RAJAN PUROHIT & ORS.
v.
RAJASTHAN UNIVERSITY OF HEALTH SCIENCE & ORS.
(Civil Appeal No. 8142 of 2011 Etc.)

AUGUST 30, 2012

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

Education/Educational Institutions:

*Admission – In Private unaided Medical College – State Government decision to fill 85% of the MBBS seats through State Pre-Medical Test 2008 (RPMT-2008) – No agreement with the College to give admission on the basis of RPMT-2008 – College filling 117 of 150 seats [i.e. 16 seats through PCPMT (exam conducted by Private Medical and Dental colleges of the State) and 101 seats on the basis of 10+2 exam] – The admission challenged by RPMT-2008 wait list candidates claiming admission against 85% seats – Single Judge of the High Court setting aside the admission directing the college to fill up the seats by candidates in the RPMT-2008 – Division Bench of the High Court upholding the order of Single Judge – On appeal, held: There was no agreement by the college to admit on the basis of RPMT-2008 – The college could not have been directed to fill up its seats through RPMT-2008 – But the admission of 117 students was contrary to clause (2) of Regulation 5 of MCI Regulations – It was also not within the right of the College, under Article 19(1)(g) of Constitution as explained in *TMA Pai and **P. A. Inamdar cases – Since the candidates admitted by the college were not at fault, in exercise of power u/Art. 142 of Constitution, direction not to disturb their admission – Direction is subject to the condition that the candidate would pay a sum of Rs. 3 lakhs – Penalty imposed on the College to surrender its 107 seats to State Government phase-wise not more than 10 seats in any academic year – Regulations*

on Graduate Medical Education, 1997 – Regulation 5(2) – Constitution of India, 1950 – Articles 19(1)(g) and 142.

Admission – In Medical College – College entering into consensual arrangement with State Government to fill 85% of MBBS seats by the students allocated by competent authority – Filling the 85% seats in two rounds of counselling from allocated students – Residual 21 seats filled by college on its own (15 through Pre-Medical Test and 6 on the basis of 10+2 examination) – In another case Pre-Medical Test Candidates in waiting list challenging filling up of the above-mentioned 6 seats wherein High Court did not disturb the admission of the 6 students and also directed admission to the petitioners therein – 21 students not allowed to appear in exam – Present writ petition by the 21 students – Single Judge of the High Court allowing petition of 15 students who were admitted through Pre-Medical Test – But dismissing the petition of 6 students in view of order of Medical Council of India discharging the 6 students from the course – Order confirmed by Division Bench of High Court – On appeal, held: The Admission of the 6 students were in violation of Regulation 5(2) of MCI Regulations – Regulation 5(1) is not applicable to State of Rajasthan because this State has many Boards/Universities/Examining Body – The present petition was also not barred by principle of res-judicata as the issue in the present petition was not the issue in the previous petition – However, invoking powers under Article 142 of the Constitution, admission to 6 students not disturbed subject to the condition that they would pay Rs. 3 lakhs – Penalty imposed on the college to surrender the 6 seats to the State Government – Regulations on Graduate Medical Education, 1997 – Regulations 5(1) and (2) – Code of Civil Procedure, 1908 – s. 11 – Principle of Res Judicata – Constitution of India, 1950 – Article 142.

Civil Appeal Nos. 8142, 8143 and 8144 of 2011:

The medical college in question was a private

unaided non-minority college. It was yet to receive its permission from the Government of India and affiliation from the Rajasthan University of Medical Sciences. Pursuant to a meeting regarding conducting of common entrance test for admission to Medical and Dental Colleges in the State of Rajasthan for the academic year 2008-2009, the college Chairman and Managing Trustee gave a written undertaking that the college would admit the students to the MBBS course only after getting permission from the authorities concerned. The college did not participate in another meeting wherein it was decided that 85% seats of the medical colleges in the State would be filled through Rajasthan Pre-Medical Test-2008 (RPMT-2008) and 15% seats would constitute NRI quota. Permission letter was granted to the college on 16-09-2008 for establishment of the college with an annual intake capacity of 150 students. The letter further stipulated that the admission process was to be completed within time schedule indicated in the Regulations on Graduate Medical Education, 1997.

The college issued advertisement inviting application for admission to MBBS course on the basis of PC-PMT conducted by Federation of Private Medical and Dental Colleges of Rajasthan and 10+2 examination. Last date of receipt of application was stipulated to be 28-09-2008. The college, out of 150 seats, filled 16 seats through PC-PMT and 101 seats were filled on the basis of 10+2 examination. The 23 seats of NRI quota were also filled up by the college.

Some of the candidates, selected through RPMT-2008 and were placed in waiting list, filed writ petition, seeking their consideration for admission against the 85% seats of the 150 seats in the college, on the basis of their merit in RPMT-2008. Single Judge of High Court, by interim order, reserved 10 seats for the writ petitioners

and by final order allowed the writ petition and directed to hold counseling from the waiting list of students of RPMT-2008.

The college as well as the students who were given admission by the college, filed appeals challenging the order of the Single Judge. Division Bench of High Court dismissed the appeals. Hence the present appeals.

<u>Civil Appeal Nos. 6210 and 6211 of 2012:</u>

Pursuant to a consensual arrangement between the State Government and the college in question, to fill 85% of the MBBS seats by allocation of students by the competent authority, the college filled up the seats in two rounds of counseling from the candidates allocated by the competent authority. The college issued an office order that residual seats which remained vacant even after the second round of counseling to be filled up by an admission process, whereby preference would be given to RPMT-2008 candidates and if the seats were still vacant, the same to be filled up on the basis of marks obtained in 10+2 examination. Pursuant to the office order, out of the 21 unfilled seats, 15 seats were filled by the candidates selected in RPMT-2008 and 6 seats were filled on the basis of 10 +2 examination.

When the 21 students were not allowed to take the examination for the MBBS course by the authorities, they filed writ petitions. Single Judge of High Court allowed the writ petitions by the 15 students whose admission was on the basis of RPMT-2008 but dismissed the petition of the 6 students whose admission was on the basis of 10+2 examination, in view of the order dated 04-02-2010 passed by Medical Council of India directing to discharge the 6 students on the ground that they were not candidates of RPMT-2008. The appeal of the college and

the 6 students was dismissed by Division Bench of the High Court.

In appeal to this court, the appellants *interalia* contended that as the admission of the 6 candidates was earlier challenged in writ petitions by candidates who had qualified in RPMT-2008 and the same was not disturbed by the High Court and that order since obtained finality, the Medical Council of India could not have passed order discharging the 6 students from MBBS course.

Partly allowing the appeals, the Court

HELD:

Civil Appeal Nos. 8142, 8143 and 8144 of 2011:

1. There was no agreement between the College and the State Government to admit students into its MBBS course on the basis of RPMT-2008 and the finding of the High Court in this regard is erroneous and the High Court could not have directed the College to fill up its seats on the basis of merit of students as determined in RPMT-2008 as per the law laid down in **T.M.A. Pai Foundation* **as explained in** ***P.A. Inamdar***. Hence, the direction of the High Court to fill up the seats by students selected or wait listed in the RPMT-2008 is set aside. [Para 30] [343-B-D]**

2. The admissions of 117 students to the MBBS course for the academic year 2008-2009 in the College were contrary to clause (2) of Regulation 5 of the MCI Regulations.The College was bound to follow the MCI Regulations while making the admissions to the MBBS seats. Even if the College was required to complete the admission process by a particular date, it could not violate the MCI Regulations on the ground that it had to complete the admission process by that date. It is clear from the provisions of Regulation 5 that the selection of students

to medical college is to be based solely on merit of the candidate and for determination of the merit, the criteria laid down in Clauses (1), (2), (3) and (4) will apply. Clause (2) of Regulation 5 on which the MCI relied upon clearly states that in States having more than one University/ Board/Examining Body conducting the qualifying examination a competitive entrance examination should be held so as to achieve a uniform evaluation as there may be variation of standards at qualifying examinations conducted by different agencies. The merit of the students who had applied pursuant to the advertisement of the College had to be uniformly evaluated by a competitive entrance examination, but no such competitive entrance examination had been held by the College between all the candidates who had applied pursuant to the advertisement. Therefore, there was a clear violation of Clause (2) of Regulation 5 of the MCI Regulations in admitting the 101 students to the MBBS Course for the academic year 2008-2009 by the College. [Paras 23, 24 and 30] [335-E-G; 336-E-G; 337-A-D; 343-B-D]

Dr. Preeti Srivastava and Anr. v. State of M.P. and Ors. **(1999) 7 SCC 120: 1999 (1) Suppl. SCR 249;** *State of M.P. and Ors. v. Gopal D. Tirthani and Ors*. **(2003) 7 SCC 83: 2003 (1) Suppl. SCR 797;** *Harish Verma and Ors. v. Ajay Srivastava and Anr*. **(2003) 8 SCC 69: 2003 (3) Suppl. SCR 833 – referred to.**

3.1. The admissions were not within the right of the College under Article 19(1)(g) of the Constitution as explained by this Court in **T.M.A. Pai Foundation* **and** ***P.A. Inamdar*. **In** **T.M.A. Pai Foundation*, **this Court, while holding that a private unaided non-minority institution has the right to establish and administer an educational institution under Article 19(1)(g) of the Constitution also held that such right will include the right to admit students into the institution. The observations in para 58 of the**

judgment of Kirpal, CJ. make it clear that students seeking admission to a professional institution were required to be treated fairly and preferences were not to be shown to less meritorious but more influential students and greater emphasis was required to be laid on the merit of the students seeking admission. In para 59, it has been further made clear that merit is to be determined for admission to professional colleges, by either the marks that the student obtains at the qualifying examination, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies. The judgment in **T.M.A. Pai Foundation* has been further explained by this Court in ***P.A. Inamdar* and it has been held therein that that non-minority unaided institutions, like the minority unaided institutions, have also the unfettered fundamental right to choose the students to be allowed admission and the procedure therefore, but the admission procedure so chosen by the institution must be fair, transparent and non-exploitative. This Court has taken the further view that all institutions imparting same or similar professional education can join together for holding a common entrance test satisfying the triple tests of the admission procedure being fair, transparent and non-exploitative. [Paras 19 and 20] [331-E-G; 332-E-H; 333-A-B-G-H]

3.2. The College admitted 16 students from the list of candidates selected in the PC-PMT 2008 conducted by the Federation of Private Medical and Dental Colleges of Rajasthan. The PC-PMT 2008 did not call for any applications from candidates for admission to the MBBS course, but only for the BDS course. Moreover, the College had not been included in the brochure published for PC-PMT 2008. Consequently, students, who may be interested not in the BDS course but in the MBBS course, could not have applied to take the PC-PMT 2008. As a result, many meritorious students desirous of taking

admission in the MBBS course in the College could not get an opportunity to participate in the PC-PMT 2008. The admission procedure adopted by the College was thus not fair and transparent and fell short of the triple tests laid down in ***P.A. Inamdar* and such admission procedure was not within the fundamental right of the College to admit students of its choice under Article 19(1)(g) of the Constitution as explained in **T.M.A. Pai Foundation.* [Para 21] [334-A-F]

3.3. The candidates, who had applied in response to the advertisement, had not passed the 10+2 examination from the same Board or University but from different Boards and Universities. If that be so, the merit of the candidates who had applied in response to the advertisement could not be evaluated by a uniform standard and could only be evaluated by a competitive entrance examination of all these students who had applied pursuant to the advertisement of the College. It is not the case of the College that any competitive entrance examination of all the students, who had applied pursuant to the advertisement, was held by the College to determine their comparative merit. Hence, the principle of merit as the basis for selection for admission in the professional courses laid down by this Court in **T.M.A. Pai Foundation* and as explained in ***P.A. Inamdar* has not been followed. Thus, even as per the law laid down by this Court in **T.M.A. Pai Foundation* and ***P.A. Inamdar,* the College has not been able to establish that the admissions of 117 students to its MBBS course for the academic year 2008-2009 were within its right under Article 19(1)(g) of the Constitution. [Para 22] [335-A-E]

***T.M.A. Pai Foundation and Ors. v. State of Karnataka and Ors.* (2002) 8 SCC 481: 2002 (3) Suppl. SCR 587; *P.A. Inamdar and Ors. v. State of Maharashtra and Ors.* (2005) 6 SCC 537: 2005 (2) Suppl. SCR 603 – followed.**

4. Since the College violated clause (2) of Regulation 5 of the MCI Regulations in making the admissions of 117 students to the MBBS course for the academic year 2008-2009 and the admissions were not within the right of the College under Article 19(1)(g) of the Constitution as explained in *T.M.A. Pai Foundation and **P.A. Inamdar , the College must, therefore, suffer some penalty as a deterrent measure so that it does not repeat such violation of the MCI Regulations in future. Moreover, if no punitive order is passed, other colleges may be encouraged to violate the MCI Regulations with impunity. In the present case, there were as many as 117 admissions contrary to the provisions of clause (2) of Regulation 5 of the MCI Regulations. The Single Judge of the High Court had directed ten seats to be kept vacant for the academic year 2008-2009 and those ten seats kept vacant have not been filled up and the College has not received any fees for the ten seats. Excluding these ten seats, the College will have to surrender 107 seats in a phased manner, not more than ten seats in each academic year beginning from the academic year 2012-2013. These 107 seats will be surrendered to the State Government and the State Government will fill up these 107 seats on the basis of merit as determined in the RPMT or any other common entrance test conducted by the State Government or its agency for admissions to Government Medical Colleges and the fees of the candidates who are admitted to the 107 seats will be the same as fixed for the Government Medical Colleges. [Para 28] [341-D-H; 342-A-C]

Deepa Thomas and Ors. v. *Medical Council of India and Ors*. **(2012) 3 SCC 430 – relied on.**

