutory authority is empowered under a statute to do any act (b) the order of such authority would adversely affect the subject and (c) although there is no lis or two contending parties, and the contest is between the authority and the subject and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is a quasi judicial decision. An authority may be described as a quasi-judicial authority when it possesses certain attributes or trappings of a 'court', but not all. In case certain powers under C.P.C. or Cr.P.C. have been conferred upon an authority, but it has not been entrusted with the judicial powers of the State, it cannot be held to be a court.

(See : *The Bharat Bank Ltd., Delhi v. The Employees of Bharat Bank & Anr.,* AIR 1950 SC 188; *Virindar Kumar Satyawadi v. The State of Punjab,* AIR 1956 SC 153; *Engineering Mazdoor Sabha & Anr. v. Hind Cycles Ltd.,* AIR 1963 SC 874; *Associated Cement Companies Ltd. v. P.N. Sharma & Anr.,* AIR 1965 SC 1595; *Ramrao & Anr. v. Narayan & Anr.,* AIR 1969 SC 724; *State of Himachal Pradesh & Ors. v. Raja Mahendra Pal & Anr.,* AIR 1999 SC 1786; *Keshab Narayan Banerjee v. State of Bihar & Ors.,* AIR 2000 SC 485; *Indian National Congress (I) v. Institute of Social Welfare & Ors.,* AIR 2002 SC 2158; *K. Shamrao & Ors. v. Assistant Charity Commissioner,* (2003) 3 SCC 563; *Trans Mediterranean Airways v. Universal Exports,* (2011) 10 SCC 316 at page 338; and *Namit Sharma v. Union of India,* JT 2012 (9) SC 166).

11. In *Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjunwala & Ors.,* AIR 1961 SC 1669, Hidayatullah, J. (as His Lordship then was) made a distinction between a "court" and a "Tribunal" as is explained hereunder:

> "…….These Tribunals have the authority of law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath, *but they are not part of the ordinary Courts of Civil Judicature.* They share the exercise of the judicial power of the State, but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law. *They are very similar to Courts, but are not Courts.* When the Constitution speaks of ' Courts' in Art. 136, 227 or 228 or in Arts. 233 to 237 or in the Lists, it contemplates Courts of Civil Judicature but not Tribunals other than such Courts. This is the reason for using both the expressions in Arts. 136 and 227. By "Courts" is meant Courts of Civil Judicature and by "Tribunals", those bodies of men *who are appointed to decide controversies arising under certain special laws.* Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before Tribunals, and the residue goes before the ordinary Courts of Civil Judicature."
>
> (Emphasis added)

To explain the distinction between a Court and Tribunal, His Lordship further relied upon the judgment in the case of *Shell Co. of Australia v. Federal Commissioner of Taxation,* (1931) A.C. 275, wherein it has been observed as under:

> "…..In that connection it may be useful to enumerate some negative propositions on this subject: 1. A Tribunal is not necessarily a Court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another body……"



12. The present case is also required to be examined in the context of Article 227 of the Constitution of India, with specific reference to the 42nd Constitutional Amendment Act 1976, where the expression 'court' stood by itself, and not in juxtaposition with the other expression used therein, namely, 'Tribunal'. The power of the High Court of judicial superintendence over the Tribunals, under the amended Article 227 stood obliterated. By way of the amendment in the sub-article, the words, "and Tribunals" stood deleted and the words "subject to its appellate jurisdiction" have been substituted after the words, "all courts". In other words, this amendment purports to take away the High Court's power of superintendence over Tribunals. Moreover, the High Court's power has been restricted to have judicial superintendence only over judgments of inferior courts, i.e. judgments in cases where against the same, appeal or revision lies with the High Court. A question does arise as regards whether the expression 'courts' as it appears in the amended Article 227, is confined only to the regular civil or criminal courts that have been constituted under the hierarchy of courts and whether all Tribunals have in fact been excluded from the purview of the High Court's superintendence. Undoubtedly, all courts are Tribunals but all Tribunals are not courts.

13. The High Court's power of judicial superintendence, even under the amended provisions of Article 227 is applicable, provided that two conditions are fulfilled; firstly, such Tribunal, body or authority must perform judicial functions of rendering

definitive judgments having finality, which bind the parties in respect of their rights, in the exercise of the sovereign judicial power transferred to it by the State, and secondly such Tribunal, body or authority should be the subject to the High Court's appellate or revisional jurisdiction.

14. In *S.P. Sampath Kumar v. Union of India,* AIR 1987 SC 346, this Court held that, in the Central Administrative Tribunal (hereinafter referred to as the 'CAT'), the presence of a judicial member was in fact a requirement of fair procedure of law, and that the administrative Tribunal must be presided over in such a manner, so as to inspire confidence in the minds of the people, to the effect that it is highly competent and an expert body, with judicial approach and objectivity and, thus, this Court held that the persons who preside over the CAT, which is intended to supplant the High Court must have adequate legal training and experience.

This Court further observed that it was desirable that a high-powered committee, headed by a sitting Judge of the Supreme Court who has been nominated by the Chief Justice of India to be its Chairman, should select the persons who preside over the CAT, to ensure the selection of proper and competent people to the office of trust and help to build up its reputation and accountability. The Tribunal should consist of one Judicial Member and one Administrative Member on any Bench.

15. In *L. Chandra Kumar v. Union of India & Ors.,* AIR 1997 SC 1125, this Court held that the power of judicial review of the High Court under Article 226 of the Constitution of India, being a basic feature of the Constitution cannot be excluded. In this context, the Court held:

> "….It must not be forgotten that what is permissible to be supplanted by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself……."



The Court further observed that the creation of this Tribunal is founded on the premise that, specialised bodies comprising of both, well trained administrative members and those with judicial experience, would by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. The contention that the said Tribunal should consist only of a judicial member was rejected, and it was held that such a direction would attack the primary grounds of the theory, pursuant to which such Tribunals were constituted.

16. In *V.K. Majotra & Ors. v. Union of India & Ors.,* AIR 2003 SC 3909, this Court reversed the judgment of the Allahabad High Court wherein, direction had been issued that the Vice-Chairman of the CAT could be only a retired Judge of the High Court, i.e., a Judicial Member and that such a post could not be held by a Member of the Administrative Service, observing that such a direction had put at naught/obliterated from the statute book, certain provisions without striking them down.

17-18. A Constitution Bench of this Court in *Statesman (Private) Ltd. v. H.R. Deb & Ors.,* AIR 1968 SC 1495, examined the provisions of Sections 7(3)(d) and g(1) of the Industrial Disputes Act, 1947, which contain the expression 'judicial office', and held that a person holds 'judicial office' if he is performing judicial functions. The scheme of Chapters V and VI of the Constitution deal with judicial office and judicial service. Judicial service means a separation of the judiciary from the executive in public services. The functions of the labour court are of great public importance and are quasi-judicial in nature, therefore, a man having experience of the civil side of the law is more suitable to preside over it, as compared to a person working on the criminal side. Persons employed performing multifarious duties and, in addition, performing some judicial functions, may not truly fulfil the requirement of the statute. Judicial office thus means, a fixed position for the performance of duties, which are primarily judicial in nature.

19. In *Shri Kumar Padma Prasad v. Union of India & Ors.,* (1992) 2 SCC 428, this Court held that the expression, 'judicial office' in the generic sense, may include a wide variety of offices which are connected with the administration of justice in one way or another. The holder of a judicial office under Article 217(2)(a), means a person who exercises *only judicial functions,* determines cases *inter-se* parties and renders decisions in purely judicial capacity. He must belong to the judicial services which is a class in itself, is free from executive control, and is disciplined to hold the dignity, integrity and independence of the judiciary. The Court held that 'judicial office' means a subsisting office with a substantive position, which has an existence independence from its holder.

20. The instant case is required to be examined in light of the aforesaid settled legal propositions.

21. The present Writ Petition was filed on the premise, that the post of the President of the Gujarat Revenue Tribunal was covered by the expression 'District Judge, as has been defined under Article 236 of the Constitution, the definition being an exclusive one, and thus, in view of the provisions of Article 233 of the Constitution, the appointment of the President of the Tribunal can be made only upon consultation with the High Court. In the alternative it was suggested, that the said Tribunal is a court and that the post of the President is one of judicial service, and in view of the provisions of Article 234 of the Constitution, the appointment of the President can be made only upon consultation with the High Court, as well as the Gujarat Public Services Commission. Even otherwise, having regard to the functions, powers and duties vested in the President, a person with legal qualification and long judicial experience should alone be appointed as President. Reference to the Bombay Legislative Assembly debate dated 18.4.1939, as expressed by the then Revenue Minister, revealed that the intention of the legislature had been that the post be filled by a retired High Court Judge, or a District Judge of not less than



ten years standing. Further, the Tribunal dealing with various cases under the Gujarat Agriculture and Land Ceiling Act, 1961, Gujarat Private Forest Act, Bombay Public Trust Act, Bombay Tenancy and Agricultural Lands Act, Bombay Jagirdari and Other Tenure Abolition Act, and with questions of title under Section 37(2) of the Bombay Land Revenue Court has to deal with large number of civil disputes between the citizens, as well as between the Government and citizens and, it is pertinent to note that at the relevant time of filing of this Writ Petition, 6500 cases were pending before the Tribunal. With these assertions, the prayers made by the writ petitioners were mainly to declare Sections 4 and 20 of the Act, 1958 as ultra-vires and unconstitutional on the grounds that they gave absolute unguided power to the State Government in relation to the appointment of the President, and further, to declare Rule 3(1) so far as it authorises the appointment of the Secretary, as ultra-vires and void, and also to quash the appointment of the respondent as the President.