5. As the 117 students who had been admitted to the MBBS course in the College were not to be blamed for the lapses on the part of the College, their admission

should not be disturbed. But since they are beneficiaries of violation of clause (2) of Regulation 5 of the MCI Regulations by the College, and have got admission into the College without any proper evaluation of their merit vis-a-vis the other students who had applied but had not been admitted in a competitive entrance examination, they must pay some amount for development of infrastructure in the medical college of the Government as a condition for allowing them to continue their MBBS studies by orders under Article 142 of the Constitution. Therefore, they will each pay a sum of Rs.3 lacs within a period of three months from the date of this judgment to the State Government and in the event of default, the students will not be permitted to take the final year examination and the admission of the defaulting students shall stand cancelled and the College will have no liability to repay the admission fee already paid. The amount so paid to the State Government shall be spent by the State Government for improvement of infrastructure and laboratories of the Government medical college of the State and for no other purpose. [Paras 27, 29 and 30] [341-C-D; 342-D-G; 343-F-H; 344-A-B]

Chowdhury Navin Hemabhai and Ors. v. State of Gujarat and Ors. **(2011) 3 SCC 617: 2011 (2) SCR 1071 ;** *Deepa Thomas and Ors. v. Medical Council of India and Ors.* **(2012) 3 SCC 430;** *Priya Gupta v. State of Chhattisgarh and Ors.* **2012 (5) SCALE 328 – relied on.**

A.P. Christians Medical Educational Society v. Government ofAndhra Pradesh and Anr. ***(1986) 2 SCC 667*****: 1986 (2) SCR 749 ;***Regional Officer, CBSE v. Ku. Sheena Peethambaran and Ors.* **(2003) 7 SCC 719: 2003 (3) Suppl. SCR 275*;*** *Visveswaraiah Technological University and Anr. v. Krishnendu Halder and Ors*. **(2011) 4 SCC 606: 2011 (2) SCR 1007 – distinguished.**

A.B. Bhaskara Rao v. Inspector of Police, CBI

Vishakapatnam **(2011) 10 SCC 259: 2011 (12) SCR 718 – referred to.**

Civil Appeal No. 6210 and 6211 of 2012

1. It cannot be held that the MCI could not have issued the order dated 04.02.2010 discharging the six students from the MBBS Course on the ground that they had not been selected in the RPMT-2008 and that their admissions were in breach of the provisions of clause (2) of Regulation 5 of the MCI Regulations, in view of the of the order dated 26.05.2009 passed by the Single Judge of the High Court in three Writ Petitions which had attained finality. The question as to whether the admission of the six students was in breach of clause (2) of Regulation 5 of the MCI Regulations was not in issue in the aforesaid three writ petitions. The High Court disposed of the three writ petitions on the basis of a compromise between the writ petitioners on the one hand. As the College has not produced the pleadings before this Court in the three writ petitions to show that an issue was raised before the High Court in the aforesaid three writ petitions by the MCI that the admission of the 6 students was in breach of clause (2) of Regulation 5 of the MCI Regulations, the principles laid down in Section 11 CPC relating to *res judicata* will not apply. As a matter of fact, when the order dated 26.05.2009 was passed the MCI had no information that the six students had not been selected in the RPMT-2008 and it was only in August, 2009, and thereafter that the MCI came to learn about the breach of the provisions of Regulation 5 and accordingly MCI issued orders to immediately discharge six students. [Para 9] [350-F-H; 351-A-B; 351-D-G]

2. It is also not correct to say that the College could admit students on the basis of marks obtained by them in the qualifying examinations under Clause (1) of

Regulation 5 of the MCI Regulations. Regulation 5(1) of the MCI Regulations applies only in a State where one University or Board or Examining Body conducts the qualifying examination, in which case, the marks obtained at such qualifying examination may be taken into consideration. As the State of Rajasthan has more than one University/Board/Examining Body conducting qualifying examinations, clause (2) of Regulation 5 of the MCI Regulations will apply which provides that a competitive entrance examination will have to be held so as to achieve a uniform evaluation. The College, therefore, was bound to hold a competitive entrance examination in accordance with clause (2) of Regulation 5 of the MCI Regulations or enter into a consensual arrangement with the State Government to admit students on the basis of the Competitive Entrance Examination conducted by the State Government. The College entered into a consensual arrangement with the State Government to admit students on the basis of merit as determined in the RPMT-2008. Therefore, the clarification of the Secretary of the MCI that for the purpose of admissions within the time schedule fixed by this Court, admission can also be made on the basis of marks secured in the 10+2 Examination as provided in Regulation 5(1) of the MCI Regulations is not in accord with the fact situation in the State of Rajasthan. The admission of the six students by the College to its MBBS Course was, therefore, in breach of clause (2) of Regulation 5 of the MCI Regulations. [Para 10] [351-G-H; 352-B-E-F-H; 353-A]

Mirdul Dhar and Anr. vs. Union of India and Ors. **(2005) 2 SCC 65 – referred to.**

3. The Court, invoking its powers under Article 142 of the Constitution directs that the admission of the 6 students in the MBBS Course will not be disturbed subject to the condition that each of the 6 students pay

to the State Government Rs.3 lacs for development of infrastructure of Government medical colleges within a period of three months from the date of the judgment failing which they will not be allowed to take the final MBBS examinations and their admission will be cancelled. [Para 12] [353-E-F]

Rajendra Prasad Mathur v. Karnataka University and Anr. **1986Supp. SCC 740;** *A. Sudha v. University of Mysore and Anr.* **(1987) 4 SCC 537; 1988 (1) SCR 368;** *Association of Management ofUnaided Private Medical and Dental College v. Pravesh Niyantran Samiti and Ors.* **(2005) 13 SCC 704;** *Monika Ranka and Ors. v. Medical Council of India and Ors.* **(2010) 10 SCC 233 – referred to.**

4. Considering the fact that the College has violated the provisions of clause (2) of Regulation 5 of the MCI Regulations, as a deterrent measure to prevent similar breach of the MCI Regulations in future, it is directed that the College will surrender six seats in the MBBS course for the academic year 2012-2013 to the State Government to be filled up on the basis of the RPMT or any other common entrance test conducted by the State Government of Rajasthan or its agency for admission to the MBBS Course and the fee that will be payable by the students admitted to the six seats will be the same as are payable by the students admitted on the basis of RPMT or another common entrance test conducted by the State Government or its agency. [Para 12] [353-F-H; 354-A-B]

Priya Gupta v. State of Chhattisgarh and Ors. **2012 (5) SCALE 328 – relied on.**

Case Law Reference:

In Civil Appeal Nos. 8142, 8143 and 8144 of 2011:

1999(1) Suppl. SCR 249	**Referred to**	**Para 11**

2003 (1) Suppl. SCR 797	**Referred to**	**Para 11**
2003 (3) Suppl. SCR 833	**Referred to**	**Para 11**
2011 (123) SCR 718	**Referred to**	**Para 12**
2002 (3) Suppl. SCR 587	**Followed**	**Paras 20 and 30**
2005 (2) Suppl. SCR 603	**Followed**	**Paras 20 and 30**
2011 (2) SCR 1071	**Relied on**	**Para 27**
1986 (2) SCR 749	**Distinghished**	**Para 24**
2003 (3) Suppl. SCR 275	**Distinguished**	**Para 25**
2011 (2) SCR 1007	**Distinguished**	**Para 25**
(2012) 3 SCC 430	**Relied on**	**Paras 27 and 28**
2012 (5) SCALE 328	**Relied on**	**Para 29**

In Civil Appeal No. 6210 and 6211 of 2012

2005 (1) SCR 380	**Referred to**	**Para 6**
(2005) 2 SCC 65	**Referred to**	**Para 6**
1986 Supp. SCC 740	**Referred to**	**Para 7**
1988 (1) SCR 368	**Referred to**	**Para 7**
(2005) 13 SCC 704	**Referred to**	**Para 7**
(2010) 10 SCC 233	**Referred to**	**Para 7**
(2012) 5 SCALE 328	**Relied on**	**Para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8142 of 2011.

From the Judgment and Order dated 03.09.2009 of the High Court of Judicature for Rajasthan at Jaipur in Special Appeal No. 241 of 2009 in Civil Writ Petition No. 10858 of 2008.

WITH

Civil Appeal Nos. 6210, 6211 of 2012, 8143, 8144 & 8999 of 2011.

Ravinder Shrivastav, Pallav Shishodia, P.S. Narsimha, K.K. Venugopal, Maninder Singh, Amrendra Sharan, Jasbir Singh Malik, S. Udaya Kumar Sagar, Bina Madhavan, Vinita Sasidharan (For Lawyer's Knit & Co.), J.S. Bhasin, T. Mahipal, A. Venayagam Balan, Rashmi Priya, Gaurav Sharma, Shivaji M. Jadhav, Amit Kumar, Atul Kumar, Rekha Bakshi, Somendra Chandra Jha, Manju Jana, Milind Kumar, Naveen Kr. Chauhan, Rahul Singh Chauhan, Mandar K. Narwane, Praveen Swarup, Rajendra Soni, Anuradha Soni, Abhinav Mukerji, P.K. Jain, Gaurav Agrawal for the Appearing Parties.

The Judgment of the Court was delivered by

A.K. PATNAIK, J.

CIVIL APPEAL NO. 8142 OF 2011, CIVIL APPEAL NO.8143 OF 2011 AND CIVIL APPEAL NO.8144 OF 2011:

1. These are appeals by way of special leave under Article 136 of the Constitution of India against the common order and judgment dated 03.09.2009 of the Division Bench of the Rajasthan High Court, Jaipur Bench, in Special Appeal Nos.241 of 2009 and 386 of 2009.

FACTS

2. The facts very briefly are that the Secretary, Medical Education, Government of Rajasthan, held a meeting on 04.12.2007 for the purpose of conducting a common entrance

test for admission to the Medical and Dental Colleges in the State of Rajasthan for the academic year 2008-2009. Besides the Secretary, Medical Education, Government of Rajasthan, the Registrar, Rajasthan Medical University of Health Sciences, Jaipur, Professor Anatomy of Medical College, Jaipur, Special Officer, Technical Education Department, Government of Rajasthan, representative from the Federation of Private Medical and Dental Colleges of Rajasthan, Jaipur, Managing Director, Geetanjali Medical College, Udaipur, Managing Director, National Institute of Medical Sciences, Jaipur, were also present in the meeting. Geetanjali Medical College and Hospital (for short 'the College') was yet to receive its permission from the Government of India and affiliation from the Rajasthan University of Medical Sciences and on 12.12.2007, the Chairman and Managing Trustee of the Geetanjali Foundation Shri Jagdish Prasad Agarwal gave a written undertaking that the College will admit the students to the MBBS course only after getting permission from the Government of India and after getting affiliation from the Rajasthan University of Medical Sciences. Another meeting for the aforesaid purpose was held under the Chairmanship of the Secretary, Medical Education on 15.12.2007 and at this meeting it was decided that students will be made available for 85% of the seats in the medical colleges in the State of Rajasthan through the Rajasthan Pre-Medical Test 2008 (for short the 'RPMT-2008), and the remaining 15% seats of the colleges will constitute NRI quota which will be filled by the colleges. The representative of the College did not participate in the meeting on the ground that inspection of the College by the Medical Council of India (for short 'MCI') was going on. The Director of the College in his letter dated 18.12.2007 to the Secretary, Medical Education, Government of Rajasthan, while expressing his inability to attend the meeting on 15.12.2007, explained that the College cannot participate in the admission procedure and cannot give consent for taking the students from the RPMT-2008 till the College received the clearances from the MCI.

Thereafter, the inspection report in respect of the College was considered by the Executive Committee of the MCI on 12.05.2008 and the MCI decided to recommend to the Government of India to issue the permission letter for establishment of the College with an annual intake of 150 students for the academic year 2008-2009. The Government of India, Ministry of Health and Family Welfare, however, took a decision not to grant permission for establishment of the College for the academic year 2008-2009 and communicated this decision in its letter dated 04.08.2008 to the Chairman and Managing Trustee of the Geetanjali Foundation.

3. Aggrieved, the College filed Writ Petition (C) No.357 of 2008 before this Court under Article 32 of the Constitution of India and on 03.09.2008 this Court disposed of the writ petition after recording the statement of the learned Additional Solicitor General that the revised orders will be passed by the Government of India within a week in respect of the College. In the order dated 03.09.2008 disposing of the writ petition of the College, this Court further observed that the College may complete the admissions by 30.09.2008 in accordance with the rules and procedure laid down for the purpose of admissions. The Government of India, Ministry of Health and Family Welfare, then issued a permission letter dated 16.09.2008 for establishment of the College with an annual intake capacity of 150 students with prospective effect from the academic year 2008-2009 under Section 10A of the Indian Medical Council Act, 1956. In this permission letter dated 16.09.2008, it was inter alia stipulated that the admission process for the academic year 2008-2009 has to be completed by the College within the time schedule indicated in the Regulations on Graduate Medical Education, 1997 made by the MCI.

4. The College by its letter dated 25.09.2008 requested the President, Federation of Private Medical and Dental Colleges of Rajasthan to allot students to the College by conducting counselling and the College also issued an

advertisement on 26.09.2008 in leading newspapers inviting applications from the candidates for admission counselling to the first year MBBS course for the academic year 2008-2009 on the basis of PC-PMT/10+2 examination with minimum 50% marks in Physics, Chemistry and Biology as per regulations of the MCI and stated in the advertisement that the last date of receipt of the applications would be 28.09.2008 and the candidates will be selected on the basis of merit. After counselling, out of the 150 seats of the College in first year MBBS course, 16 seats were filled up by students from PC-PMT conducted by the Federation of Private Medical and Dental Colleges of Rajasthan and 101 seats were filled up from amongst candidates who had passed the 10+2 examination and 23 seats of the NRI quota were filled up by the College.

5. Some of the candidates who were selected through the RPMT-2008 and placed in the waiting list of candidates for admission to the MBBS seats in the medical colleges in the State of Rajasthan filed eight writ petitions before the Rajasthan High Court, Jaipur Bench, contending that they were entitled to be admitted to the seats of the College in the first year MBBS course on the basis of their merit in the RPMT-2008 and praying for a direction to the College to consider and give them admission in the MBBS course in the College against the 85% seats of the 150 seats on the basis of their merit in RPMT-2008 by holding counselling and further praying that no one should be admitted against the 150 seats from any source other than the RPMT-2008. The learned Single Judge of the High Court, who heard the writ petitions, initially passed an interim order on 29.09.2008 directing that ten seats in the College will be reserved for the writ petitioners. The learned Single Judge of the High Court thereafter passed the final order on 18.03.2009 holding that the RPMT-2008 was conducted in accordance with Regulation 5 of the Regulations on Graduate Medical Education, 1997 made by the MCI (for short 'the MCI Regulations') as well as in accordance with Ordinance 272 (IV)

and the policy of the State Government and the College could not have admitted candidates to the 85% of the seats in the MBBS course as per its own choice at the cost of meritorious students placed in the waiting list of candidates found successful in the RPMT-2008. The learned Single Judge of the High Court thus allowed the writ petitions and declared that the admissions made by the College in MBBS course for the academic year 2008-2009 against 85% of the seats were illegal and directed the State to hold counselling from the waiting list of students of RPMT-2008 and further directed that the writ petitioners will be given admission as per their merit position in the waiting list and the process be completed before the commencement of the RPMT-2009. The final order dated 18.03.2009 of the learned Single Judge was challenged by the College as well as the students who were admitted by the College in Special Appeals before the Division Bench of the High Court. All these Special Appeals were heard by a Division Bench of the Rajasthan High Court, Jaipur Bench, but dismissed by a common order dated 03.09.2009. Aggrieved, the students who had been admitted into the College have filed Civil Appeal Nos.8142 of 2011 and 8143 of 2011 and the College has filed Civil Appeal No.8144 of 2011.

6. Mr. K. K. Venugopal, Mr. Dushyant Dave, Mr. Ravinder Shrivastav and Mr. Pallav Shishodia, learned senior counsel for the appellants, submitted that the college had not agreed to admit students to its MBBS seats from amongst the students selected in the RPMT-2008 in the meeting held on 15.12.2007 under the Chairmanship of the Secretary, Medical Education, Government of Rajasthan because the College did not have the permission from the Government of India to establish the College. They submitted that the first counselling for students selected in the RPMT -2008 for admission in the MBBS course was held on 17.07.2008 and second and last counselling for such students selected in the RPMT-2008 for admission in the MBBS course was over on 24.09.2008 and the College received the letter of permission from the Government of India

for establishing the College for MBBS course with an annual intake of 150 students for the academic year 2008-2009 onwards on 25.09.2008 and by this date as the second and last counselling for the candidates selected on the basis of RPMT-2008 was over, the College could not admit the students to 85% of the seats in the MBBS course on the basis of the RPMT-2008. They submitted that in these peculiar facts the College issued an advertisement in leading newspapers inviting applications from the candidates for admission in the first year MBBS course for the academic year 2008-2009 on the basis of their merit in PC-PMT or 10+2 examination. They submitted that the Principal of the R.N.T. Medical College and Controller by his letter dated 29.09.2008 also constituted a team of five officers with Professor and Head of Department of Pathology & Academic Officer of the College as the Chairman to supervise the admissions in the College. They submitted that after counselling, 16 students were admitted from the list of candidates selected on the basis of PC-PMT conducted by the Federation of the Private and Dental Colleges of Rajasthan on the basis of their merit and 101 students were admitted on the basis of their merit in 10+2 examination in the MBBS course of the College.

7. They relied upon the judgment of this Court in *T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors.* [(2002) 8 SCC 481] in which it has been held that a private unaided non-minority institution has the right to establish and administer an educational institution under Article 19(1)(g) of the Constitution of India and that such right includes the right to admit students into the institution. They also cited the judgment of this Court in *P.A. Inamdar & Ors. v. State of Maharashtra & Ors.* [(2005) 6 SCC 537] in which the law laid down in *T.M.A. Pai Foundation* (supra) was clarified and it was held that non-minority unaided institutions, like the minority institutions, can also legitimately claim unfettered fundamental right to choose the students to be allowed admission and the State cannot impose a quota of seat

sharing in such institutions and that this can only be done by a consensual arrangement. They submitted that in *P.A. Inamdar* (supra), this Court further held that all private institutions imparting same or similar professional education can join together for holding a common entrance test satisfying the triple tests of the admission procedure being fair, transparent and non-exploitative. They submitted that in accordance with the aforesaid law laid down by this Court in *T.M.A. Pai Foundation* and *P.A. Inamdar* (supra), a common entrance test, namely, PC-PMT 2008, was held by the Federation of the Private and Dental Colleges of Rajasthan and on the basis of the merit as determined in PC-PMT 2008, 16 students have been admitted to the MBBS course of the College.

8. They submitted that the finding of the High Court that admission to the 85% of the seats in the MBBS course of the College could, as per the MCI Regulations, be made only on the basis of merit as determined in the RPMT is not correct. They submitted that Regulation 4 of the MCI Regulations lays down the "eligibility criteria" for admission to the MBBS course and it provides that a candidate should have completed the age of 17 years on or before the date mentioned therein and he should have passed the qualifying examination. They submitted that all the 117 students (16+101) admitted to the MBBS course in the College for the academic year 2008-2009 fulfilled the requirements regarding age and passing of qualifying examination as provided in Regulation 4 of the MCI Regulations. They submitted that Regulation 5 of the MCI Regulations states that the selection of students to medical college shall be based solely on the merit of the candidate and clause (1) of Regulation 5 states that for determining the merit, the marks obtained at the qualifying examination may be taken into consideration. They argued that the marks of 101 students admitted on the basis of their 10+2 qualifying examination were taken into consideration and, therefore, Regulation 5 of the MCI Regulations had not been violated. They submitted that in the facts of the present case since the seats of the MBBS course

in the College had to be filled up for the academic year 2008-2009 on or before 30.09.2009, the College had no option but to fill up the seats on the basis of merit as determined in the 10+2 examination after publishing the advertisement in the leading newspapers.

9. Learned senior counsel for the appellants also submitted that none of the students, who had applied pursuant to the advertisement published by the College for admission on the basis of merit as determined in the PC-PMT 2008 or the 10+2 examination, had made any grievance before any authority that they were not given admission on the basis of merit or that students with lesser merit had been admitted in the seats for the MBBS course in the College for the academic year 2008-2009. They argued that in fact, as desired by the High Court, a report was called for on the admissions made by the College in the MBBS course for the academic year 2008-2009 and a Committee comprising the Deputy Secretary, Medical Education, Government of Rajasthan, the Registrar, Rajasthan University of Health Sciences, Jaipur, Dean, Medical College, Jhalawar and Professor, M.M. Medical College, Ajmer, examined all the records of admissions and conducted an enquiry and submitted a report with a finding that though the College was directed by the State Government to admit students from RPMT-2008, admissions were given by the College on the basis of PC-PMT on merit in 10+2 examinations due to availability of short period for admissions and the Rajasthan University of Health Sciences has treated the admissions to be irregular and not illegal.

10. Learned senior counsel for the appellants cited the judgment of this Court in *Chowdhury Navin Hemabhai & Ors. v. State of Gujarat & Ors.* [(2011) 3 SCC 617] in which this Court has held that even though under the MCI Regulations the appellants could not be admitted to the MBBS course in the academic year 2008-2009, for the purpose of doing complete justice in the matter, the admissions of the appellants therein

to the MBBS course in the College during the academic year 2008-2009 should not be disturbed. They also submitted that a similar view has been taken by this Court in *Deepa Thomas & Ors. v. Medical Council of India & Ors.* [(2012) 3 SCC 430] wherein this Court agreed with the view of the MCI and the High Court that the admissions of the appellants therein were irregular as they had not secured the minimum marks of 50% in the common entrance examination as prescribed in the MCI Regulations and yet directed, as a special case, that the appellants therein shall be allowed to continue and complete their MBBS course and should be permitted to appear in the University examinations as if they had been regularly admitted to the course. They submitted that in the event this Court is of the opinion that the MCI Regulations 1997 have been violated in admitting the 117 students in the MBBS course of the College, to do complete justice in the matters, this Court should allow these students to continue in the MBBS course in exercise of its powers under Article 142 of the Constitution of India as has been done in the aforesaid two cases.

11. Mr. Amarendra Sharan, learned senior counsel appearing for the MCI, submitted that the Division Bench of the High Court has in the impugned order held that the stand of the College that the permission letter dated 16.09.2008 of the Central Government was received by the College on 25.09.2008, i.e. after the second and last counselling of students selected in the RPMT-2008 was over, appears to be doubtful. He supported the aforesaid finding of the High Court and argued that the College avoided to participate in the counselling of students selected in the RPMT-2008 even though it was aware that the Government of India had granted the permission for establishing the College on 16.09.2008. He submitted that the MCI Regulations were made by the MCI with the previous sanction of the Central Government in exercise of power conferred under Section 33 of the Indian Medical Council Act, 1956 and was, therefore, statutory in character and are binding so far as admissions to medical colleges are

concerned. He vehemently argued that the letter dated 16.09.2008 of the Secretary of the MCI clarifying that admissions could be made on the basis of marks in the qualifying examination to complete the admissions by 30th of September could not override the MCI Regulations. He submitted that Regulation 4 of the MCI Regulations, which provides the minimum eligibility of students to be admitted to the MBBS course, is not the only provision which has to be followed by the Medical Colleges for admissions to the MBBS course. He submitted that Regulation 5 of the MCI Regulations provided that selection of students to a medical college shall be based solely on merit of the candidates and clause (2) of Regulation 5 stipulated that in States, having more than one university/board/examining body conducting the qualifying examination a competitive entrance examination should be held so as to achieve a uniform evaluation as there may be variation of standard at qualifying examination conducted by different agencies. He submitted that selection for the 85% of the seats in the College for the academic year 2008-2009 could, therefore, be only on the basis of merit as determined in a competitive entrance examination and not on the basis of the marks obtained in qualifying examination. He submitted that there is a clear finding in the impugned order of the High Court that the College was not listed in brochure with the application form notified by the Federation of Private Medical and Dental Colleges of Rajasthan for PC-PMT 2008 and in fact no competitive entrance examination was conducted for admission to the MBBS course of the College. He argued that the admissions of the 16 students in the MBBS course for the academic year 2008-2009 on the basis of PC-PMT 2008, thus, were not on the basis of merit as determined in a competitive entrance examination as is sought to be made out by the appellants. He submitted that names of 101 candidates who had been admitted on the basis of their marks in the qualifying examination vis-à-vis of the candidates who had not been admitted had not been determined in a common competitive

entrance examination. He argued that the only way the College could comply with the provisions of clause (2) of Regulation 5 of the MCI Regulations was to admit students selected in the RPMT-2008. He submitted that in *T.M.A. Pai Foundation* and *P.A. Inamdar* (supra) cited by the learned counsel for the appellants, this Court has also held that the admissions to the private unaided professional colleges have to be made by selection through a common entrance test and in the aforesaid judgments, this Court has not held that the MCI Regulations will not be followed while giving admissions to the MBBS course. He submitted that this Court, on the contrary, has held in *Dr. Preeti Srivastava & Anr. v. State of M.P. & Ors.* [(1999) 7 SCC 120], *State of M.P. & Ors. v. Gopal D. Tirthani & Ors.* [(2003) 7 SCC 83] and *Harish Verma & Ors. v. Ajay Srivastava & Anr.* [(2003) 8 SCC 69] that the Regulations of the MCI laying down the standards of education for post-graduate medical courses have to be complied with.

12. Mr. Sharan finally submitted that as the admissions to 85% of the seats in the College for the academic year 2008-2009 were in violation of clause (2) of Regulation 5 of the MCI Regulations, the High Court was right in declaring the admissions to be invalid. He submitted that if the Court, in exercise of its powers under Article 142 of the Constitution, shows any sympathy to the students admitted to the MBBS course, in breach of the MCI Regulations, there would be academic chaos. According to him, there was no equity either in favour of the College or in favour of the students who had been admitted to the College in violation of clause (2) of Regulation 5 of the MCI Regulations. He cited the decision in *A.P. Christians Medical Educational Society v. Government of Andhra Pradesh & Anr.* [(1986) 2 SCC 667] in which this Court rejected the plea that the interests of the students should not be sacrificed because of the conduct or folly of management and that they should be permitted to appear at the university examination notwithstanding the circumstance that permission and affiliation had not been granted to the institution. He also

relied on the observations of this Court in *Regional Officer, CBSE v. Ku. Sheena Peethambaran & Ors.* [(2003) 7 SCC 719] that condoning the lapses or overlooking the legal requirements in consideration of mere sympathy factor does not solve the problem, but disturbs the discipline of the system and ultimately, adversely affects the academic standards. He submitted that in *A. B. Bhaskara Rao v. Inspector of Police, CBI Vishakapatnam* [(2011) 10 SCC 259] this Court has laid down the principles governing the exercise of power under Article 142 of the Constitution of India and one of the principles is that the Court generally does not pass an order in contravention of or ignoring the statutory provisions nor is the power exercised merely on sympathy.

13. He also cited the observations of this Court in *Visveswaraiah Technological University & Anr. v. Krishnendu Halder & Ors.* [(2011) 4 SCC 606] that no student or college, in the teeth of the existing and prevalent rules of the State and the University can say that such rules should be ignored, whenever there are unfilled vacancies in colleges. He submitted that if the College was not able to fill up the seats in the MBBS course for the academic year 2008-2009 for the reason that the second and last counselling of students selected on the basis of RPMT-2008 was over, the seats should have been kept vacant and could not have been filled up in violation of the MCI Regulations.