The State Government contested the case, contending that the provisions of Article 236 of the Constitution have no application. Further, the Act as well as the Rules provide that a person having long standing experience in the area of revenue law, and under Rule 3(2) an advocate who is qualified to be a Judge of the High Court, is eligible for the post of the President of the Tribunal. The Administrative Officer has long and vast experience in revenue matters, being posted as Special Divisional Magistrate, Collector, Deputy Secretary and Secretary dealing with laws pertaining to revenue and was hence, competent enough to deal with any subject assigned under the said Act and the Rules. Thus, the Secretary to the Government of Gujarat was competent/eligible to be selected to the post of the President of the Tribunal.

22. The High Court examined the functions and powers of the Tribunal. Section 117KK of the Bombay Land Revenue Code provides for reference of certain matters to the Tribunal

for its opinion. Section 117L provides that the opinion of the Tribunal, along with settlement report, be laid on the table of the State Legislature and a copy thereof, be sent to every Member and the said report is liable to be discussed by way of a resolution moved in the State Legislature.

23. The Tribunal has also been conferred with the power to adjudicate disputes, which may arise from the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948. Section 75(1) of the said Act provides that an appeal against the award of the Collector, made under Section 66 may be filed before the Tribunal. Sub-section (2) of Section 75, provides that in deciding appeals preferred under sub-section (1), the Tribunal shall exercise all the powers which a court has and subject to the regulations framed by the Tribunal under the Act 1957, follow the same procedure *which a court follows in deciding appeals from the decree or order of an original court under the CPC.* Section 76(1) of the Act provides that notwithstanding anything contained in the Act, 1957, an application for revision may be made to the Tribunal against any order of the Collector, except an order under Section 32P, or an order in appeal against an order under sub-section (4) of Section 32G. Section ?80 provides that all inquiries and proceedings before the Tribunal *shall be deemed to be judicial proceedings* within the meaning of Sections 193, 219 and 228 of the IPC. Section 85 deals with bar of jurisdiction. It further provides that no Civil Court shall have the jurisdiction to settle, decide or deal with, any question which is by or under this Act, required to be settled, decided or dealt with, by the Tribunal in appeal or revision. It is also provided in sub-section (2) of Section 85 that no order of the Tribunal shall be questioned in any civil or criminal court.

24. The Gujarat Agricultural Lands Ceiling Act, 1960, was enacted to fix a ceiling on holdings of agricultural lands, and to provide for the acquisition and disposal of surplus agricultural lands. Chapter VI of the said Act deals with procedure, appeals and revision. Section 36 provides that any person aggrieved



by an award made by the Tribunal under Section 24, or by the Collector under Section 28, may appeal to the Tribunal. Sub-section (3) of Section 36 provides that in deciding such appeal the Tribunal *shall exercise all the powers which a Court has and follow the same procedure which the Court follows in deciding appeals from the decree or order of the original court under the CPC*. Section 38 provides that notwithstanding anything contained in the Act, 1957, an application for revision may be made to the Tribunal constituted under the said Act, against any order passed by the Collector. Section 47 deals with bar of jurisdiction, as it provides that no civil court shall have the jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the Tribunal. Section 48 provides that all inquiries and proceedings before the ?Tribunal *shall be deemed to be 'judicial proceedings'*, within the meaning of Sections 193, 219 and 228 of the IPC.

25. The Bombay Public Trust Act, l950, has been enacted to regulate, and to make better provision for the administration of public religious and charitable trusts in the State of Bombay, which also extends to the State of Gujarat. 1n exercise of powers conferred under Section 84 of the said Act, the Government of Bombay has framed the Bombay Public Trusts (Gujarat) Rules, 1961. Section 51 of the Act provides for consent of the Charity Commissioner for the institution of a suit. Sub-section (2) of Section 51 says that if the Charity Commissioner refuses his consent for the institution of a suit under sub-section (1) of Section 51, the concerned person may file an appeal to the Tribunal. References made to the Tribunal have been dealt with in Chapter Xl of the Act. Section 71 deals with appeals to the Tribunal, and provides that an appeal to the Tribunal under Sub-section (2) of Section 51, against the decision of the Charity Commissioner, refusing consent for the institution of a suit, shall be filed within 60 days from the date of such decision, in such form and shall be accompanied by such fee, as may be prescribed, and that the decision of the

Tribunal shall be final and conclusive. Section 74 provides that all inquiries and appeals shall be deemed to be *judicial proceedings* within the meaning of Sections 193, 219 and 228 of the IPC. Section 76 provides that, save, in so far as they may be inconsistent with anything contained in the Act, *the provisions of the CPC will apply to all proceedings before the court under this Act*. Section 80 deals with bar of jurisdiction of civil courts, as it provides that no civil court can deal with any question which is by, or under the Act, to be decided or dealt with, by any officer or authority under the Act in respect of which, the decision or order of such officer or authority has been made final and conclusive.

26. Section 13(1) of the Act, 1957, provides that in exercising the jurisdiction conferred upon the Tribunal, the Tribunal shall have all the powers of a civil court as enumerated therein and *shall be deemed to be a civil court* for the purposes of Sections 195, 480 and 482 of the Cr.P.C., and that its proceedings shall be deemed to be judicial proceedings, within the meaning of Sections 193, 219 and 228 of the IPC.

27. The aforesaid observations made by the High Court, taking into consideration various statutes dealing with not only the revenue matters, but also covering other subjects, make it crystal clear that the Tribunal does not deal only with revenue matters provided under the Schedule I, but has also been conferred appellate/revisional powers under various other statutes. Most of those statutes provide that the Tribunal, while dealing with appeals, references, revisions, would act giving strict adherence to the procedure prescribed in the CPC, for deciding a matter as followed by the Civil Court and certain powers have also been conferred upon it, as provided in the Cr.P.C. and IPC. Thus, we do not have any hesitation in concurring with the finding recorded by the High Court that the Tribunal is akin to a court and performs similar functions.

During the course of arguments before the High Court, learned Additional Advocate General had conceded that the



judgments and orders passed by the Tribunal can be challenged under Article 227 of the Constitution. Thus, it has been conceded before the High Court that the High Court has supervisory control over the Tribunal, to the extent that it can revise and correct the judgments and orders passed by it. In such a fact-situation, the consultation/concurrence of the High Court, in the matter of making the appointment of the President of the Tribunal is required.

28. The object of consultation is to render the consultation meaningful to serve the intended purpose. It requires the meeting of minds between the parties involved in the process of consultation on the basis of material facts and points, to evolve a correct or at least satisfactory solution. If the power can be exercised only after consultation, consultation must be conscious, effective, meaningful and purposeful. It means that the party must disclose all the facts to other party for due deliberation. The consultee must express his opinion after full consideration of the matter upon the relevant facts and quintessence. (Vide: *UOI v. Sankalchand Himatlal Sheth,* AIR 1977 SC 2328; *Subhash Sharma & Ors. v. UOI,* AIR 1991 SC 631; *Justice K.P Mohapatra v. Sri Ram Chandra Nayak and Ors.,* (2002) 8 SCC 1; *Gauhati High Court & Anr. v. Kuladhar Phukan & Anr.,* AIR 2002 SC 1589; *High Court of Judicature for Rajasthan v. P.P Singh,* AIR 2003 SC 1029; *UOI v. Kali Dass Batish,* AIR 2006 SC 789; and *Andhra Bank v. Andhra Bank Officers,* AIR 2008 SC 2936).

29. Thus, it is evident from the above that the procedure to be observed under Article 234 of the Constitution goes to the extent of the true meaning of consultative process and not an empty formality.

30. In view of the above, we do not see any cogent reason to take a view contrary to the view taken by the High Court. The appeal lacks merit and is, therefore, accordingly dismissed.

B.B.B. Appeal dismissed.

KANWAR SINGH MEENA
*v.*
STATE OF RAJASTHAN & ANR.
(Criminal Appeal No. 1662 of 2012)

OCTOBER 16, 2012

**[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]**

*Code of Criminal Procedure, 1973 – s. 439(2) – Cancellation of bail – Considerations for – Held: The primary considerations are whether accused likely to tamper with evidence; whether bail was granted ignoring relevant materials indicating prima facie case or whether bail was granted on irrelevant materials – On facts, the bail order was passed ignoring relevant evidence indicating prima facie case against the accused and ignoring the fact that brother of the accused, an IPS officer was influencing the investigation – In a gruesome crime, High court exercised its discretion to grant bail in an arbitrary and casual manner – Bail order suffers from serious infirmities and hence legally not tenable.*

**A criminal case was registered against respondent No. 2 accused and 5 others u/ss. 147, 148, 149, 364 and 302 IPC. High Court released respondent No. 2 – accused on bail. The appellant-complainant filed this appeal against the bail order.**

**The complainant contended that the High Court released the accused on bail ignoring the principles which guide the courts in exercise of their discretion to grant bail and also over-looked vital evidence collected by the Investigating agency in the case and the fact that the brother of the accused was an IPS officer and was influencing the investigation.**

**Disposing of the appeal, the Court**





**HELD: 1.1 Section 439 Cr.P.C. confers very wide powers on the High Court and the Court of Sessions regarding bail. But, while granting bail, the High Court and the Sessions Court are guided by the same considerations as other courts. That is to say, the gravity of the crime, the character of the evidence, position and status of the accused with reference to the victim and witnesses, the likelihood of the accused fleeing from justice and repeating the offence, the possibility of his tampering with the witnesses and obstructing the course of justice and such other grounds are required to be taken into consideration. Each criminal case presents its own peculiar factual scenario and, therefore, certain grounds peculiar to a particular case may have to be taken into account by the court. The court has to only opine as to whether there is *prima facie* case against the accused. The court must not undertake meticulous examination of the evidence collected by the police and comment on the same. Such assessment of evidence and premature comments are likely to deprive the accused of a fair trial. [Para 10] [856-E-H; 857-A]**