14. Mr. Jasbir Singh Malik, learned counsel for the State of Rajasthan, adopted the arguments of Mr. Amarendra Sharan and further submitted that the information book on RPMT-2008 mentioned the College as one of the Colleges covered by the RPMT-2008 and, therefore, the College cannot contend that the students who are selected in the RPMT- 2008 were not to be admitted to the MBBS seats of the College. He submitted that at the meeting of the Central Under-Graduate Admission Board on 23.09.2008, it was decided not to include the College for the counselling as there was no intimation from the College,

but it was recorded in the proceedings of the meeting that if information is received from the College then students can be provided from the RPMT-2008 by holding counselling at the College at Udaipur at their cost. He submitted that a separate counselling could therefore be held for students who had been selected on the basis of RPMT-2008 for admission to the College if the College had intimated the Convener of the Central Under-Graduate Admission Board that it had got the permission letter dated 16.09.2008 after the second counselling of students selected in the RPMT-2008. He submitted if such separate counselling for admission to the MBBS seats in the College would have been held, it would have been the first counselling so far as this College was concerned and there was no bar as per the law laid down by this Court for holding such separate counselling for the College.

15. Mr. Naveen Kumar Chauhan, learned counsel appearing for the Rajasthan University, adopted the arguments of Mr. Amarendra Sharan, learned senior counsel appearing for the MCI, and Mr. Jasbir Singh Malik, learned counsel for the State of Rajasthan, and further submitted that the College had been included in the information brochure of the RPMT-2008 published on 26.02.2008 because it had initially agreed to participate in the RPMT-2008 at the meeting which took place in December, 2007. He referred to the findings of the Division Bench of the High Court in the impugned order that the College never raised objection about its inclusion in the brochure published by the State Government for RPMT-2008 when the process of admission was initiated by the authorities for holding the RPMT-2008. He submitted that the Division Bench of the High Court has also recorded the finding that on 16.09.2008, the College itself has sent a letter to the Vice-Chancellor of the University of Health Sciences saying that if it gets the approval from the Government of India after the second counselling of the students selected on the basis of the RPMT-2008, a request will be made by the College to suggest the way or to

provide the merit list of RPMT-2008 students for admission in the College. He submitted that both the learned Single Judge and the Division Bench have also taken note of the Ordinance 272 of the University which provides that all private unaided professional institutions will be under an obligation to admit students to the MBBS or the BDS courses on the basis of the selection for admission to MBBS/BDS courses in the Government Colleges. He finally argued that Mr. Jagdish Prasad Agarwal, the Chairman and Managing Trustee of the Geetanjali Foundation, had furnished a written undertaking on 12.12.2007 that it will admit students in MBBS degree only after getting the permission from the MCI/Government of India and after getting affiliation from the Rajasthan University of Medical Sciences, but the College had given admission to the students even before getting affiliation from the University.

16. Ms. Anuradha Soni Verma, appearing for the private respondents, who had filed writ petition in the High Court submitted that none of the students who had been admitted into the College in the MBBS seats for the academic year 2008-2009 have been enrolled by the University and it is only pursuant to the orders of the Court that they had been permitted to take examinations of the MBBS course.

FINDINGS WITH REASONS

17. The College is a private unaided professional institution and it has been held by this Court in *T.M.A. Pai Foundation* (supra) that a private unaided professional institution has a fundamental right under Article 19(1)(g) of the Constitution of India to establish and administer an educational institution and such right will include the right to admit students into the institution. In *P.A. Inamdar* (supra), this Court has explained the judgment in *T.M.A. Pai Foundation* (supra). Paragraphs 127 and 128 of the judgment of this Court in *P.A. Inamdar* (supra), as reported in the SCC, are quoted hereinbelow:

"127. Nowhere in *Pai Foundation*, either in the majority or

in the minority opinion, have we found any justification for imposing seat- sharing quota by the State on unaided private professional educational institutions and reservation policy of the State or State quota seats or management seats.

128. We make it clear that the observations in *Pai Foundation* in paragraph 68 and other paragraphs mentioning fixation of percentage of quota are to be read and understood as possible consensual arrangements which can be reached between unaided private professional institutions and the State."

Hence, in the absence of a consensual arrangement between the College and the State Government, the College was not under any legal obligation to admit students to 85% of the MBBS seats in the academic years 2008-2009. The learned Single Judge and the Division Bench of the High Court in the present batch of cases, however, appear to have recorded a finding that a consensual arrangement was there between the College and the State Government of Rajasthan that 85% of the seats in the MBBS course in the College will be filled up from amongst students selected in the RPMT-2008. Learned counsel for the appellants have disputed this finding of the High Court.

18. Hence, the first question that we have to decide in this case is whether the College had agreed to admit students placed in the merit list or waiting list of RPMT-2008 into the 85% of 150 seats of the MBBS course approved by the Central Government. We find that in the proceedings of the meeting held on 15.12.2007 under the Chairmanship of Secretary, Medical Education, for conducting a common entrance test for admissions to MBBS seats in different colleges in the State of Rajasthan, it has been recorded in Para 5:

"Students will be made available on 85 per cent seats through R.P.M.T. to National Institute of Medical Sciences,

Jaipur and Geetanjali Medical College and Hospital Udaipur. Consent has already been given in this connection earlier by Mahatma Gandhi Medical College and Hospital, Jaipur. On the remaining 15 per cent seats (N.R.I. quota) admissions will be given by these institutions."

From the aforesaid proceedings, it is clear that although a decision was taken by the authorities that students will be made available on 85 per cent seats through R.P.M.T. to Geetanjali Medical College and Hospital Udaipur (the College), there is no mention that the College (Geetanjali Medical College) had given its consent to this arrangement although there is a mention that Mahatma Gandhi Medical College and Hospital, Jaipur, has given its consent to the aforesaid consensual arrangement earlier. In fact, there was no representation of the College at the meeting held on 15.12.2007 and on 18.12.2007 the Director (Foundation) of the College addressed the following letter to the Secretary to the Government Medical Education, Government of Rajasthan:

"**GMCH**

HEALTH IS HAPPINESS

GF/GMCH/07 December 18, 2007

Dr. Govind Sharma, IAS
Secretary to the Government
Medical Education,
Government of Rajasthan
Secretariat
JAIPUR (RAJASTHAN)

Sub: Participation in Admission Procedure

Respected Sir,

In the above reference we have received your letter to

attend the meeting schedule on 15th December 2007 for participation in the admission procedure for admission of students in 2008. I was not able to attend the meeting as the MCI inspection was going on at our place. Further to this we have given an undertaking to the MCI that till all the clearances received from MCI we cannot participate in the admission procedure. Therefore we cannot give consent that we will take the students from PMT or PCMT till we receive the clearances.

Kindly have a note of the same and oblige.
Thanking you,
Yours sincerely,

For GEETANJALI MEDICAL COLLEGE & HOSPITAL

Sd/-

(M.S. Bhatt)
DIRECTOR (FOUNDATION)
Encl: as above"

From the aforesaid letter also, it is clear that the College was not willing to give consent that it will take students from RPMT-2008 till it received the clearances. When the College, however, came to learn that it will be receiving its clearances from the Government of India, it wrote a letter dated 16.09.2008 to the Vice Chancellor of the Rajasthan University of Health Sciences in which it is stated as follows:

"To,

The Vice Chancellor,
Rajasthan University of Health Sciences,
Jaipur.

Sub: - Admissions in M.B.B.S. Course for Session 2008-09

Hon'ble Sir,

In the above reference kindly note that till we have not received the approval for Govt. of India, However, if the approval comes after the second counselling that kindly suggest us the way or/Provide us the Merit List of RPMT Students for the admission in our college.

Kindly do the needful and oblige.

Thanking you,

Sd/-
(Nitin Sharma)
Authorised Signatory"

In reply to the aforesaid letter dated 16.09.2008, the Vice Chancellor of the Rajasthan University of Health Sciences wrote back that if the College wants to admit students for the academic year 2008-2009 then it should confirm the number of seats for allotment so that seats may be allotted in the upcoming counselling of RPMT-2008 on 23.09.2008. The letter dated 23.09.2007 of the Vice Chancellor, Rajasthan University of Health Sciences, to the College is extracted hereinbelow:

"RAJASTHAN UNIVERSITY OF HEALTH SCIENCES
Sector-18, Kumbha Marg,
Partap Nagar, Jaipur-302033

Sr. No.F-11() RPMT/RUHS/2008-09
22nd September, 2008

To,

Nitin Sharma,
Geetanjali Medical College & Hospital,
Udaipur.

Sub: Admissions in M.B.B.S. Course for Session 2008-09

Sir,

In reply to your letter dated 16.09.2008, with regard to the above said subject, it is submitted that if you want to admit the students for the session of 2008-09 then you should confirm the number of seats for allotment so that seats may be allotted in the upcoming counseling of RPMT-2008 on 23.09.2008.

Sd/-
Vice Chancellor"

The aforesaid discussion would show that there is in fact no consensual arrangement between the College and the State or the University that the College will admit students from the merit list or wait list of RPMT-2008. The finding of the learned Single Judge and the Division Bench of the High Court that there was such a consensual arrangement between the College and the State Government to admit students from the merit list or wait list of RPMT-2008 is, therefore, erroneous. Hence, the direction of the High Court to the College to consider and admit students from the merit list or wait-list of RPMT-2008 will have to be set aside.

19. We may next consider the question whether the admissions of 117 students to the MBBS course of the College were within the fundamental right of the College as explained by this Court in *T.M.A. Pai Foundation* (supra). In *T.M.A. Pai Foundation* (supra), this Court, while holding that a private unaided non-minority institution has the right to establish and administer an educational institution under Article 19(1)(g) of the Constitution of India also held that such right will include the right to admit students into the institution. In paragraphs 58 and 59 of the judgment, however, Kirpal, CJ speaking for the Court observed:

"58. For admission into any professional institution, merit must play an important role. While it may not be normally

possible to judge the merit of the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional, it is necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preferences shown to less meritorious but more influential applicants. Excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission. Appropriate regulations for this purpose may be made keeping in view the other observations made in this judgment in the context of admissions to unaided institutions.

59. Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies."

The observations in para 58 of the judgment of Kirpal, CJ. quoted above make it clear that students seeking admission to a professional institution were required to be treated fairly and preferences were not to be shown to less meritorious but more influential students and greater emphasis was required to be laid on the merit of the students seeking admission. In para 59 of the judgment of Kirpal, CJ. in *T.M.A. Pai Foundation* (supra) quoted above, it has been further made clear that merit is to be determined for admission to professional colleges, by either the marks that the student obtains at the qualifying examination, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies.

20. The judgment in *T.M.A. Pai Foundation* (supra) has been further explained by this Court in *P.A. Inamdar* (supra)

and it has been held therein that that non-minority unaided institutions, like the minority unaided institutions, have also the unfettered fundamental right to choose the students to be allowed admission and the procedure therefor but the admission procedure so chosen by the institution must be fair, transparent and non-exploitative. Para 137 of the judgment of this Court in *P.A. Inamdar* (supra), which is relevant for deciding this case, is quoted hereinbelow:

> "137. Pai Foundation has held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admission and the procedure therefor subject to its being fair, transparent and non-exploitative. The same principle applies to non-minority unaided institutions. There may be a single institution imparting a particular type of education which is not being imparted by any other institution and having its own admission procedure fulfilling the test of being fair, transparent and non-exploitative. All institutions imparting same or similar professional education can join together for holding a common entrance test satisfying the abovesaid triple tests. The State can also provide a procedure of holding a common entrance test in the interest of securing fair and merit-based admissions and preventing mal-administration. The admission procedure so adopted by private institution or group of institutions, if it fails to satisfy all or any of the triple tests, indicated hereinabove, can be taken over by the State substituting its own procedure. The second question is answered accordingly."

Thus, in para 137 of the judgment in *P.A. Inamdar* (supra) quoted above, this Court has taken the view that all institutions imparting same or similar professional education can join together for holding a common entrance test satisfying the triple tests of the admission procedure being fair, transparent and non-exploitative.

21. Keeping in mind the aforesaid law laid down by this Court in *T.M.A. Pai Foundation* and *P.A. Inamdar* (supra), we may now examine the admission procedure adopted by the College for admitting the students to the MBBS seats for the academic year 2008-2009. The College has admitted 16 students from the list of candidates selected in the PC-PMT 2008 conducted by the Federation of Private Medical and Dental Colleges of Rajasthan. The PC-PMT 2008 conducted by the Federation of Private Medical and Dental Colleges of Rajasthan did not call for any applications from candidates for admission to the MBBS course, but only for the BDS course. Moreover, the College had not been included in the brochure published for PC-PMT 2008 conducted by the Federation of Private Medical and Dental Colleges of Rajasthan. Consequently, students, who may be interested not in the BDS course but in the MBBS course, could not have applied to take the PC-PMT 2008 conducted by the Federation of Private Medical and Dental Colleges of Rajasthan. As a result, many meritorious students desirous of taking admission in the MBBS course in the College could not get an opportunity to participate in the PC-PMT 2008 conducted by the Federation of Private Medical and Dental Colleges of Rajasthan. The admission procedure adopted by the College was thus not fair and transparent and fell short of the triple tests laid down in *P.A. Inamdar* (supra) and such admission procedure was not within the fundamental right of the College to admit students of its choice under Article 19(1)(g) of the Constitution of India as explained in *T.M.A. Pai Foundation* (supra).

22. The stand of the College, however, is that the College had published an advertisement dated 26.09.2008 inviting applications from all the eligible candidates who had passed the 10+2 examination with minimum 50% marks in Physics, Chemistry and Biology individually in all the subjects and having English as compulsory subject for admission to its MBBS course and in response to such advertisement, students had

applied and selection of students was done on the basis of their merits. It is, however, not disputed that the candidates, who had applied in response to the advertisement, had not passed the 10+2 examination from the same board or university but from different boards and universities. If that be so, the merit of the candidates who had applied in response to the advertisement could not be evaluated by a uniform standard and could only be evaluated by a competitive entrance examination of all these students who had applied pursuant to the advertisement of the College. It is not the case of the College that any competitive entrance examination of all the students, who had applied pursuant to the advertisement, was held by the College to determine their comparative merit. Hence, the principle of merit as the basis for selection for admission in the profession courses laid down by this Court in *T.M.A. Pai Foundation* (supra) and as explained in *P.A. Inamdar* (supra) has not been followed. Thus, even as per the law laid down by this Court in *T.M.A. Pai Foundation* and *P.A. Inamdar* (supra), the College has not been able to establish that the admissions of 117 students to its MBBS course for the academic year 2008-2009 were within its right under Article 19(1)(g) of the Constitution.