**1.2 While cancelling bail under Section 439(2) Cr.P.C. the primary considerations which weigh with the court are whether the accused is likely to tamper with the evidence or interfere or attempt to interfere with the due course of justice or evade the due course of justice. The High Court or the Sessions Court can cancel bail even in cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice. If the court granting bail ignores relevant materials indicating *prima facie* involvement of the accused or takes into account irrelevant material, which has no relevance to the question of grant of bail to the accused, the High Court or the Sessions Court would be justified in cancelling the bail. Such orders are against the well recognized principles underlying the power to grant bail. Such orders**

**are legally infirm and vulnerable leading to miscarriage of justice and absence of supervening circumstances such as the propensity of the accused to tamper with the evidence, to flee from justice, etc. would not deter the court from cancelling the bail. The High Court or the Sessions Court is bound to cancel such bail orders particularly when they are passed releasing accused involved in heinous crimes because they ultimately result in weakening the prosecution case and have adverse impact on the society. Supreme Court is equally guided by the above principles in the matter of grant or cancellation of bail. [Para 10] [857-A-F]**

**2. In the interest of justice, the impugned order granting bail to the accused deserves to be quashed. The order passed by the High Court releasing the accused involved in a heinous crime on bail, ignoring the relevant material, is legally not tenable. It suffers from serious infirmities. The High Court has exercised its discretionary power in an arbitrary and casual manner. The statements of the two witnesses appear to be relevant as they *prima facie* indicate involvement of the accused in the crime in question. The High Court ought not to have ignored those statements. The High Court has expressed no opinion as to why it was releasing the accused on bail. It was imperative for the High Court to do so. A diary entry indicates that brother of the accused tried to bring pressure on the investigating agency. In his affidavit filed in this court, Additional Deputy Commissioner of Police, has confirmed that the accused had made an effort to influence the investigation. The fact that brother of the accused is an IPS officer is not noticed by the High Court. Even Assuming that the accused is not likely to flee from justice or after release on bail he has not tried to tamper with the evidence, a legally infirm and untenable order passed in arbitrary exercise of discretion releasing the accused involved in a gruesome crime on bail should not**



**be allowed to stand. This order needs to be corrected because it will set a bad precedent. Besides, it will have adverse effect on the trial. [Paras 15 and 16] [868-D-H; 861-A-D]**

*Gurcharan Singh and Ors. etc. v. State (Delhi Administration)* **(1978) 1 SCC 118: 1978 (2) SCR 358 ; *Puran v. Rambilas and Anr.* (2001) 6 SCC 338: 2001 (3) SCR 432;** *Dinesh M.N. (S.P.) v. State of Gujarat* **(2008) 5 SCC 66: 2008 (6) SCR 1134 – relied on.**

*Dolat Ram v. State of Haryana* **(1995) 1 SCC 349: 1994 (6) Suppl. SCR 69 – referred to.**

**Case Law Reference:**

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| **1978 (2) SCR 358** | **Relied on** | **Para 7** |
| **2001 (3) SCR 432** | **Relied on** | **Para 8** |
| **1994 (6) Suppl. SCR 69** | **Referred to** | **Para 8** |
| **2008 (6) SCR 1134** | **Relied on** | **Para 9** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1662 of 2012.

From the Judgment & Order dated 19.08.2011 of the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in S.B. Criminal Misc. Bail Application No. 7452 of 2011.

Lekh Raj Rehalia (For Varinder Kumar Sharma) for the Appellant.

U.U. Lalit, Ajay Vir Singh Jain, Atul Agarwal, Pravin Agarwal, Ajay Saroya, Munawwar Naseem, Sanchit Dhawan, Siddharth Arora, Nisha Mohan Das for the Respondents.

The Judgment of the Court was delivered by

**(SMT.) RANJANA PRAKASH DESAI, J.** 1. Leave granted.

2. The appellant is the brother of one Purna Singh Meena. On 20/5/2009, he lodged a complaint in respect of murder of Purna Singh Meena ("*the deceased*") against Khushi Ram Meena, who is respondent 2 herein and five others at Gandhi Nagar Police Station, District Jaipur City (East), which was registered under Sections 147, 148, 149, 364 and 302 of the Indian Penal Code (for short, "*the IPC*"). By the impugned order, the Rajasthan High Court released Khushi Ram Meena ("*the accused*") on bail. The appellant has challenged the said order in this appeal.

3. The grievance of the appellant as stated by his counsel Mr. Lekh Raj Rehalia is that the High Court committed a grave error in releasing the accused on bail. According to him the High Court ignored the well established principles which guide the courts in exercise of their discretion to grant bail. It is *inter alia* contended that the High Court overlooked extremely vital evidence collected by the investigating agency and, without assigning any reasons, it released the accused on bail. The High Court failed to notice that there is more than *prima facie* case against the accused and that the brother of the accused who is an IPS Officer is trying to exert pressure on the investigating officers. It is submitted that the High Court's order being perverse must be set aside and the accused must be directed to be taken in custody.

4. Mr. Ajay Vir Singh, learned counsel for respondent 1-State supported the appellant. He relied on the affidavit of Mr. Yogesh Dadhich, Additional Deputy Commissioner of Police, Jaipur City (East), Jaipur in support of his submissions. He also drew our attention to an extract from the relevant station diary which indicates that the brother of the accused tried to pressurize the investigating agency.

5. Mr. U.U. Lalit, learned senior counsel appearing for the accused submitted that though the High Court has not assigned any reasons for releasing the accused on bail, it has made a reference to various important features of the matter. The High



Court has observed that the information was received by the police at 6.10 a.m. on 20/5/2009 on mobile; however, no FIR was registered immediately; that the FIR came to be filed at 3.15 p.m. on 20/5/2009; that though the investigation was transferred to CID (CB) on 5/6/2009, the same officer continued the investigation and got the statements of witnesses recorded under Section 164 of the Criminal Procedure Code (for short, "**the Code**") on 10/6/2009; that when the matter was investigated by CID (CB), the factual report of investigation was submitted by Sandeep Singh and Rajesh Sharma which reveals that the accused was not involved in this case; that the location of the mobile of the accused as per the investigation was at Sikar and that the trial court had rejected the application filed by the investigating agency to declare the accused as absconder. The High Court also considered the fact that the other co-accused have been enlarged on bail by the High Court. Counsel submitted that the impugned order was passed after taking all the above vital features into account and, therefore, it cannot be said that there is any non application of mind. Counsel submitted that each of the above circumstances is very relevant and makes out a case of false implication of the accused. Counsel pointed out that there is nothing on record to indicate that after release on bail, the accused had tried to bring pressure on the police. The diary entry produced in this court pertains to an earlier period. Counsel submitted that the accused is on bail for a considerable period. There is nothing on record to show that he has tried to tamper with the evidence or he has obstructed the course of administration of justice. It would be, therefore, improper to cancel his bail.

6. Cancellation of bail is a serious matter. Bail once granted can be cancelled only in the circumstances and for the reasons which have been clearly stated by this court in a catena of judgments. It would be appropriate to refer to a few of them before dealing with the rival contentions.

7. In *Gurcharan Singh and others etc. v. State (Delhi*

*Administration)*[1], the appellant Gurcharan, who was Superintendent of Police, was charged along with other police personnel under Section 120-B read with Section 302 of the IPC. During the preliminary enquiry six alleged eye-witnesses, who were police personnel, did not support the prosecution case. However, after the FIR was lodged during the course of investigation, seven witnesses including the said six police personnel gave statements implicating appellant Gurcharan Singh. One eye-witness A.S.I. Gopal Das made a statement under Section 164 of the Code in favour of the prosecution. Learned Sessions Judge released appellant Gurcharan Singh on bail after observing that there was little to gain by him by tampering with the witnesses who had, themselves, already tampered with their evidence by making contradictory statements. Learned Sessions Judge further observed that after reviewing the entire material he was of the opinion that there was little probability of appellant Gurcharan Singh fleeing from justice or tampering with the witnesses. He noted that having regard to the character of evidence he was inclined to grant bail. The prosecution moved the High Court under Section 439 (2) of the Code for cancellation of the said order. The High Court *inter alia* observed that considering the nature of the offence and the character of the evidence, the reasonable apprehension of witnesses being tampered with and all other relevant factors, it had no option but to cancel the bail. The High Court observed that learned Sessions Judge did not exercise his judicial discretion on relevant well-recognized principles. An appeal was carried from the said order to this court. This court observed that the powers of the High Court and the Sessions Court under Section 439 (1) of the Code are much wider than those conferred on a court other than the High Court and Sessions Court in respect of bail. However, certain considerations which have to be taken into account are common to all courts. This court noted that gravity of the circumstances in which the offence is committed; the position

1. (1978) 1 SCC 118.



and the status of the accused with reference to the victim and the witnesses; the likelihood of the accused fleeing from justice; of repeating the offence; of jeopardizing his own life being faced with a grim prospect of a possible conviction in the case; of tampering witnesses; the history of the case as well as its investigation and such other relevant grounds will have to be taken into account. To ascertain whether there is *prima facie* case against the accused, character of the evidence will have to be considered. While confirming the High Court's interference with the discretion exercised by the Sessions Court, this court expressed its displeasure about the unwarranted premature comments made by the Sessions Court on the merits of the case when at that stage it was only called upon to consider whether *prima facie* case was made out against the accused or not. This court particularly referred to statement of ASI Gopal Das, recorded under Section 164 of the Code and observed that this witness had made no earlier contradictory statement and the taint of unreliability could not be attached to his statement at that stage as was done by the Sessions Court. This court found that the Sessions Court was not alive to legal position that there was no substantive evidence recorded against the accused until the eye-witnesses were examined in the trial. Serious note was taken of the fact that the Sessions Court had not focused its attention on relevant considerations. The approach of the Sessions Judge was viewed as suffering from serious infirmity and cancellation of bail was endorsed.