23. Moreover, the College was bound to follow the MCI Regulations while making the admissions to the MBBS seats. The permission letter dated 16.09.2009 stipulated that the admission process for the academic year 2008-2009 has to be completed within the time schedule indicated in the MCI Regulations. Hence, even if the College was required to complete the admission process by 30.09.2008, it could not violate the MCI Regulations on the ground that it had to complete the admission process by 30.09.2008. Clauses (1), (2), (3) and (4) of the Regulation 5 of the MCI Regulations which deal with the principle of merit as the sole basis for selection of candidate for admission to a medical college are quoted hereinbelow:

"5. Selection of Students: The selection of students to

medical college shall be based solely on merit of the candidate and for determination of the merit, the following criteria be adopted uniformly throughout the country:

(1) In states, having only one Medical College and one university/board/examining body conducting the qualifying examination, the marks obtained at such qualifying examination may be taken into consideration;

(2) In states, having more than one university/ board/ examining body conducting the qualifying examination (or where there is more than one medical college under the administrative control of one authority) a competitive entrance examination should be held so as to achieve a uniform evaluation as there may be variation of standards at qualifying examinations conducted by different agencies;

(3) Where there are more than one college in a state and only one university/board conducting the qualifying examination, then a joint selection board be constituted for all the colleges;

(4) A competitive entrance examination is absolutely necessary in the cases of institutions of All India character;"

It will be clear from the provisions of Regulation 5 quoted above that the selection of students to medical college is to be based solely on merit of the candidate and for determination of the merit, the criteria laid down in Clauses (1), (2), (3) and (4) will apply. Clause (2) of Regulation 5 on which the MCI relied upon clearly states that in States having more than one University/ Board/Examining Body conducting the qualifying examination a competitive entrance examination should be held so as to achieve a uniform evaluation as there may be variation of standards at qualifying examinations conducted by different agencies. As we have noted, it is not the case of the College

that all students who applied pursuant to the advertisement had passed 10+2 Examinations conducted by one and the same University/Board/Examining Body. Hence, the merit of the students who had applied pursuant to the advertisement of the College had to be uniformly evaluated by a competitive entrance examination, but no such competitive entrance examination had been held by the College between all the candidates who had applied pursuant to the advertisement. Therefore, there was a clear violation of Clause (2) of Regulation 5 of the MCI Regulations in admitting the 101 students to the MBBS Course for the academic year 2008-2009 by the College.

24. The contention on behalf of the respondents is that once it is held by the court that the admissions of 117 students in the MBBS course of the College was in violation of Regulation 5 of the MCI Regulations, the court will have to declare the admissions as invalid and the students admitted have to be discharged from the MBBS course. In support of this contention three decisions of this Court have been cited on behalf of the respondents. We may now examine these three decisions. In *A.P. Christians Medical Educational Society v. Government of Andhra Pradesh & Anr.* (supra), the appellant-society had admitted students to the medical college, which was a minority institution, in the 1st year MBBS course without fulfilling the conditions for running a medical college and in total disregard of the provisions of the A.P. Education Act, the Osmania University Act and the Regulations of the Osmania University. The appellant-society challenged the State Government's refusal to grant permission in a writ petition before the High Court but the writ petition was dismissed and appeal by way of special leave was filed before this Court by the appellant-society and a writ petition was also filed before this Court by the students who had been admitted to the medical college. This Court while dismissing the appeal as well as the writ petition held that the Court cannot issue directions to the university to protect the interests of the students who had

been admitted to the medical college as that would be in clear transgression of the provisions of the University Act and the Regulations of the University. The College in this case has been granted permission letter to establish a medical college after the MCI and the Central Government found the College to have satisfied the required conditions. Hence, the decision of this Court in *A.P. Christians Medical Educational Society v. Government of Andhra Pradesh & Anr.* (supra) also does not apply to the facts of this case.

25. In *Regional Officer, CBSE v. Ku. Sheena Peethambaran & Ors.* (supra), a student had to pass Class IX Examination to be eligible to appear in Class X Examination conducted by the CBSE as per the conditions under the relevant Bye-laws of the CBSE. The respondent in that case filled up the form for High School Examination but the same was withheld by the school authorities on the ground that she had not cleared her Class IX Examination. She filed a writ petition in the High Court contending that she had been promoted to Class X but was later on declared failed in Class IX Examination. The High Court entertained the writ petition and passed an interim order permitting her to take the Class X Examination conducted by the CBSE and finally directed the CBSE to declare her result of the Class X Examination. The CBSE challenged the decision of the High Court before this Court and on these facts the Court held that the High Court could not have condoned the lapses or overlooked the legal requirements in consideration of mere sympathy factor as it disturbs the discipline of the system and affects the academic standards. In *Visveswaraiah Technological University & Anr. v. Krishnendu Halder & Ors.* (supra), the respondents secured marks which were more than the minimum marks prescribed by the AICTE norms, but less than what were prescribed by the University Regulations and they were admitted to the Bachelor of Engineering course during the academic year 2007-2008. When the list of admissions was submitted by the colleges to

the university for approval, the university refused to approve their admissions on the ground that they had secured less than the minimum percentage required for being eligible to admissions. Two students filed writ petitions before the High Court but the learned Single Judge dismissed the writ petition. In appeal, the Division Bench of the High Court directed the university to approve the admissions of the two students as they fulfilled the eligibility criteria fixed by the AICTE. The university filed appeal before this Court and this Court held that once the power of the State and the examining body to fix higher qualifications higher than the minimum suggested by the AICTE is recognized, the rules and regulations made by the State and the university will be binding and will be applicable in respect of States, unless AICTE itself subsequently modifies its norms by increasing the eligibility criteria beyond those fixed by the university and the State. This Court observed in para 17, which is quoted hereinbelow:

> "17. No student or college, in the teeth of the existing and prevalent rules of the State and the University can say that such rules should be ignored, whenever there are unfilled vacancies in colleges. In fact the State/University, may, in spite of vacancies, continue with the higher eligibility criteria to maintain better standards of higher education in the State or in the colleges affiliated to the University. Determination of such standards, being part of the academic policy of the University, are beyond the purview of judicial review, unless it is established that such standards are arbitrary or `adversely affect' the standards if any fixed by the Central Body under a Central enactment. The order of the Division Bench is therefore unsustainable."

26. Regulation 5 of the MCI Regulations, as we have seen, deals with selection of students to medical college on the basis of merit of the candidates and does not deal with the eligibility of students for admission to MBBS course. It is Regulation 4

which lays down the "eligibility criteria" for admission to the medical course and it provides that no candidate shall be allowed to be admitted to the MBBS course until: (i) he/she has completed the age of 17 years on or before the 31st December of the year of admission to the MBBS course and (ii) he/she has passed the qualifying examination as stipulated therein. It is not the case of the MCI that any of the 117 students, who had been admitted to the MBBS course, do not fulfill the eligibility criteria as laid down in Regulation 4 of the MCI Regulations. The case of the MCI is that the provisions of clause (2) of Regulation 5 relating to selection on the basis of merit, as discussed above, has been violated. There is, in our considered opinion, a difference between a candidate not fulfilling the eligibility criteria for admission to the MBBS course and a candidate who fulfils the eligibility criteria but has not been admitted in accordance with the procedure for selection on the basis of merit. In a case where a candidate does not fulfill the eligibility criteria for admission to a course or for taking an examination, he cannot ask the Court to relax the eligibility criteria. But this is not what the appellants have asked for in this case before us. Hence, the decisions of this Court in *Regional Officer, CBSE v. Ku. Sheena Peethambaran & Ors.* (supra) and *Visveswaraiah Technological University & Anr. v. Krishnendu Halder & Ors.* (supra) do not apply to the facts of this case.

27. In the facts of this case, the College was at fault in not holding a competitive entrance examination for determining the inter-se merit of the students who had applied to the College for admission into the MBBS seats of the College in accordance with clause (2) of Regulation 5 of the MCI Regulations and in not following a transparent and fair admission procedure and the 117 students who had been admitted to the MBBS course in the College were not to be blamed for these lapses on the part of the College. In *Chowdhury Navin Hemabhai & Ors. v. State of Gujarat & Ors.* (supra), this Court has held that where the admissions of the

students took place due to the fault of rule-making authority in not making the State Rules, 2008 in conformity of the MCI Regulations, the students if discharged from the MBBS course, will suffer grave injustice and this Court should therefore exercise its power under Article 142 of the Constitution to do complete justice between the parties and allow the students to continue to study the MBBS course. Similarly, in *Deepa Thomas & Ors. v. Medical Council of India & Ors.* (supra) this Court held that since irregular admissions were made by the colleges in violation of the MCI Regulations due to mistake or omission in the Prospectus issued by colleges, the students who have been admitted should be allowed to continue the MBBS course and passed orders accordingly in exercise of power under Article 142 of the Constitution. We are, thus, of the view that the 117 students, who have been admitted in the MBBS course by the College for the academic year 2008 in violation of clause (2) of Regulation 5 of the MCI Regulations, should not be disturbed.

28. The fact, however, remains, that the College had violated clause (2) of Regulation 5 of the MCI Regulations in making the admissions of 117 students to the MBBS course for the academic year 2008-2009 and the admissions were not within the right of the College under Article 19(1)(g) of the Constitution as explained in *T.M.A. Pai Foundation* and *P.A. Inamdar* (supra). The College must, therefore, suffer some penalty as a deterrent measure so that it does not repeat such violation of the MCI Regulations in future. Moreover, if no punitive order is passed, other colleges may be encouraged to violate the MCI Regulations with impunity. In *Deepa Thomas & Ors. v. Medical Council of India & Ors.* (supra), this Court directed the College to surrender seats equal to the number of irregular admissions in phased manner starting with the admissions of the year 2012. In the present case, there were as many as 117 admissions contrary to the provisions of clause (2) of Regulation 5 of the MCI Regulations. The learned Single Judge of the High Court had directed ten seats to be

kept vacant for the academic year 2008-2009 and we are told that those ten seats kept vacant have not been filled up and the College has not received any fees for the ten seats. Excluding these ten seats, the College will have to surrender 107 seats in a phased manner, not more than ten seats in each academic year beginning from the academic year 2012-2013. These 107 seats will be surrendered to the State Government and the State Government will fill up these 107 seats on the basis of merit as determined in the RPMT or any other common entrance test conducted by the State Government or its agency for admissions to Government Medical Colleges and the fees of the candidates who are admitted to the 107 seats will be the same as fixed for the Government Medical Colleges.

29. The 117 students, who were admitted to the MBBS course, may not be at fault if the College did not hold a competitive entrance examination for determining the inter se merit of students who had applied to the College in the MBBS seats of the College, but they are beneficiaries of violation of clause (2) of Regulation 5 of the MCI Regulations by the College. They have got admission into the College without any proper evaluation of their merit vis-a-vis the other students who had applied but had not been admitted in a competitive entrance examination. We have held in *Priya Gupta v. State of Chhattisgarh & Ors.* [2012 (5) SCALE 328 = JT 2012 (5) SC 102] that beneficiaries of admissions made contrary to the MCI Regulations must pay some amount for development of infrastructure in the medical college of the government as a condition for allowing them to continue their MBBS studies by our orders under Article 142 of the Constitution. We, therefore, hold that each of the 117 students who have been admitted in the MBBS seats in the College will pay Rs.3 lacs to the State Government on account of their admission in violation of clause (2) of Regulation 5 of the MCI Regulations and the total amount received by the State Government from the 117 students will be spent for improvement of infrastructure and laboratories in

the Government Medical Colleges of the State and for no other purpose.

CONCLUSIONS

30. We accordingly hold:

(i) that there was no agreement between the College and the State Government to admit students into its MBBS course on the basis of RPMT-2008 and the finding of the High Court in this regard is erroneous and the High Court could not have directed the College to fill up its seats on the basis of merit of students as determined in RPMT-2008 as per the law laid down in *T.M.A. Pai Foundation* as explained in *P.A. Inamdar* (supra). Hence, the direction of the High Court to fill up the seats by students selected or wait listed in the RPMT-2008 is set aside.

(ii) The admissions of 117 students to the MBBS course for the academic year 2008-2009 in the College were contrary to clause (2) of Regulation 5 of the MCI Regulations and were not within the right of the College under Article 19(1)(g) of the Constitution as explained by this Court in *T.M.A. Pai Foundation* and *P.A. Inamdar* (supra).

(iii) In exercise of our power under Article 142 of the Constitution, we direct that none of the 117 students who were otherwise eligible for admission to the MBBS course will be disturbed from pursuing their MBBS course, subject to the condition that they will each pay a sum of Rs.3 lacs within a period of three months from today to the State Government and in the event of default, the students will not be permitted to take the final year examination and the admission of the defaulting students shall stand cancelled and the College will have no liability to

repay the admission fee already paid. The amount so paid to the State Government shall be spent by the State Government for improvement of infrastructure and laboratories of the Government medical college of the State and for no other purpose.

(iv) The College which was responsible for making the admissions in violation of clause (2) of Regulation 5 of the MCI Regulations will surrender 107 (117 - 10) MBBS seats to the State Government phase wise, not more than ten in any academic year beginning from the academic year 2012-2013 and these surrendered seats will be filled up by the students selected in RPMT or any other common entrance test conducted by the State Government of Rajasthan or its agency for admissions to the Government Colleges and the fees payable by the students admitted to the surrendered seats would be the same as that payable by the students of Government Colleges.

(v) The results of the students in the MBBS course held up on account of interim orders passed by the Court may now be published.

The impugned judgment of the High Court is modified accordingly and the appeals are allowed to the extent as indicated in this judgment. The pending I.A. Nos. 3 and 4 stand disposed of.