8. In *Puran v. Rambilas & Anr.*[2], the appellant therein was charged under Sections 498-A and 304-B of the IPC. The Additional Sessions Judge, Nagpur released the appellant therein, on bail. The High Court cancelled the bail granted to the appellant. The said order was under challenge before this court. It was argued that rejection of bail in a non-bailable case at the initial stage and the cancellation of bail already granted have to be considered and dealt with on different basis. Very

1. (2001) 6 SCC 338.

cogent and overwhelming circumstances are necessary for an order directing the cancellation of bail already granted. It was argued that generally speaking the grounds for cancellation of bail broadly are interference or attempt to interfere with the due course of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. Reliance was placed on *Dolat Ram v. State of Haryana*[3] in support of this submission. This court observed that in *Dolat Ram*, it was clarified that the above instances are merely illustrative and not exhaustive and one such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime and that too without giving any reasons. This court observed that such an order would be against the principles of law and, interest of justice would require that such a perverse order be set aside and bail be cancelled. This court found that inasmuch as the Sessions Court had ignored vital materials while granting bail, the High Court had rightly cancelled the bail. It was further observed that such orders passed in heinous crimes would have serious impact on the society and an arbitrary and wrong exercise of discretion by the trial court has to be corrected.

9. In *Dinesh M.N. (S.P.) v. State of Gujarat*[4], the appellant therein - a police officer was involved in a case of fake encounter. Learned Sessions Judge released him on bail. It was evident from the bail order that learned Sessions Judge was influenced by the fact that the deceased was a dreaded criminal, against whom as many as 25 FIRs were lodged. An application for cancellation of bail was moved before the High Court under Section 439(2) of the Code. The High Court cancelled the bail holding that learned Sessions Judge had not kept in view the seriousness of the offence in which the high ranking police officer was involved. It was observed that past conduct or antecedents of the deceased could not have been

3. (1995) 1 SCC 349.

4. (2008) 5 SCC 66.



a ground for grant of bail to the accused. This court while dealing with the challenge to the said order held that though it is true that parameters for grant of bail and cancellation of bail are different, if the trial court while granting bail acts on irrelevant materials, bail can be cancelled. It was observed that perversity of a bail order can flow from the fact that irrelevant materials have been taken into consideration adding vulnerability to the order granting bail. On the facts of the case, this court held that that the deceased had a shady reputation and criminal antecedents, was certainly not a factor which should have been taken into consideration while granting bail to the accused. It was the nature of the act committed by the accused which ought to have been taken into consideration. The order of the High Court was confirmed on the ground that the bail was granted on untenable grounds. The argument that supervening circumstances such as attempt to tamper with the evidence and interference with the investigation were absent and, therefore, bail could not have been cancelled by reappreciating evidence, was rejected by this court.

10. Thus, Section 439 of the Code confers very wide powers on the High Court and the Court of Sessions regarding bail. But, while granting bail, the High Court and the Sessions Court are guided by the same considerations as other courts. That is to say, the gravity of the crime, the character of the evidence, position and status of the accused with reference to the victim and witnesses, the likelihood of the accused fleeing from justice and repeating the offence, the possibility of his tampering with the witnesses and obstructing the course of justice and such other grounds are required to be taken into consideration. Each criminal case presents its own peculiar factual scenario and, therefore, certain grounds peculiar to a particular case may have to be taken into account by the court. The court has to only opine as to whether there is *prima facie* case against the accused. The court must not undertake meticulous examination of the evidence collected by the police and comment on the same. Such assessment of evidence and

premature comments are likely to deprive the accused of a fair trial. While cancelling bail under Section 439(2) of the Code, the primary considerations which weigh with the court are whether the accused is likely to tamper with the evidence or interfere or attempt to interfere with the due course of justice or evade the due course of justice. But, that is not all. The High Court or the Sessions Court can cancel bail even in cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice. If the court granting bail ignores relevant materials indicating prima facie involvement of the accused or takes into account irrelevant material, which has no relevance to the question of grant of bail to the accused, the High Court or the Sessions Court would be justified in cancelling the bail. Such orders are against the well recognized principles underlying the power to grant bail. Such orders are legally infirm and vulnerable leading to miscarriage of justice and absence of supervening circumstances such as the propensity of the accused to tamper with the evidence, to flee from justice, etc. would not deter the court from cancelling the bail. The High Court or the Sessions Court is bound to cancel such bail orders particularly when they are passed releasing accused involved in heinous crimes because they ultimately result in weakening the prosecution case and have adverse impact on the society. Needless to say that though the powers of this court are much wider, this court is equally guided by the above principles in the matter of grant or cancellation of bail.

11. It is necessary now to briefly note the facts of the case. The complaint lodged by the appellant stated that on 19/5/2009, the deceased came to his house at about 7.00 p.m. After the deceased received a phone call, he told the appellant that he had to take money from someone and asked him to drop him by his bike at Gandhi Nagar. Accordingly, he dropped the deceased near Janta Store, Opp. Shyam Hawans Paradise Apartment, Gandhi Nagar at 12.00 in the night. The deceased told him that he will come back next morning. Since the deceased did not return as promised, the appellant reached



Padawa near Shyam Hawans Paradise Apartment at about 11.00 a.m. and inquired about the deceased. Chowkidar Kuldip Prajapati told him that the deceased was with Rita madam in Flat No.603 and in the morning at about 6.00 a.m., the accused, who used to meet Rita madam came with his four/five men in a jeep bearing Registration No.RJ-14-UB-294. All of them went into Flat no.603; beat up the deceased; dragged him out of the flat, dumped him in the jeep and left the place in the jeep. After that, he searched for the deceased. He ultimately went to the police station and gave the information to the police. Thereafter, he went to the mortuary in SMS Hospital. At the mortuary he saw the dead body of the deceased and identified it. The appellant stated that he was sure that the deceased was murdered by the accused and his associates. On the basis of this FIR, investigation was started.

12. During investigation, on 10/6/2009, statements of Kuldip Prajapati, the Chowkidar of Shyam Hawans Paradise Apartment and Rita were recorded under Section 164 of the Code by Judicial Magistrate, First Class No.15, Jaipur City, Jaipur. Copies of these statements have been perused by us. Kuldip Prajapati *inter alia* stated in his statement that Rita came to reside in Flat No.603 situate in Shyam Hawans Paradise Apartment belonging to R.P. Singh on 7/5/2009. The accused was a usual visitor at the said flat. On 19/5/2009 at about 8.30 p.m., he received a phone call from the accused. The accused asked him whether Rita was in the flat to which he answered in the affirmative. He further stated that on 20/5/2009 at about 6.00 a.m., the accused came there in a jeep along with three to four men. He went to Rita's flat. After sometime, Rita came to him and told him that there was a dispute going on in her house. He went upstairs with Rita. He saw the accused along with three to four persons dragging a man. On his enquiry, the accused told him that a wicked man had entered his flat. The accused did not tell him where he was taking the man. He put the man inside the jeep and took him away.

13. In her statement, recorded under Section 164 of the Code, Rita, *inter alia*, stated that she was married to one Ramgopal Meena. Ramgopal Meena became insane and, therefore, she deserted him. She was staying with her parents. Since her elder brother was dealing in wine, the accused, an Excise Officer used to visit their house frequently. On his request, she began residing with him. Later on, physical relations developed between both of them. The accused made arrangement for her in a rented house wherever he was posted. When she was residing in Deepak Colony, she came in contact with the deceased, who was also residing in Deepak Colony. Intimate friendship developed between her and the deceased. Rita further stated that disputes arose between her and the accused. She stated that the accused knew that she was staying with the deceased. In the absence of the deceased, the accused came to her and threatened her. He told her not to reside with the deceased and vacate the house. He made her vacate the house and put her up in a rented accommodation in Gandhi Nagar. On 19/5/2009, the accused was continuously making telephone calls to her. Last call was received at 11.30 p.m. He was threatening her and asking her as to why she was in touch with the deceased. The deceased came to her flat at about 5.30 a.m. When they were taking tea at about 6.00 a.m., the accused came there. He was accompanied by Rai Singh and two others. Those two other persons caught her. They pushed her outside the flat. They closed the door. She went downstairs to call the guard Kuldip Prajapati. She told him that some dispute was going on in her flat. When both of them were going upstairs, she saw all the four persons dragging the deceased down. She did not know where the deceased was taken. She informed the brother of the deceased that the accused had taken away the deceased. She concluded that the accused, Rai Singh, Vijay and Subhash jointly committed the murder of the deceased.

14. From the complaint and the aforementioned two statements recorded under Section 164 of the Code, it *prima*



*facie* appears that there was illicit relationship between the accused and Rita. However, Rita came in contact with the deceased and intimate relationship developed between the two, which was not liked by the accused. It appears to be the case of the investigating agency that, therefore, the accused eliminated the deceased with the help of his companions.