CIVIL APPEAL NO._6210_OF 2012 (Arising out of SLP (C) No.24967 of 2011) AND CIVIL APPEAL NO. 6211 OF 2012 (Arising out of SLP (C) No.25353 of 2011):

1. Leave granted. I.A. No.2 of 2011 in Civil Appeal arising out of SLP (C) No. 24967 of 2011 for deletion of the proforma respondent Nos.5 to 19 is allowed. I.A. No. 3 of 2011 in Civil

Appeal arising out of SLP (C) No. 25353 of 2011 for deletion of the proforma respondent Nos. 4 to 18 is allowed.

2. These are appeals by way of special leave under Article 136 of the Constitution of India against the common order dated 10.08.2011 passed by the Division Bench of the Rajasthan High Court in DB Special Appeal (Writ) No.632 of 2011 and DB Special Appeal (Writ) No.407 of 2011.

FACTS

3. The facts very briefly are that by a consensual arrangement between the State Government of Rajasthan and Mahatama Gandhi Medical College and Hospital (for short 'the College') 85% of the MBBS seats in the College are filled up by the allocation of students by the Competent Authority. The Competent Authority, namely, the Convener of the Central Under-Graduate Admission Board (for short 'the Convener') by his letter dated 31.07.2008 to the Principal of the College allotted 85 students who had been selected in the Rajasthan Pre-Medical Test 2008 (for short 'the RPMT-2008') for admission to the payments seats of the College. Thereafter, by another letter 30.08.2008, the Convener sent to the College a list of re-shuffled/allotted/wait-listed students for admission in the MBBS seats in the College. In this letter dated 30.08.2008, it was stated that the last date of joining the course for the students so allotted would be 11.09.2008 and the list of vacancies which are not filled up shall be displayed on the notice board of the College on 12.09.2008 and the students from the wait-list will be admitted to the vacancies and this must be completed by 18.09.2008. On 25.09.2008, the Convener sent another letter dated 25.09.2008 to the College enclosing therewith a list of candidates who had been selected/re-shuffled for the MBBS Course for the year 2008 in the extended second round of counselling and it was stated in this letter that the last date of joining the course for these students would be 27.09.2008 and the list of vacancies shall be displayed on the

notice board of the College on 28.09.2008 at 10.00 a.m. and the students shall be admitted from the wait-list into the vacancies and such admission process must be completed by 30.09.2008. On 29.09.2008, the Additional Principal of the College issued an office order that the residual seats which remained vacant even after the second round of counselling will be filled up by an admission process which will start on 30.09.2008 at 6.00 p.m. in the Medical Education Unit of the College and in such admission process preference will be given to candidates who have qualified in the RPMT-2008 and if the seats are still vacant, the same will be offered to candidates on the basis of 10+2 marks and the admission process will be completed on the same date i.e. 30.09.2008. Accordingly, on 30.09.2008, an admission notice for the year 2008-2009 was put up by the College inviting applications for admission to the MBBS Course for the year 2008-2009 from students who have passed 10+2 examination with minimum 50% marks in Physics, Chemistry and Biology in case of general candidates and minimum of 40% marks in Physics, Chemistry and Biology for SC/ST/OBC candidates as per the guidelines of the Medical Council of India (for short 'the MCI') and it was stated in the admission notice that RPMT-2008 candidates will be given preference. Pursuant to this admission notice, a total of 21 students were admitted to the unfilled seats in the MBBS Course for the academic year 2008-2009 in the College. Out of these 21 students, 15 students had been selected in the RPMT-2008 and 6 students had not been selected in the RPMT-2008.

4. Thereafter, these 21 students filed S.B. Civil Writ Petition No.2946 of 2010 in the Rajasthan High Court and their case in the writ petition was that pursuant to the admission notice dated 30.09.2008 they applied for admission to the MBBS Course in the college and they were given admission and they deposited the fees and started pursuing studies in the MBBS Course in the college, but they were not allowed to take the

examinations by the authorities. The learned Single Judge of the High Court found that the MCI had issued an order dated 04.02.2010 directing the college to discharge the 6 students who had not been selected in the RPMT-2008 on the ground that they had been admitted to the MBBS Course in violation of Regulation 5 of the Medical Council of India Regulations 1997 (for short 'the MCI Regulations'). By order dated 18.03.2011 the learned Single Judge of the High Court allowed the writ petitions of 15 students who had qualified in the RPMT-2008 but dismissed the writ petitions of the 6 students who were discharged pursuant to the order dated 04.02.2010 of the MCI on the ground that they had not been selected in the RPMT-2008. Aggrieved, the 6 students and the College filed D.B. Special Appeal No.407 of 2011 and D.B. Special Appeal (Print) No.632 of 2011 but by the impugned order, the Division Bench of the High Court has dismissed the appeals. Aggrieved, the 6 students and the College have filed these civil appeals.

CONTENTIONS ON BEHALF OF THE APPELLANTS:

5. Mr. Maninder Singh and Mr. P.S. Narsimha, learned counsel appearing for the appellants, submitted that the admission of the 6 students in the College were earlier challenged in three writ petitions by students who had qualified in the RPMT-2008 namely, Miss Divya Gupta, Miss Heena Soni and Mr. Mohd. Zibran and in these writ petitions (S.B. Civil Writ Petition No.13419 of 2008, S.B. Civil Writ Petition No.10350 of 2008 and S.B. Civil Writ Petition No.11165 of 2008), the MCI was also a respondent and by a common order dated 26.05.2009 the learned Single Judge disposed of the three writ petitions with the direction that the three writ petitioners will be admitted in the MBBS (First Year Course) against 15% Management Quota for the academic year 2009-2010 and the writ petitioners will be charged fees which are charged to the students admitted on the basis of their merit against 85% of the seats to be filled up by the Competent Authority of the State

Government and these admissions will be within the annual intake strength as approved by the MCI. They submitted that by the order dated 26.05.2009 passed in the earlier three writ petitions, the admission of the 6 students were not disturbed by the learned Single Judge of the High Court. They argued that the order dated 26.05.2009 of the learned Single Judge in the three writ petitions of 2008 has become final and the MCI therefore could not have passed the order dated 04.02.2010 discharging the 6 students from the MBBS Course on the ground that they have not been selected in the RPMT-2008.

6. Learned counsel for the appellants further submitted that the only reason given by the MCI in its order dated 04.02.2010 for discharging the 6 students was that they have not passed the RPMT-2008 but the Secretary of the MCI in his letter dated 16.09.2009 had clarified that for the purpose of completing the admissions within the time schedule fixed by this Court in the case of *Mirdul Dhar and Another vs. Union of India and Others* [(2005) 2 SCC 65], i.e. 30th September of the year, admissions could also be done on the basis of marks secured in the 10+2 examination as provided in Regulation 5(1) of the MCI Regulation. They submitted that since the 6 students have been given admission on the last date of the time schedule for the purpose of filling up the unfilled seats of MBBS Course, these admissions on the basis of their marks in 10+2 examination are in accord with Clause (1) of Regulation 5 of the MCI Regulations.

7. The learned counsel for the appellants finally submitted that it is not the case of the MCI that the 6 students did not fulfill the eligibility criteria for admission to the MBBS course as provided in Regulation 4 of the MCI Regulation. They submitted that all the 6 students satisfied the eligibility criteria as they were above 17 years and had also passed the qualifying examinations. They argued that the case of the MCI was that clause (2) of Regulation 5 of the MCI Regulations has been violated and for such violation, if any, the 6 students who have

been pursuing their MBBS course since 2008 should not be disturbed. They argued that this is, therefore, a fit case in which this Court in exercise of its powers under Article 142 of the Constitution should protect the admission of the 6 students. They cited the judgment in *Rajendra Prasad Mathur v. Karnataka University and Another* (1986 Supp. SCC 740) in which this Court has held that though the appellants were not eligible for admission to the Engineering degree course and had no legitimate claim to such admission, the blame for the wrongful admission lie more upon the Engineering College and, therefore, the appellants must be allowed to continue their studies in the respective Engineering Colleges in which they were granted admission. They also relied upon the decision of this Court in *A. Sudha v. University of Mysore and Another* [(1987) 4 SCC 537], in which it was similarly held that though the appellant was not eligible for admission in the first year MBBS course of the Mysore University, the appellant was innocent and should not be penalized by not allowing her to continue her studies in the MBBS course. They also relied on the observations of this Court in *Association of Management of Unaided Private Medical and Dental College v. Pravesh Niyantran Samiti and Others* [(2005) 13 SCC 704] that in a medical college no seat should be allowed to go waste and contended that if no student of the RPMT-2008 was available for admission to the unfilled seats on the last date of admission, the College had no option but to fill up the seats by six students on the basis of their marks in the 10+2 Examination. They also referred to the order in *Monika Ranka and Others v. Medical Council of India and Others* [(2010) 10 SCC 233] in which this Court after taking note of the fact that the candidates who have secured less than 50% marks in the entrance examination had been admitted in MBBS course in the R.D. Gardi Medical College, Ujjain, M.P., directed that their admissions should not be disturbed and ordered to reduce from the management quota for the year 2009-2010 the number of seats equal to the number of irregular admissions.

CONTENTIONS ON BEHALF OF THE RESPONDENTS:

8. Mr. Amarendra Sharan, learned senior counsel appearing for the MCI, on the other hand, submitted that seats which remained vacant even after the second counselling cannot be filled up in breach of the MCI Regulations. He submitted that in the present case the High Court has clearly held that the admission of the 6 students was in violation of Clause (2) of Regulation 5 of the MCI Regulations which requires that students could be admitted on the basis of their merit as determined in Competitive Entrance Examination. He vehemently argued that since the Competitive Entrance Examination, namely, RPMT-2008, was conducted by the State Government of Rajasthan, the College could admit students to the MBBS Course in the seats remaining vacant after second counselling only from amongst the RPMT-2008 selected candidates on the basis of their merit. He submitted that this Court should not therefore disturb the impugned orders of the learned Single Judge and the Division Bench of the High Court. The learned counsel for the State adopted the arguments of Mr. Sharan.

FINDINGS WITH REASONS:

9. We have considered the submissions of the learned counsel for the parties and we do think that we can hold that because of the order dated 26.05.2009 passed by the learned Single Judge of the High Court in S.B. Civil Writ Petition Nos.13419 of 2008, 10350 of 2008 and 11165 of 2008, which had attained finality, the MCI could not have issued the order dated 04.02.2010 discharging the six students from the MBBS Course on the ground that they had not been selected in the RPMT-2008 and that their admissions were in breach of the provisions of clause (2) of Regulation 5 of the MCI Regulations. We take this view because we find on a reading of the order dated 26.05.2009 of the learned Single Judge of the High Court in the aforesaid three writ petitions that the question as to

whether the admission of the six students was in breach of clause (2) of Regulation 5 of the MCI Regulations was not in issue in the aforesaid three writ petitions. The learned Single Judge of the High Court has disposed of the three writ petitions on the basis of a compromise between the writ petitioners on the one hand, and the respondent nos. 4 and 5, on the other hand, and the compromise was that the three writ petitioners would be granted admission in the MBBS Course for the academic year 2009-2010. The learned Single Judge of the High Court, however, has further directed that their admissions will be adjusted against 15% management seats which are available to the college and not against 85% seats which are to be filled strictly on the basis of the merit list sent by the Convener and that the students will be charged fee which is ordinarily to be deposited by the students who are admitted on the basis of their merit against 85% State quota seats and that the admissions will be within the annual intake strength as approved by the MCI. As the College has not produced the pleadings before this Court in the three writ petitions to show that an issue was raised before the learned Single Judge of the High Court in the aforesaid three writ petitions by the MCI that the admission of the 6 students was in breach of clause (2) of Regulation 5 of the MCI Regulations, the principles laid down in Section 11 of the Code of Civil Procedure, 1908 relating to res judicata will not apply. As a matter of fact, when the order dated 26.05.2009 was passed by the learned Single Judge of the High Court in the aforesaid three writ petitions, the MCI had no information that the six students had not been selected in the RPMT-2008 and it was only in August, 2009, and thereafter that the MCI came to learn about the breach of the provisions of Regulation 5 and accordingly MCI issued orders to immediately discharge six students.

10. We cannot also accept the contention of the appellants that the College could admit students on the basis of marks obtained by them in the qualifying examinations under Clause (1) of Regulation 5 of the MCI Regulations. The College has

relied upon the letter dated 16.09.2009 of the Secretary of the MCI clarifying that for the purpose of completing the admissions within the time schedule fixed by the Court as in the case of *Mirdul Dhar and Another vs. Union of India and Others* (supra), i.e., 30th September of the year, the admission to the MBBS course could be done on the basis of marks secured in 10+2 Examination, as provided in Regulation 5(1) of the MCI Regulations. But a reading of Regulation 5(1) of the MCI Regulations quoted above would show that this provision applies only in a State where one university or board or examining body conducts the qualifying examination, in which case, the marks obtained at such qualifying examination may be taken into consideration. In the State of Rajasthan, there are more than one university/board/examining body conducting qualifying examination and therefore Regulation 5(1) of the MCI Regulations does not apply. As the State of Rajasthan has more than one University/Board/Examining Body conducting qualifying examinations, clause (2) of Regulation 5 of the MCI Regulations, which provides that a competitive entrance examination will have to be held so as to achieve a uniform evaluation, will apply. The College, therefore, was bound to hold a competitive entrance examination in accordance with clause (2) of Regulation 5 of the MCI Regulations or enter into a consensual arrangement with the State Government to admit students on the basis of the Competitive Entrance Examination conducted by the State Government. This is exactly what the College has done. It had entered into a consensual arrangement with the State Government to admit students on the basis of merit as determined in the RPMT-2008. In our considered opinion therefore, the clarification in the letter dated 16.09.2009 of the Secretary of the MCI that for the purpose of admissions within the time schedule fixed by this Court, admission can also be made on the basis of marks secured in the 10+2 Examination as provided in Regulation 5(1) of the MCI Regulations is not in accord with the fact situation in State of Rajasthan. The admission of the six students by the College

to its MBBS Course on 30.09.2008 was, therefore, in breach of clause (2) of Regulation 5 of the MCI Regulations.

11. We are, however, of the view that in this case also, as in the case of Geetanjali Medical College, the violation of clause (2) of Regulation 5 of the MCI Regulations is by the College. In this case also, as in the case of Geetanjali Medical College, the case of the MCI is not that the six students were not eligible for admission to the MBBS Course in accordance with the eligibility criteria laid down in Regulation 4 of the MCI Regulations, but that they have not been selected in the RPMT-2008, which was the competitive entrance examination conducted in accordance with clause (2) of Regulation 5 of the MCI Regulations. Moreover, in this case also, as in the case of Geetanjali Medical College, the six students had got admission to the MBBS course not on the basis of their merit determined in the RPMT-2008 in accordance with clause (2) of Regulation 5 of the MCI Regulations, but on the basis of their marks in the 10+2 and thus they were beneficiaries of the violation of clause (2) of Regulation 5 of the MCI Regulations.

12. Hence, for the reasons stated in our judgment in the case of Geetanjali Medical College, we invoke our powers under Article 142 of the Constitution and direct that the admission of the 6 students in the MBBS Course will not be disturbed subject to the condition that each of the 6 students pay to the State Government Rs.3 lacs for development of infrastructure of government medical colleges within a period of three months from today failing which they will not be allowed to take the final MBBS examinations and their admission will be cancelled. Considering, however, the fact that the College has violated the provisions of clause (2) of Regulation 5 of the MCI Regulations, as a deterrent measure to prevent similar breach of the MCI Regulations in future, we direct that the College will surrender six seats in the MBBS course for the academic year 2012-2013 to the State Government to be filled up on the basis of the RPMT or any other common entrance

test conducted by the State Government of Rajasthan or its agency for admission to the MBBS Course and the fee that will be payable by the students admitted to the six seats will be the same as are payable by the students admitted on the basis of RPMT or another common entrance test conducted by the State Government or its agency. The impugned orders of the High Court are modified accordingly and the appeals are allowed to the extent as indicated in this judgment. No costs.

13. Before we part with this case, we would like to reiterate what we have held in paragraphs 30 and 31 of our judgment in the case of *Priya Gupta v. State of Chhattisgarh & Ors.* [2012 (5) SCALE 328 = JT 2012 (5) SC 102]:

> "30. Thus, the need of the hour is that binding dicta be prescribed and statutory regulations be enforced, so that all concerned are mandatorily required to implement the time schedule in its true spirit and substance. It is difficult and not even advisable to keep some windows open to meet a particular situation of exception, as it may pose impediments to the smooth implementation of laws and defeat the very object of the scheme. These schedules have been prescribed upon serious consideration by all concerned. They are to be applied stricto sensu and cannot be moulded to suit the convenience of some economic or other interest of any institution, especially, in a manner that is bound to result in compromise of the above-stated principles. Keeping in view the contemptuous conduct of the relevant stakeholders, their cannonade on the rule of merit compels us to state, with precision and esemplastically, the action that is necessary to ameliorate the process of selection. Thus, we issue the following directions in rem for their strict compliance, without demur and default, by all concerned,.
>
> (i) The commencement of new courses or increases in seats of existing courses of MBBS/BDS are to

be approved/recognised by the Government of India by 15th July of each calendar year for the relevant academic sessions of that year.

(ii) The Medical Council of India shall, immediately thereafter, issue appropriate directions and ensure the implementation and commencement of admission process within one week thereafter.

(iii) After 15th July of each year, neither the Union of India nor the Medical or Dental Council of India shall issue any recognition or approval for the current academic year. If any such approval is granted after 15th July of any year, it shall only be operative for the next academic year and not in the current academic year. Once the sanction/approval is granted on or before 15th July of the relevant year, the name of that college and all seats shall be included in both the first and the second counselling, in accordance with the Rules.

(iv) Any medical or dental college, or seats thereof, to which the recognition/approval is issued subsequent to 15th July of the respective year, shall not be included in the counselling to be conducted by the concerned authority and that college would have no right to make admissions in the current academic year against such seats.

(v) The admission to the medical or dental colleges shall be granted only through the respective entrance tests conducted by the competitive authority in the State or the body of the private colleges. These two are the methods of selection and grant of admission to these courses. However, where there is a single Board conducting the state examination and there is a single medical college, then in terms of clause 5.1 of the Medical Council of India Eligibility

Certificate Regulations, 2002 the admission can be given on the basis of 10+2 exam marks, strictly in order of merit.

(vi) All admissions through any of the stated selection processes have to be effected only after due publicity and in consonance with the directions issued by this Court. We vehemently deprecate the practice of giving admissions on 30th September of the academic year. In fact, that is the date by which, in exceptional circumstances, a candidate duly selected as per the prescribed selection process is to join the academic course of MBBS/BDS. Under the directions of this Court, second counselling should be the final counselling, as this Court has already held in the case of *Ms. Neelu Arora & Anr. v. UOI & Ors.* [(2003) 3 SCC 366] and third counselling is not contemplated or permitted under the entire process of selection/grant of admission to these professional courses.

(vii) If any seats remain vacant or are surrendered from All India Quota, they should positively be allotted and admission granted strictly as per the merit by 15th September of the relevant year and not by holding an extended counselling. The remaining time will be limited to the filling up of the vacant seats resulting from exceptional circumstances or surrender of seats. All candidates should join the academic courses by 30th September of the academic year.

(viii) No college may grant admissions without duly advertising the vacancies available and by publicizing the same through the internet, newspaper, on the notice board of the respective feeder schools and colleges, etc. Every effort has

to be made by all concerned to ensure that the admissions are given on merit and after due publicity and not in a manner which is ex-facie arbitrary and casts the shadow of favouritism.

(ix) The admissions to all government colleges have to be on merit obtained in the entrance examination conducted by the nominated authority, while in the case of private colleges, the colleges should choose their option by 30th April of the relevant year, as to whether they wish to grant admission on the basis of the merit obtained in the test conducted by the nominated State authority or they wish to follow the merit list/rank obtained by the candidates in the competitive examination collectively held by the nominated agency for the private colleges. The option exercised by 30th April shall not be subject to change. This choice should also be given by the colleges which are anticipating grant of recognition, in compliance with the date specified in these directions.

31. All these directions shall be complied with by all concerned, including Union of India, Medical Council of India, Dental Council of India, State Governments, Universities and medical and dental colleges and the management of the respective universities or dental and medical colleges. Any default in compliance with these conditions or attempt to overreach these directions shall, without fail, invite the following consequences and penal actions:-

a) Every body, officer or authority who disobeys or avoids or fails to strictly comply with these directions stricto sensu shall be liable for action under the provisions of the Contempt of Courts Act. Liberty is granted to any interested party to take out the contempt

proceedings before the High Court having jurisdiction over such Institution/State, etc.

b) The person, member or authority found responsible for any violation shall be departmentally proceeded against and punished in accordance with the Rules. We make it clear that violation of these directions or overreaching them by any process shall tantamount to indiscipline, insubordination, misconduct and being unworthy of becoming a public servant.

c) Such defaulting authority, member or body shall also be liable for action by and personal liability to third parties who might have suffered losses as a result of such default.

d) There shall be due channelization of selection and admission process with full cooperation and coordination between the Government of India, State Government, Universities, Medical Council of India or Dental Council of India and the colleges concerned. They shall act in tandem and strictly as per the prescribed schedule. In other words, there should be complete harmonisation with a view to form a uniform pattern for concerted action, according to the framed scheme, schedule for admission and regulations framed in this behalf.

e) The college which grants admission for the current academic year, where its recognition/ approval is granted subsequent to 15th July of the current academic year, shall be liable for withdrawal of recognition/approval on this ground, in addition to being liable to indemnify such students who are denied

admission or who are wrongfully given admission in the college.

f) Upon the expiry of one week after holding of the second counselling, the unfilled seats from all quotas shall be deemed to have been surrendered in favour of the respective States and shall be filled thereafter strictly on the basis of merit obtained in the competitive entrance test.

g) It shall be mandatory on the part of each college and University to inform the State and the Central Government/competent authority of the seats which are lying vacant after each counselling and they shall furnish the complete details, list of seats filled and vacant in the respective states, immediately after each counselling.

h) No college shall fill up its seats in any other manner."

K.K.T. Appeals partly allowed.

ANUP SARMAH

v.

BHOLA NATH SHARMA AND ORS.

(Special Leave Petition (Crl.) No.8907 of 2009)

OCTOBER 30, 2012

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

Hire-Purchase – Vehicle purchased by petitioner on hire-purchase basis – Complaint filed by petitioner that the respondents-financier had forcibly taken the custody of the said vehicle – Criminal proceedings initiated against the respondents before the Judicial Magistrate – Quashed by High Court in criminal revision – Justification – Held: In an agreement of hire purchase, the purchaser remains merely a trustee/bailee on behalf of the financier/financial institution and ownership remains with the latter – Thus, in case the vehicle is seized by the financier, no criminal action can be taken against him as he is re-possessing the goods owned by him.

Trilok Singh & Ors. v. Satya Deo Tripathi **AIR 1979 SC 850: 1979 (4) SCC 396;** *K.A. Mathai alias Babu & Anr. v. Kora Bibbikutty & Anr.* **(1996) 7 SCC 212 and** *Charanjit Singh Chadha & Ors. v. Sudhir Mehra* **(2001) 7 SCC 417 – relied on.**

M/s. Damodar Valley Corporation v. The State of Bihar **AIR 1961 SC 440: 1961 SCR 522;** *Instalment Supply (Private) Ltd. & Anr. v. Union of India & Ors.* **AIR 1962 SC 53: 1962 SCR 644;** *K.L. Johar & Co. v. The Deputy Commercial Tax Officer, Coimbtore III* **AIR 1965 SC 1082: 1965 SCR 112 and** *Sundaram Finance Ltd. v. State of Kerala & Anr.* **AIR 1966 SC 1178: 1966 SCR 828 – referred to.**

Case Law Reference:

1979 (4) SCC 396	**relied on**	**Para 5**
(1996) 7 SCC 212	**relied on**	**Para 6**
2001) 7 SCC 417	**relied on**	**Para 7**
1961 SCR 522	**referred to**	**Para 7**
1962 SCR 644	**referred to**	**Para 7**
1965 SCR 112	**referred to**	**Para 7**
1966 SCR 828	**referred to**	**Para 7**

CRIMINAL APPELLATE JURISDICTION : Special Leave (Crl) No. 8907 of 2009.

From the Judgment & Order dated 22.6.2009 of the High Court of Guahati at Gauhati in Criminal Revision No. 156 of 2009.

Gopal Singh, Rituraj Biswas, Sujaya Bardhan for the Appellant.

Naresh Kaushik, Sanjeev Kumar Bhardwaj, Vivya Nagpal Lalita Kaushik for the Respondents.

The following Order of the Court was delivered

O R D E R

1. This petition has been filed against the impugned judgment and order dated 22.6.2009 passed by the High Court of Assam at Gauhati in Criminal Revision No. 156 of 2009 rejecting the case of the petitioner against the respondents that they had forcibly taken the custody of the vehicle purchased by the petitioner on hire-purchase from them. The court has quashed the criminal proceedings against the respondents.

2. Learned counsel for the petitioner has submitted that

respondents-financer had forcibly taken away the vehicle financed by them and illegally deprived the petitioner from its lawful possession and thus, committed a crime. The complaint filed by the petitioner had been entertained by the Judicial Magistrate (Ist Class), Gauhati (Assam) in Complaint Case No. 608 of 2009, even directing the interim custody of the vehicle (Maruti Zen) be given to the petitioner vide order dated 17.3.2009. The High Court has wrongly quashed the criminal proceedings pending before the learned Magistrate.

3. On the contrary, learned counsel appearing on behalf of the respondents, has submitted that under the hire-purchase agreement, the financier remains the owner of the vehicle till the entire payment is made and, therefore, possession taken by the financier for non-payment of instalments by the petitioner could not be held an offence. Thus, the High Court has rightly quashed the proceedings and no interference is required.

4. We have considered the rival submissions raised by the learned counsel for the parties and perused the records.

5. In *Trilok Singh & Ors. v. Satya Deo Tripathi,* AIR 1979 SC 850, this Court examined the similar case wherein the truck had been taken in possession by the financier in terms of hire purchase agreement, as there was a default in making the payment of instalments. A criminal case had been lodged against the financier under Sections 395, 468, 465, 471, 12-B/34, I.P.C. The Court refused to exercise its power under Section 482, Cr.P.C. and did not quash the criminal proceedings on the ground that the financier had committed an offence. However, reversing the said judgment, this Court held that proceedings initiated were clearly an abuse of process of the Court. The dispute involved was purely of civil nature, even if the allegations made by the complainant were substantially correct. Under the hire purchase agreement, the financier had made the payment of huge money and he was in fact the owner of the vehicle. The terms and conditions incorporated in the

agreement gave rise in case of dispute only to civil rights and in such a case, the Civil Court must decide as what was the meaning of those terms and conditions.

6. In *K.A. Mathai alias Babu & Anr. v. Kora Bibbikutty & Anr.,* (1996) 7 SCC 212, this Court had taken a similar view holding that in case of default to make payment of instalments **financier had a right to resume possession even if the hire purchase agreement does not contain a clause of resumption of possession** for the reason that such a condition is to be read in the agreement. In such an eventuality, it cannot be held that the financier had committed an offence of theft and that too, with the requisite mens rea and requisite dishonest intention. The assertions of rights and obligations accruing to the parties under the hire purchase agreement wipes out any dishonest pretence in that regard from which it cannot be inferred that financier had resumed the possession of the vehicle with a guilty intention.