15. At this stage, we do not want to comment on the credibility or otherwise of the evidence collected by the prosecution. Whether the statements of Kuldip Prajapati and Rita would ultimately help the prosecution to establish its case can be ascertained only when the trial is concluded. That is the function of the trial court. It would be inappropriate to discuss the evidence in depth at this stage because it is likely to influence the trial court. We, therefore, refrain from doing so. But, we must make it clear that the statements of Kuldip Prajapati and Rita, recorded under Section 164 of the Code, appear to be relevant as they *prima facie* indicate involvement of the accused in the crime in question. The High Court ought not to have ignored those statements. It is true that the High Court has referred to certain features of the prosecution case, but that reference is in the form of submissions made by counsel for the accused. The High Court has not discussed those features. It has expressed no opinion as to why it was releasing the accused on bail. It was imperative for the High Court to do so. We have been shown an extract from a relevant diary entry which does indicate that brother of the accused tried to bring pressure on the investigating agency. In his affidavit filed in this court, Mr. Yogesh Dadhich, Additional Deputy Commissioner of Police, Jaipur City (East), has confirmed that the accused had made an effort to influence the investigation. The fact that brother of the accused is an IPS officer is not denied by his counsel. This fact is not noticed by the High Court. If it was not brought to the notice of the High Court by the investigating agency, then, it will have to be said that the investigating agency adopted a very casual approach before the High Court. In any case, the order passed by the High Court releasing the

accused involved in a heinous crime on bail, ignoring the relevant material, is legally not tenable. It suffers from serious infirmities. The High Court has exercised its discretionary power in an arbitrary and casual manner. We have also noticed that the incident took place on 19/5/2009 and the accused could be arrested only on 1/6/2011. His two attempts to get anticipatory bail, one from the Sessions Court and the other from the High Court, did not succeed. Assuming that the accused is not likely to flee from justice or after release on bail he has not tried to tamper with the evidence, that is no reason why a legally infirm and untenable order passed in arbitrary exercise of discretion releasing the accused involved in a gruesome crime on bail should be allowed to stand. This order needs to be corrected because it will set a bad precedent. Besides, it will have adverse effect on the trial.

16. Taking an overall view of the matter, we are of the opinion that in the interest of justice, the impugned order granting bail to the accused deserves to be quashed and a direction needs to be given to the police to take the accused in custody. We enquired with learned counsel for respondent 1-State of Rajasthan as to what is the stage of the case. We were shocked to know that till date, even the charges are not framed. We feel that the matter brooks no further delay. A direction needs to be given to the trail court to frame the charges and conclude the trial at the earliest. In the circumstances, the impugned order dated 19/8/2012 granting bail to accused – Khushi Ram Meena is quashed. The police are directed to take accused - Khushi Ram Meena in custody. The trial court is directed to frame charges within a period of one month from the date of receipt of this order. The trial court is further directed to proceed with the case and conclude it at the earliest independently and in accordance with law without being influenced by any observations made by us which may touch merits of the case as they are merely *prima facie* observations.

17. The appeal is disposed of in the aforestated terms.

K.K.T. Appeal disposed of.



SABEEHA FAIKAGE & ORS.

*v.*

UNION OF INDIA & ORS.

(Writ Petition (Civil) No. 505 of 2006)

OCTOBER 18, 2012

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

*Constitution of India, 1950 – Articles 32, 21 and 142 – Recruitment of Indian seafarers – On the vessel of a foreign country – Through Recruitment and Placement Service providers — The vessel, comprising of 10 Indian seafarers, went missing in the high seas on 5.9.2005 – Service providers informed the Director General of Shipping about the missing of vessel on 10.10.2005 – The Director General on 19.10.2005 requested the country, to which the vessel belonged, to carry out the investigation into the casualty – Indian government communicated to the relatives of the Indian seafarers on the vessel certifying that they were presumed to be dead – Writ of mandamus by relatives of the Indian seafarers on the vessel, seeking investigation to the disappearance of the seafarers and inquiry to find out on account of what, Indian Government certified that their relatives were presumed to be dead – Supreme Court initially issued notice limited to the question whether Maritime Administration of India was invited to take part in the marine casualty investigation as provided in Para 4 of M.S. Notice 26 of 2002 – By subsequent order, the Court called upon the State to furnish details with regard to Conventions and Codes relating to marine casualty incidents, and called upon the service providers to release interim compensation amount at the rate of 40,000 US Dollars for the Officers and 25,000 US Dollars for non-officers, to be deposited with the Court – Held: State was not liable for violation of right to life under Article 21 and hence not liable to pay any compensation – The court cannot award punitive damages, as there was no inaction with*

*malicious intent, or conscious abuse or intentional doing of some wrongful act or negligence on part of the State – The service providers, being private individuals, protection under Article 21 is not available to them – Further they are not liable to pay compensation because as per Shipping Act of the flag country of the vessel, the liability to pay compensation is on the vessel owner/salvors or their insurers – Even if the service provides are guilty of violation of Rules 2005 having not reported the casualty to the Director General of Shipping within 48 hours, the Court cannot give any direction as their licence stands already withdrawn as per rule 6 of 2005 Rules in relation to some other case – The amount of compensation, already deposited, cannot be said to be inadequate in absence of material to show age, income of seafarers and other relevant factors – The service providers also cannot be directed to pay compensation as per Collective Bargaining Agreements unless it is shown that they were bound by collective Bargaining Agreements – The lacuna in respect of quantum of insurance coverage in 2005 Rules cannot be filled up in exercise of powers under Article 142 because numerous factors are to be taken into consideration in making such law – As the State has indicated setting up of Indian Maritime Causality Investigation Cell and amendment of 2005 Rules, State directed to expedite the proposal – Clarified that compensation received by the relatives of the seafarers is without prejudice to their claim for higher compensation in any appropriate proceedings – Merchant Shipping (Recruitment and Placement of Seafarers) Rules, 2005 – Shipping Act, 2004 of Saint Vincent and Grenadines – ss. 332, 333, 334 and 335.*

*P.D. Shamdasani v. Central Bank of India* **AIR 1952 SC 59: 1952 SCR 391 – followed.**

*Municipal Corporation of Delhi v. Association of Victims ofUphaar Tragedy and Ors*. **AIR 2012 SC 100: 2011 SCR 1 – relied on.**



*Lata Wadhwa and Ors. v. State of Bihar and Ors.* **(2001) 8 SCC197: 2001 (1) Suppl. SCR 578 – distinguished.**

*Indian Council for Enviro-Legal Action v. Union of India and Ors*.**(2011) 8 SCC 161: 2011 (9) SCR 146 ;** *Union of India v. Associationfor Democratic Reforms and Anr*. **(2002) 5 SCC 294: 2002 (3) SCR 696 ;** *Ashok Kumar Gupta and Anr. v. State of U.P. and Ors*. **(1997) 5 SCC 201: 1997 (3) SCR 269 ;** *Vineet Narain and Ors. v. Union of India and Anr*. **(1998) 1 SCC 226: 1997 (6) Suppl. SCR 595 – referred to.**

**Case Law Reference:**

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|---|---|---|
| **2011 (9) SCR 146** | **Referred to** | **Para 9** |
| **2002 (3) SCR 696** | **Referred to** | **Para 9** |
| **1997 (3) SCR 269** | **Referred to** | **Para 9** |
| **1997 (6) Suppl. SCR 595** | **Referred to** | **Para 9** |
| **1952 SCR 391** | **Followed** | **Para 12** |
| **2011 SCR 1** | **Relied on** | **Para 14** |

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 505 of 2006.

Under Article 32 of the Constitution of India.

H.P. Raval, ASG, Rajeev Dutta, Ashok Bhan, P. Soma Sundaram, R. Krishna Kumar, B. Vinodh Kanna, P.B. Suresh, Vipin Nair (For Temple Law Firm), Rahul Dhawan, Pukhrambam Ramesh Kumar, Asha G. Nair, A. Dev Kumar, S.S. Rawat, D.S. Mahra, David C. Gomes, O.P. Gaggar for the Appearing Parties.

The Order of the Court was delivered by

**A.K. PATNAIK, J.** 1. The petitioners have lost their husbands/sons in a marine casualty and have filed this writ

petition under Article 32 of the Constitution complaining of the breach of the fundamental right to life under Article 21 of the Constitution.

2. The facts very briefly are that the husbands of petitioner nos. 1, 2 and 3 and the sons of petitioner nos. 4 and 5 were recruited and placed through respondent nos. 4 and 5 to work as Seafarers on tugboat Jupiter-6 carrying the flag of Saint Vincent and the Grenadines. On 21.08.2005, Jupiter-6 along with its crew comprising 10 Indians and 3 Ukrainians, left Walvis Bay in Namibia and was towing a dead ship Satsung on its way to Alang in Gujarat in India. On 05.09.2005, Jupiter-6 went missing in the high seas. On 10.10.2005, respondent no. 4 informed the Director General of Shipping, Bombay, that it had received a distress signal from Jupiter-6 *via* its life saving radio equipment on board and a search was conducted from the place where distress signal originated, which was 220 nautical miles South of Port Elizabeth, South Africa, but Jupiter-6 could not be located. Pursuant to reports in a section of the media about the missing of Jupiter-6 since 08.10.2005, the Director General of Shipping, Bombay, issued a press release on 15.10.2005 that the Ministry of Shipping and Road Transport and Highways had alerted the Indian Coast guard which, in turn, has alerted the South African Search and Rescue Region as Jupiter-6 was last sighted near Cape Town in South Africa and that all efforts are being made to trace the crew members. On 25.04.2006, however, the respondent no. 4 sent a letter to the petitioners saying that all efforts to search the missing Jupiter-6 and her 13 crew members have proved unproductive and that the owners of the vessel are coordinating with the underwriters for nomination of local P & I correspondent who will deal with them for requisite compensation package and on getting further information from the local P & I correspondent, the petitioners will be informed of the further follow-up action to process the claims. Finally, the petitioners received the communication dated 17.08.2006 from the Government of India, Ministry of Shipping, Government Shipping Office, Mumbai, certifying that their husbands/sons were presumed to be dead.



3. The petitioners have prayed for *inter alia* a writ of mandamus/direction to the respondents to conduct an investigation into the mysterious disappearance of their husbands/sons who were on board Jupiter-6. The petitioners have also prayed for an enquiry to find out what transpired between the Government of India and the Saint Vincent and the Grenadines on account of which the Government of India has certified that their husbands/sons are presumed to be dead. After perusing the Merchant Shipping Notice No.26 of 2002 dated 10.10.2002 issued by the Government of India, Ministry of Shipping, Directorate of the Director General of Shipping, (for short "M.S. Notice 26 of 2002"), this Court issued notice on 10.11.2006 in the writ petition to the respondents confined to the question as to whether the Maritime Administration of the State (India) was invited to take part in the marine casualty investigation as provided in para 4 of M.S. Notice 26 of 2002. In response to the notice, a counter affidavit was filed on 03.01.2008 on behalf of respondent nos. 1, 2 and 3 stating therein that they became aware of the casualty for the first time when they received a communication dated 10.10.2005 about the incident from respondent no.4 and that the administration of the State (India) was not invited to participate in the investigation as per para 4 of M.S. Notice 26 of 2002.

4. The matter was thereafter heard and on 24.09.2008 this Court passed an order, paragraph 4 of which is extracted hereinbelow:

> 4. The office of Director General of Shipping has issued M.S.Notice No.26 of 2002 dated 10.10.2002 in regard to the procedure to be followed in the event of marine casualties and incidents involving Indian citizens on board of foreign flag vessels. To ascertain whether there is any basis for the grievance put forth by the petitioners, we, therefore, direct the Directorate to collect, analyze and prepare a report with reference to the following information and file the same with an affidavit of a responsible officer from the office of the Director General of Shipping.

(a) How many reports of marine casualties have been received by the Indian Government after 10.10.2002 involving Indian citizens on board of foreign flag vessels and how many are received within 48 hours of the occurrence of the incident as required by the Directorate?

(b) In how many of such cases reports have been received by the Directorate from the manning agents of the ships in India who recruited the seafarers as required by clause 5(a) and (b) of M.S. Notice dated 10.10.2002?

(c) In how many cases, Indian Government has been invited to participate in the marine casualty investigation by the lead State or the flag State (as required by paras 5.2, 6.3 and 9.1 of the Code for the Investigation of Marine Casualties and Incidents)?

(d) In how many cases the Indian Government has sent its comments within 30 days from the date of receiving the draft of the final report from the lead investigating State (as required by clause 12.1 of the Code for the Investigation of Marine Casualties and Incidents) to enable the lead investigating State to incorporate/ amend / modify the final report?

(e) In how many cases the Indian Government has made available to the public the final report in regard to marine casualty incidents and, if so, the period and the manner in which it has been so made public (as required by clause 12.3 of the Code for the Investigation of Marine Casualties and Incidents)?

(f) In how many cases Indian Government has taken action against the recruiting agents/manning agents/managers of the foreign flag ships which employed Indian crew and in what manner it has safeguarded the interest of the Indian crew (particularly in view of its M.S. Notice No.13 of 2005 dated 25.10.2005 of the Directorate which admits the receipt of several complaints about the failure of shipping companies and recruiting agents of Indian seafarers in reporting marine casualties involving them to the Government and the family members) for non-compliance with its direction?



The above information, if made available, will enable us to decide whether there is really implementation or compliance of the Conventions and Codes relating to marine casualty incidents. We find that the counter affidavit filed by the Indian Government does not furnish necessary and sufficient details.

Learned counsel for the petitioner and learned counsel for the ship managers and the learned ASG may also submit their suggestions for proper and better implementation of the existing Conventions and Codes.

The pendency of this petition or any further investigation in the matter by any agency should not come in the way of either the Insurers/owners/managers of the tug paying compensation to the family members of the missing crew. In fact, learned counsel for respondent No.4 and 5 stated that they have offered interim compensation to the families. The petitioners deny that any such offer was made. The learned counsel for respondents 4 and 5 stated that even now respondents 4 and 5 are willing and ready to make the interim payment without prejudice to the rights and contentions of both the parties and the same will be despatched within 10 days from today and that they will get in touch with the insurers for release of the amounts to the missing crew family members expeditiously. We make it clear that receipt of any amount by the family members of the missing crew may receive any compensation tendered or paid by the managers or insurers will be without prejudice and receipt of such payment will not prejudice their case in any manner."

5. A reading of the para 4 of the order dated 24.09.2008 would show that this Court limited the scope of the writ petition

to two issues: (i) the safety of Indian citizens on board of foreign flag vessels and (ii) in case such Indian citizens on board a foreign flag vessel lost their lives, the compensation payable to their kith and kin. On the first issue, the Court called upon the Union of India to furnish the necessary and sufficient details with regard to implementation of the Conventions and Codes relating to marine casually incidents and on the second issue, the Court called upon respondents 4 and 5 to release interim compensation to the family members of the missing crew and clarified that the compensation paid by respondents 4 and 5 or the insurers will be without prejudice to the claim of the family members of the crew.

6. Pursuant to the aforesaid order passed on 24.09.2008, respondents 1, 2 and 3 filed affidavits from time to time referring to the steps taken by the Government of India to ensure the safety and security of seafarers including a chart showing the position of various welfare measures and safety measures relating to seafarers in 2006 and 2011. Pursuant to the order passed on 24.09.2008 of this Court, the respondent nos. 4 and 5 also informed this Court that M/s James Mckintosh Company Pvt. Ltd., Mumbai, have on behalf of the owners of Jupiter-6 offered to pay a compensation at the rate of 40,000 US Dollars for the death of each of the officers on board Jupiter-6 and at the rate of 25,000 US Dollars for the death of each of the non-officers on board Jupiter-6. They further informed this Court that out of the thirteen crew members of Jupiter-6, the three Ukrainian nationals have been paid compensation by the owners of the vessel and the widow of one non-officer Mr. Subhash Das has been paid compensation of 25,000 US Dollars. Accordingly, on 15.11.2010 the Court directed that a sum of 2,85,000 US Dollars for the remaining nine Indian seafarers (four officers and five non-officers) be deposited in Court for payment to their family members without prejudice to their claims for higher compensation. Thereafter, a sum of Rs.1,29,29,386/- equivalent to 2,85,000 US Dollars was deposited by respondents 4 and 5 and by order dated



28.03.2011, the Court permitted the legal heirs/representatives of the officers/seamen to lodge their claims for disbursement of compensation with the Registrar (Judicial) who was required to verify the claims and submit a report to this Court with regard to disbursement. Registrar (Judicial) is now in the process of verifying the claims and disbursing the amounts to the legal heirs of the deceased Indian seafarers.

7. At the hearing of the writ petition, learned counsel for the petitioners Mr. P. Soma Sundaram and Mr. Vipin Nair submitted that under Article 21 of the Constitution every person has been guaranteed the right to life and this right has been violated in the case of the seafarers on board Jupiter-6. They submitted that though Jupiter-6 went missing in the high sea on 05.09.2005, the respondent no.4 informed the Government about the loss of Jupiter-6 35 days after 05.09.2005, i.e. on 10.10.2005, and the Government did not conduct any investigation into the incident and issued death certificates on 17.08.2006 saying that the crew members of Jupiter-6 are presumed to be dead. They submitted that under M.S. Notice 26 of 2002 the manning agents who have recruited the seafarers on board the foreign flag vessel, in the present case respondent nos.4 and 5, were required to inform the Government about the marine casualty within three days of the incident and as the Indian nationals were involved in the marine casualty, the Government of India was required to conduct a marine casualty investigation forthwith. They submitted that under the Merchant Shipping (Recruitment and Placement of Seafarers) Rules, 2005 (for short 'the Rules 2005) and in particular Rule 3 thereof, the Government was also required to conduct an investigation when a complaint is received against the Recruitment and Placement service providers, but no such enquiry has been conducted by the Government on the complaint regarding missing of Jupiter-6 despite complaints having been made to the Government. They also referred to the Flag State Report of the Maritime Investigation Branch, Saint Vincent and the Grenadines, Report No.5 of September 2005,

which states that disappearance of Jupiter-6 along with her crew remains an enigma. They submitted that this report would go to show that respondent nos. 4 and 5 had been indicted for the incident and yet no action has been taken by the Government against respondent nos. 4 and 5.

8. Learned counsel for the petitioners next submitted that under Rule 4 (3)(a) of the Rules 2005 read with Form-III prescribed by the Rules 2005, it is mandatory for the Recruitment and Placement service providers to provide insurance cover to the seafarers they employ. They submitted that it will be clear from the declaration to be filed by the Recruitment and Placement service providers in Form-III along with the application for licence that they are required to ensure that all seafarers recruited and placed with the ship owners are adequately covered by insurance cover. They submitted that under Rule 3 (1)(j) of the Rules 2005, the Recruitment and Placement service providers also have the legal obligation to inform the seamen's employment office concerned and next of kin of the seafarer of each death or disability of the seafarer within forty-eight hours of such death or disability as well as the details of the insurance coverage of the seafarers but in spite of such legal requirements, respondent nos. 4 and 5 have not disclosed the details of the insurance coverage to the seafarers. They submitted that respondent nos. 4 and 5 are responsible for providing adequate insurance coverage as they had assumed the responsibility for operation of the ship as Managers and were actually the ship owners and were thus liable for the compensation payable to the petitioners. They argued that the insurance amounts of 40,000 US Dollars for each of the officers and 25,000 US Dollars for each of the non-officers deposited by respondent nos. 4 and 5 in this Court are not adequate and the compensation amounts should have been much higher as indicated in the Model Collective Bargaining Agreements for Indian seafarers filed along with the letter dated 02.11.2010 of the Government of India addressed to the Registrar of this Court annexed to the affidavit filed on behalf



of respondent nos.1, 2 and 3 on 19.07.2011. They relied on the decision of this Court in *Lata Wadhwa & Ors. v. State of Bihar & Ors.* [(2001) 8 SCC 197] in which this Court, while exercising its powers under Article 32 of the Constitution, directed payment of higher compensation for each of the claimants on account of deaths in a fire tragedy by Tata Iron and Steel Company Limited. They also relied on the recent decision of this Court in *Municipal Corporation of Delhi v. Association of Victims of Uphaar Tragedy & Ors*. [AIR 2012 SC 100] in which this Court enhanced the compensation payable to the claimants on account of death and injury in a fire tragedy in Uphaar Cinema Hall. They submitted that similar directions for determination of the higher compensation by the Registrar of this Court may be given in this case also.

9. Learned counsel for the petitioners finally submitted that though Rules 2005 mandates that insurance coverage has to be provided to Indian seafarers, it does not mention the amount for which the insurance coverage is to be done. According to the learned counsel for the petitioners, this lacuna in law in respect of quantum of insurance coverage should be filled up by this Court by invoking its powers under Article 142 of the Constitution. In support of this submission, they relied on the judgments of this Court in *Indian Council for Enviro-Legal Action v. Union of India & Ors*. [(2011) 8 SCC 161], *Union of India v. Association for Democratic Reforms and Anr*. [(2002) 5 SCC 294], *Ashok Kumar Gupta & Anr. v. State of U.P. & Ors*. [(1997) 5 SCC 201] and *Vineet Narain & Ors. v. Union of India & Anr*. [(1998) 1 SCC 226]. They submitted that this Court should declare that in case of a marine casualty involving Indian citizens, the amount payable in case of death of an officer would be 89,100 plus US Dollars and the amount payable in case of death of a child of an officer under 18 years would be 17,820 US Dollars and the amount payable in case of death of a non-officer would be 82,500 US Dollars plus and the amount payable in case of death of a child of a non-officer under 18 years 16,500 US Dollars.

10. Mr. Rajeev Dutta, learned counsel appearing for respondent nos.4 and 5, submitted that notice in the writ petition was initially limited to the question as to whether the Maritime Administration of the State (India) was invited to take part in the marine casualty investigation as provided in para 4 of M.S. Notice 26 of 2002, but subsequently by order dated 24.09.2008 of this Court the scope of the enquiry in the writ petition has been widened to include the safety of the seafarers and disbursement of compensation to the seafarers on board Jupiter-6 who have lost their lives. Relying on the counter affidavit filed by respondent no.4, he submitted that respondent no.4 came to know about Jupiter-6 going missing on 08.10.2005 at about 2100 hrs. Indian Standard Time (Saturday) and immediately thereafter, respondent no.4 informed the Director General of Shipping on 10.10.2005 at about 1100 hrs. Indian Standard Time (Monday) about the incident, i.e. within the stipulated time as per M.S. Notice 26 of 2002. He argued that there was, therefore, no delay on the part of respondent no.4 to inform the Government of India about the incident. He submitted that the seafarers, who were employed and placed on board Jupiter-6, were bound by the terms of the employment contract which provided that they will be governed by the law of Flag State and the employment contract did not stipulate for compensation in case of death or disability nor was the employment contract governed by the provisions of the Collective Bargaining Agreements. He submitted that under Section 338 of the Shipping Act, 2004 of Saint Vincent and the Grenadines, the Flag State of Jupiter-6, the limits of liability of the ship owner have been fixed for claims arising on any distinct occasion and the compensation deposited in this Court at the rate of 40,000 US Dollars in case of death of officers and 25,000 US Dollars in case of death of non-officers is in accordance with the provisions of Section 338 of the Shipping Act, 2004 of Saint Vincent and the Grenadines. He vehemently argued that since the aforesaid compensation amount has been deposited for disbursement to the legal heirs of the deceased seafarers, respondent nos.4 and 5 are not liable for any amount



of compensation and this Court should not, therefore, direct for any higher amount of compensation than what has been deposited.

11. Mr. H.P. Raval, learned Additional Solicitor General for respondent nos.1, 2 and 3, submitted that the Merchant Shipping Act, 1958 does not apply to seamen on board of a ship or a vessel of a foreign country. He referred to the counter affidavit filed on behalf of respondent nos.1, 2 and 3 on 03.01.2008 and the annexure thereto and submitted that the respondent no.4 by its letter dated 10.10.2005 informed the Director General of Shipping about the Jupiter-6 going missing and on 19.10.2005, the Surveyor Incharge-cum-Deputy Director General of Shipping requested Saint Vincent and the Grenadines to carry out investigation into the casualty as Indian nationals were involved in the casualty. He referred to the additional affidavit filed on behalf of the Union of India in December 2009 in which the various measures taken by the Government of India for the safety of the seafarers have been detailed. He submitted that the Rules 2005 make it obligatory for Recruitment and Placement service providers to declare that all seafarers recruited and placed on board by them would be adequately covered by insurance cover, but the quantum of compensation for which the seafarers are to be insured in case of injury or death have not been indicated therein and this has resulted in variable amounts of compensation being paid to Indian seafarers working in different shipping companies, often resulting in exploitation of categories which are lesser in demand. He also referred to the affidavit filed on behalf of respondent nos.1, 2 and 3 on 20. 09.2011 in which a chart has been extracted to show how the Government of India proposes to improve the welfare and safety measures relating to seafarers over what existed in 2006. He finally submitted that so far as respondent no.4 is concerned its application for registration as Recruitment and Placement service providers has been rejected by the speaking order dated 16.06.2008 of the Director, Seamen's Employment Office, Department of

Shipping, for default in paying compensation to the crew of a vessel other than Jupiter-6, namely, M.V. RAZZAK, which also went missing.

12. We have considered the submissions of learned counsel for the parties and we find that in *P.D. Shamdasani v. Central Bank of India* [AIR 1952 SC 59] a Constitution Bench of this Court has held that right to life and personal liberty guaranteed under Article 21 of the Constitution is only available against the State and that Article 21 was not intended to afford protection to life and personal liberty against violation by private individuals. Hence, the main question that we have to really decide in this case is whether the Union of India (not respondent no.4 nor respondent no.5) was liable for violation of the right to life guaranteed under Article 21 of the Constitution and was liable for any compensation to the petitioners for not causing a marine casualty investigation when Jupiter-6 went missing in the high seas. Jupiter-6 was carrying the flag of Saint Vincent and the Grenadines, although it had on its board some Indian seafarers. The Director General of Shipping has issued M.S. Notice 26 of 2002, which lays down the procedure with regard to marine casualty investigation involving Indian citizens on board foreign flag vessels. M.S. Notice 26 of 2002 states that India is a major supplier of manpower to global shipping and in the recent past it has been observed with concern that many of the accidents/ incidents at sea involving Indian citizens on board foreign flag vessels have not been reported to the Indian Maritime Administration. It also states that the Code for Investigation of Marine Casualties and Incidents had been adopted on 27.11.1997 by the IMO Assembly in its 20th Session and the code provides for casualty investigation with the involvement of different interested States. It has been further clarified in para 2 of M.S. Notice 26 of 2002 that this Code applies to either one or more interested States that are substantially interested in marine casualty and the substantially interested States includes the State whose nationals have lost their lives or received serious injuries as a result of the marine



casualty. It is provided in para 2 of M.S. Notice 26 of 2002 that the onus of conducting the investigation into the marine casualty lies with the flag State or the coastal State within whose territorial sea the casualty has occurred. Para 4 of M.S. Notice 26 of 2002, however, states that for the purpose of effective casualty investigation, it is imperative that the Maritime Administration of the State, whose nationals are involved in the marine casualty, by virtue of being ship's crew, is required to be invited to take part in the marine casualty investigation, as a substantially interested State, by the State conducting the investigation. It is also stated in para 4 of M.S. Notice 26 of 2002 that our Maritime Administration should be proactively involved in the investigation and should take part in it as a substantially interested State in order to facilitate effective investigation and proper analysis of all marine casualties involving Indian nationals and for correctly identifying the causes of said casualties.

13. In the counter affidavit filed on behalf of respondent nos. 1, 2 and 3 on 03.01.2008, it is stated that on receipt of the letter dated 10.10.2005 from respondent no.4, Surveyor Incharge-cum-Deputy Director General of Shipping by letter dated 19.10.2005 requested Saint Vincent and the Grenadines to carry out the investigation into the casualty and submit the investigation report along with the findings of the casualty as that would alleviate the sufferings of the families of the Indian crew members. It is further stated in the aforesaid counter affidavit of respondent nos. 1, 2 and 3 that the maritime investigation branch, Saint Vincent and the Grenadines sent a report of the investigation which was carried out in September 2005, but in this report it is stated that no definite conclusion could be ascertained about the events but there could be following possible scenarios:

> "1. The crew was trying to reconnect the tow again under conditions of significant swell, the tug capsized and sunk.

Released EPIRB signal 33 days after m.v. "JUPITER 6" disappearance cannot be connected with this scenario.

2. Piracy/hijacking

Piracy/hijacking is not common in this area.

Suspicion of Piracy/hijacking remains valid as there was 180 MT of diesel oil on board the tug.

For the time being our conclusion about the Manager's actions regarding this accident are as follows:

The disappearance of m.v. "Jupiter 6" along with her crew remains an enigma."

Thus, respondent nos. 1, 2 and 3 became aware of the casualty for the first time when they received the communication dated 10.10.2005 about the incident from respondent no.4 and the Surveyor Incharge-cum-Deputy Director General of Shipping by letter dated 19.10.2005 requested Saint Vincent and the Grenadines to carry out the investigation into the casualty as Indian nationals were part of the crew of Jupiter-6. On these facts, it is difficult for us to hold that the Union of India was guilty of violation of the right to life and was liable for compensation to the petitioners.

14. In *Municipal Corporation of Delhi v. Association of Victims of Uphaar Tragedy & Ors*. (supra) cited by the learned counsel for the petitioners, the Delhi High Court had held the theatre owner (licensee), Delhi Vidyut Board (DVB), Municipal Corporation of Delhi (MCD) and the licensing authority liable for the fire incident in Uphaar Cinema Hall and severely compensated the victims of the accident, but this Court held that the MCD and the licensing authority could not be held liable for compensation merely because there has been some inaction in performance of the statutory duties or because the action taken by them is ultimately found to be without authority of law and they would be liable only if there was some malice



or conscious abuse on their part. This Court, however, held in the aforesaid case that DVB was liable because direct negligence on its part had been established and this negligence was a proximate cause for the injuries to and death of the victims. Para 32 of the opinion of R.V. Raveendran, J., in the aforesaid case is quoted hereinbelow:

"It is evident from the decision of this Court as also the decisions of the English and Canadian Courts that it is not proper to award damages against public authorities merely because there has been some inaction in the performance of their statutory duties or because the action taken by them is ultimately found to be without authority of law. In regard to performance of statutory functions and duties, the courts will not award damages unless there is malice or conscious abuse. The cases where damages have been awarded for direct negligence on the part of the statutory authority or cases involving doctrine of strict liability cannot be relied upon in this case to fasten liability against MCD or the Licensing Authority. The position of DVB is different, as direct negligence on its part was established and it was a proximate cause for the injuries to and death of victims. It can be said that insofar as the licensee and DVB are concerned, there was contributory negligence. The position of licensing authority and MCD is different. They were not the owners of the cinema theatre. The cause of the fire was not attributable to them or anything done by them. Their actions/omissions were not the proximate cause for the deaths and injuries. The Licensing Authority and MCD were merely discharging their statutory functions (that is granting licence in the case of licensing authority and submitting an inspection report or issuing a NOC by the MCD). In such circumstances, merely on the ground that the Licensing Authority and MCD could have performed their duties better or more efficiently, they cannot be made liable to pay compensation to the victims of the tragedy. There is no close or direct proximity to the acts of the Licensing Authority and MCD on the one hand and the fire

accident and the death/injuries of the victims. But there was close and direct proximity between the acts of the Licensee and DVB on the one hand and the fire accident resultant deaths/injuries of victims. In view of the well settled principles in regard to public law liability, in regard to discharge of statutory duties by public authorities, which do not involve *mala fides* or abuse, the High Court committed a serious error in making the licensing authority and the MCD liable to pay compensation to the victims jointly and severally with the Licensee and DVB."

K.S. Radhakrishnan, J, while fully endorsing the reasoning as well as the conclusions reached by R.V. Raveendran, J, was also of the view that Constitutional Courts can, in appropriate cases of serious violation of life and liberty of individuals, award punitive damages, but the same generally requires the malicious intent on the side of the wrong doer, i.e., an intentional doing of some wrongful act. In the facts of the present case, as we have noticed, the Surveyor Incharge-cum-Deputy Director General of Shipping has requested the flag State to carry out the investigation into the casualty within nine days of the information received about the casualty and we are not in a position to hold that there was any inaction with malicious intent or conscious abuse or intentional doing of some wrongful act or negligence on the part of respondent nos. 1, 2 and/or 3which was the proximate cause of the disappearance or death of the Indian seafarers on board Jupiter-6.

15. In *Lata Wadhwa & Ors. v. State of Bihar & Ors.* (supra) the petitioners had filed a writ petition under Article 32 of the Constitution on the ground that right to life under Article 21 of the Constitution had been violated and had prayed for *inter alia* a writ of mandamus or any other writ or direction in prosecution of the Tata Iron and Steel Company and their agents and servants, for the alleged negligence in organizing the function, held on 03.03.1989 in Jamshedpur in which fire accident took place and to direct that appropriate compensation be provided to the victims by the State Government as well as the Company.



When the writ petition came up before this Court, the senior counsel appearing for the company stated before the Court that notwithstanding several objections, which have been raised in the counter affidavit, the company did not wish to treat the litigation as an adverse one and left it to the Court for determining the monetary compensation to be paid after taking into consideration all the benefits and facilities already extended to the victims or their family members. On the aforesaid submission made by the company, the Court directed the Registry of the Court to determine the compensation taking into account the enhancement made in the judgment. In the facts of the present case, respondent nos. 4 and 5 have deposited in this Court the compensation amount made available by the insurers of Jupiter-6 and their counsel has not made any submission before the Court that they are prepared to pay to the petitioners any enhanced compensation as may be fixed by this Court. As a matter of fact, it appears from the provisions of the Shipping Act, 2004 of Saint Vincent and the Grenadines and, in particular, Sections 332, 333, 334 and 335 thereof that the liability for compensation of any claim in respect of life or personal injuries is of the ship owners/salvors or their insurers and respondent nos. 4 and 5 are neither the ship owners/salvors nor their insurers.

16. As far as respondent nos. 4 and 5 are concerned, they are holding a recruitment and placement service licence issued under Rule 4 of the Rules 2005. Rule 3(1)(j) provides that the inspecting authority shall carry out an inspection of recruitment and placement service so as to ensure that the seamen's employment office concerned and next of kin of the seafarer is informed of each death or disability of the seafarer within 48 hours of such death or disability in Form-V. Rule 6 of the Rules 2005 further provides that where there is an adverse report of the inspecting authority or complaint by a seafarer or otherwise, the Director General of Shipping can authorize the Director to issue a show cause notice in Form-VII to the recruitment and placement service licence provider requiring it to show cause within a period of thirty days from the date of issue of such

notice as to why the licence shall not be suspended or withdrawn and to suspend or withdraw the licence after considering the reply. In this case, the licence of respondent no.4 has already been withdrawn by the speaking order dated 16.06.2008 of the Director General, Seamen's Employment Office, Department of Shipping, for default in paying compensation to crew of vessel M.V. RAZZAK. Hence, even if respondent no.4 has not reported the casualty to the Director General of Shipping, Mumbai, within a period of 48 hours as stipulated in the Rules 2005 as alleged by the petitioners in the writ petition, no further direction can be given by this Court in this case because the licence of respondent no.4 already stands withdrawn.

17. On the quantum of compensation, Rule 4(3) of the Rules 2005, provides that the application for recruitment and placement service licence shall be accompanied by a declaration in Form III and Form III requires the application to *inter alia* make the following declaration:

> "(xi) I/We shall ensure that all ships on which seafarers are recruited and placed are covered adequately by the P & I Insurance."

All that the aforesaid declaration requires is that all ships on which seafarers are recruited and placed are covered adequately by the P & I Insurance. In the present case, Jupiter-6 was a ship bearing the flag of Saint Vincent and the Grenadines and was also covered by insurance and the insurers have deposited Forty Thousand Dollars (40,000 Dollars) for each deceased officer seafarer and Twenty Five Thousand Dollars (25,000 Dollars) for each deceased non-officer seafarer. 40,000 Dollars is equivalent to Rs.18,14,800/- and 25,000 Dollars is equivalent to Rs.11,34,250/- as mentioned in the report of Registrar (J). It is difficult for us to hold that the aforesaid amount of compensation is not adequate in the absence of sufficient materials produced before us to show the age, income of the seafarers and all other factors which are relevant for determination of compensation in the case of death



of seafarers (officers and non-officers). We cannot also direct respondent nos.3 and 4 to pay the compensation as per the Collective Bargaining Agreements in the absence of any materials placed before the Court to show that the respondent nos. 4 and 5 were bound by the Collective Bargaining Agreements.

18. Regarding the submission of the learned counsel for the petitioners that this Court should declare law in exercise of its powers under Article 142 of the Constitution, we do not think that we should venture to do so in this case considering the numerous factors which are to be taken into consideration in making the law relating to maritime casualty and the compensation payable in case of death of Indian seafarers. We have, however, taken note of the additional affidavit filed on behalf of respondent nos. 1, 2 and 3 on 19.07.2011 in which the proposal for setting up an Indian Maritime Casualty Investigation Cell and for amending the 2005 Rules have been indicated. In our view, it will be enough for us to recommend to the respondent no.1 to expedite the proposals which have been under consideration of the Government and to take immediate steps to amend the Merchant Shipping Act, 1958 and the Rules 2005 in a manner they deem proper to ensure that the life of seafarers employed in different ships in high seas are made more secure and safe and in case of loss of life, their kith and kin are paid adequate amount of compensation.

19. This writ petition is disposed of with the aforesaid observations and with a direction to the Registrar (J) to expedite the payment of compensation to the legal heirs of the victims in accordance with the orders passed in this case as early as possible, in any case, within a period of four months from today. We make it clear that the compensation received by the legal heirs of the Indian seafarers on board Jupiter-6 will be without prejudice to their claim for higher compensation in any appropriate proceedings.

K.K.T. Writ Petition disposed of.