7. In *Charanjit Singh Chadha & Ors. v. Sudhir Mehra,* (2001) 7 SCC 417, this Court held that recovery of possession of the vehicle by financier-owner as per terms of the hire purchase agreement, does not amount to a criminal offence. Such an agreement is an executory contract of sale conferring no right in rem on the hirer until the transfer of the property to him has been fulfilled and in case the default is committed by the hirer and possession of the vehicle is resumed by the financier, it does not constitute any offence for the reason that such a case/dispute is required to be resolved on the basis of terms incorporated in the agreement. The Court elaborately dealt with the nature of the hire purchase agreement observing that in a case of mere contract of hiring, it is a contract of bailment which does not create a title in the bailee. However, there may be variations in the terms and conditions of the agreement as created between the parties and the rights of the parties have to be determined on the basis of the said agreement. The Court further held that in such a contract,

element of bailment and element of sale are involved in the sense that it contemplates an eventual sale. The element of sale fructifies when the option is exercised by the intending purchaser after fulfilling the terms of the agreement. When all the terms of the agreement are satisfied and option is exercised a sale takes place of the goods which till then had been hired. While deciding the said case, this Court placed reliance upon its earlier judgments in *M/s. Damodar Valley Corporation v. The State of Bihar,* AIR 1961 SC 440; *Instalment Supply (Private) Ltd. & Anr. v. Union of India & Ors.,* AIR 1962 SC 53; *K.L. Johar & Co. v. The Deputy Commercial Tax Officer, Coimbtore III,* AIR 1965 SC 1082; and *Sundaram Finance Ltd. v. State of Kerala & Anr.,* AIR 1966 SC 1178.

8. In view of the above, the law can be summarised that in an agreement of hire purchase, the purchaser remains merely a trustee/bailee on behalf of the financier/financial institution and ownership remains with the latter. Thus, in case the vehicle is seized by the financier, no criminal action can be taken against him as he is re-possessing the goods owned by him.

9. If the case is examined in the light of the aforesaid settled legal proposition, we do not see any cogent reason to interfere with the impugned judgment and order. The petition lacks merit and, accordingly, dismissed.

B.B.B. SLP dismissed.

COMMISSIONER OF CENTRAL EXCISE, NEW DELHI
v.
M/S. CONNAUGHT PLAZA RESTAURANT (P) LTD., NEW DELHI
(Civil Appeal Nos.5307-5308 of 2003)

NOVEMBER 27, 2012

[D.K. JAIN AND JAGDISH SINGH KHEHAR, JJ.]

Central Excise and Tariff Act, 1985 – Chapter 21, Heading 21.05 – "Soft serve" – Classification – Term "ice-cream" under heading 21.05 – Common parlance test – Applicability of – Whether 'soft serve' served at the restaurants/ outlets commonly and popularly known as McDonalds, is classifiable under heading 21.05 (as claimed by the revenue) or under heading 04.04 or 2108.91 (as claimed by the assessee) – Held: Headings 04.04 and 21.05 are couched in non-technical terms – Neither the headings nor the chapter notes/section notes explicitly define the entries in a scientific or technical sense – Further, there is no mention of any specifications in respect of either of the entries – In absence of any statutory definition or technical description, no reason to deviate from application of the common parlance principle in construing the term "ice-cream" under heading 21.05 – The common parlance test operates on the standard of an average reasonable person who is not expected to be aware of technical details relating to the goods – Such a person would enter the "McDonalds" outlet with the intention of simply having an "ice-cream" or a 'softy ice-cream', oblivious of its technical composition – Mere semantics cannot change the nature of a product in terms of how it is perceived by persons in the market, when the issue at hand is one of excise classification – Fiscal statutes are framed at a point of time and meant to apply for significant periods of time thereafter; they cannot be expected to keep up with nuances and niceties

of the gastronomical world – Plea of assessee that the term"ice-cream" under heading 21.05 ought to be understood in light of the standards provided in the PFA cannot be accepted – The provisions of PFA are for ensuring quality control and are not a standard for interpreting goods mentioned in the Tariff Act, the purpose and object of which is completely different – Besides, trade Notice of Mumbai Commissionerate also indicated the commercial understanding of 'soft-serve' as 'softy ice-cream' – Tribunal, thus, erred in classifying 'soft-serve' under tariff sub-heading 2108.91 – The 'soft serve' marketed by the assessee, during the relevant period, is to be classified under tariff sub-heading 2105.00 as "ice-cream" – Interpretation of statutes – Taxing statutes.

The question for consideration in the instant appeals, filed by the revenue, under Section 35L of the Central Excise Act, 1944 was whether 'soft serve' served at the restaurants/outlets commonly and popularly known as McDonalds, is classifiable under heading 21.05 (as claimed by the revenue) or under heading 04.04 or 2108.91 (as claimed by the assessee) of the Central Excise and Tariff Act, 1985.

Whereas heading 21.05 refers to "ice-cream and other edible ice", heading 04.04 is applicable to "other dairy produce; or edible products of animal origin which are not specified or included elsewhere" and heading 2108.91 is a residuary entry applicable to "edible preparations, not elsewhere specified or included" and "not bearing a brand name".

The case of the assessee is that "soft serve" is a product distinct and separate from "ice-cream" since the world over "ice-cream" is commonly understood to have milk fat content above 8% whereas 'soft serve' does not contain more than 5% of milk fat; it cannot be considered

as "ice-cream" by common parlance understanding since it is marketed by the assessee the world over as 'soft serve'; "ice-cream" should be understood in its scientific and technical sense; and hence, for these reasons, 'soft serve' is to be classified under heading 04.04 as "other dairy produce" and not under heading 21.05.

On the other hand, the Revenue claims that "ice-cream" has not been defined under heading 21.05 or in any of the chapter notes of Chapter 21; that 'soft serve' is known as "ice-cream" in common parlance; and hence, it must be classified in the category of "ice-cream" under heading 21.05 of the Tariff Act.

Allowing the appeals, the Court

HELD: 1.1. According to the rules of interpretation for the First Schedule to the Tariff Act, mentioned in Section 2 of the Tariff Act, classification of an excisable good shall be determined according to the terms of the headings and any corresponding chapter or section notes. Where these are not clearly determinative of classification, the same shall be effected according to Rules 3, 4 and 5 of the general rules of interpretation. However, it is also a well known principle that in the absence of any statutory definitions, excisable goods mentioned in tariff entries are construed according to the common parlance understanding of such goods. [Para 15] [384-B-C]

1.2. In order to find an appropriate entry for the classification of 'soft serve', it would be necessary to first construe the true scope of the relevant headings. None of the terms in heading 04.04 and heading 21.05 have been defined and no technical or scientific meanings have been given in the chapter notes. Evidently, 'soft serve' is not defined in any of the chapters aforesaid. Under these circumstances, it becomes imperative to

examine if the subject good could come under the purview of any of the classification descriptions employed in the Tariff Act. [Para 17] [385-G-H; 386-A]

Oswal Agro Mills Ltd. & Ors. v. Collector of Central Excise & Ors. **1993 Supp (3) SCC 716: 1993 (3) SCR 378 – relied on.**

Common Parlance Test :

2.1. Time and again, the principle of common parlance as the standard for interpreting terms in the taxing statutes, albeit subject to certain exceptions, where the statutory context runs to the contrary, has been reiterated. The application of the common parlance test is an extension of the general principle of interpretation of statutes for deciphering the mind of the law maker. [Para 18] [386-D-E]

2.2. In the absence of a statutory definition in precise terms; words, entries and items in taxing statutes must be construed in terms of their commercial or trade understanding, or according to their popular meaning. In other words they have to be constructed in the sense that the people conversant with the subject-matter of the statute, would attribute to it. Resort to rigid interpretation in terms of scientific and technical meanings should be avoided in such circumstances. This, however, is by no means an absolute rule. When the legislature has expressed a contrary intention, such as by providing a statutory definition of the particular entry, word or item in specific, scientific or technical terms, then, interpretation ought to be in accordance with the scientific and technical meaning and not according to common parlance understanding. [Para 31] [392-H; 393-A-C]

Oswal Agro Mills Ltd. & Ors. v. Collector of Central Excise & Ors. **1993 Supp (3) SCC 716: 1993 (3) SCR 378;**

Ramavatar Budhaiprasad Etc. v. Assistant Sales Tax Officer Akola **(1962) 1 SCR 279;** *Commissioner of Sales Tax, Madhya Pradesh v. Jaswant Singh Charan Singh* **(1967) 2 SCR 720;** *Dunlop India Ltd. v. Union of India & Ors.* **(1976) 2 SCC 241: 1976 (2) SCR 98;** *Shri Bharuch Coconut Trading Co. and Ors. v. Municipal Corporation of the City of Ahmedabad & Ors.* **1992 Suppl.(1) SCC 298: 1990 (3) Suppl. SCR 392;** *Indian Aluminium Cables Ltd. v. Union of India & Ors.* **(1985) 3 SCC 284: 1985 (1) Suppl. SCR 731;** *Collector of Central Excise, Kanpur v. Krishna Carbon Paper Co.***(1989) 1 SCC 150: 1988 (3) Suppl. SCR 12;** *Reliance Cellulose Products Ltd., Hyderabad v. Collector of Central Excise, Hyderabad-I Division, Hyderabad* **(1997) 6 SCC 464: 1997 (1) Suppl. SCR 485;** *Shree Baidyanath Ayurved Bhavan Ltd. v. Collector of Central Excise, Nagpur* **(1996) 9 SCC 402;** *Naturalle Health Products (P) Ltd. v. Collector of Central Excise, Hyderabad* **(2004) 9 SCC 136: 2003 (5) Suppl. SCR 433;** *B.P.L. Pharmaceuticals Ltd. v. Collector of Central Excise, Vadodara* **(1995) Suppl. 3 SCC 1: 1995 (3) SCR 1235 – relied on.**

The King v. Planter Nut and Chocolate Company Ltd. **(1951) C.L.R. (Ex. Court) 122 – referred to.**

Classification of 'Soft-Serve'

3.1. The Tribunal had held that in view of the technical literature and stringent provisions of the Prevention of Food Adulteration Act, 1955 (PFA), 'soft serve' cannot be classified as "ice-cream" under Entry 21.05 of the Tariff Act. In the absence of a technical or scientific meaning or definition of the term "ice-cream" or 'soft serve', the Tribunal should have examined the issue at hand on the touchstone of the common parlance test. [Para 32] [393-D-E]

3.2. The headings 04.04 and 21.05 have been couched in non-technical terms. Heading 04.04 reads

"other dairy produce; edible products of animal origin, not elsewhere specified or included" whereas heading 21.05 reads "ice-cream and other edible ice". Neither the headings nor the chapter notes/section notes explicitly define the entries in a scientific or technical sense. Further, there is no mention of any specifications in respect of either of the entries. Hence, it cannot be said that since 'soft serve' is distinct from "ice-cream" due to a difference in its milk fat content, the same must be construed in the scientific sense for the purpose of classification. The statutory context of these entries is clear and does not demand a scientific interpretation of any of the headings. Therefore, in the absence of any statutory definition or technical description, there is no reason to deviate from the application of the common parlance principle in construing whether the term "ice-cream" under heading 21.05 is broad enough to include 'soft serve' within its import. [Para 33] [393-F-H; 394-A-B]

3.3. There is no merit in the averment made by the assessee that 'soft serve' cannot be regarded as "ice-cream" since the former is marketed and sold around the world as 'soft serve'. The manner in which a product may be marketed by a manufacturer, does not necessarily play a decisive role in affecting the commercial understanding of such a product. What matters is the way in which the consumer perceives the product at the end of the day notwithstanding marketing strategies. The common parlance test operates on the standard of an average reasonable person who is not expected to be aware of technical details relating to the goods. It is highly unlikely that such a person who walks into a "McDonalds" outlet with the intention of enjoying an "ice-cream", 'softy' or 'soft serve', if at all these are to be construed as distinct products, in the first place, will be aware of intricate details such as the percentage of milk fat content, milk non-solid fats, stabilisers, emulsifiers or

the manufacturing process, much less its technical distinction from "ice-cream". On the contrary, such a person would enter the outlet with the intention of simply having an "ice-cream" or a 'softy ice-cream', oblivious of its technical composition. The true character of a product cannot be veiled behind a charade of terminology which is used to market a product. In other words, mere semantics cannot change the nature of a product in terms of how it is perceived by persons in the market, when the issue at hand is one of excise classification. [Para 34] [394-C-G]

4. The assessee quoted some culinary authorities for the submission that ice cream must necessarily contain more than 10% milk fat content and be served only in a frozen to hard stage for it to qualify as "ice cream". It argued that classifying 'soft serve', containing 5% milk fat content, as "ice cream", would make their product stand foul of requirements of the PFA which demands that an "ice-cream" must have at least 10% milk fat content. However, in the view of this Court, such a hard and fast definition of a culinary product like "ice-cream" that has seen constant evolution and transformation is untenable. Food experts suggest that the earliest form of ice cream may have been frozen syrup. Maguelonne Toussaint-Samat in her work History of Food charters the evolution of "ice cream" in the landmark work from its primitive syrupy form to its contemporary status with more than hundred different forms, and categorizes 'soft serve' as one such form. While some authorities are strict in their classification of products as "ice cream" and base it on milk fat content, others are more liberal and identify it by other characteristics. There is, thus, no clear or unanimous view regarding the true technical meaning of "ice cream". In fact, there are different forms of "ice cream" in different parts of the world that have varying characteristics. [Paras 35, 36, 37] [394-H; 395-A-D; 396-C-D]

History of Food by Maguelonne Toussaint-Samat and The Science of Food by C. Clarke **– referred to.**

5. On the basis of the authorities cited on behalf of the assessee, it cannot be said that "ice cream" ought to contain more than 10% milk fat content and must be served only frozen and hard. Besides, even if it is assumed for the sake of argument that there is one standard scientific definition of "ice cream" that distinguishes it from other products like 'soft serve', there is no reason why such a definition must be resorted to in construing excise statutes. Fiscal statutes are framed at a point of time and meant to apply for significant periods of time thereafter; they cannot be expected to keep up with nuances and niceties of the gastronomical world. The terms of the statutes must be adapted to developments of contemporary times rather than being held entirely inapplicable. It is for precisely this reason that this Court has repeatedly applied the "common parlance test" every time parties have attempted to differentiate their products on the basis of subtle and finer characteristics; it has tried understanding a good in the way in which it is understood in common parlance. [Para 38] [396-E-G]

Akbar Badrudin Giwani v. Collector of Customs, Bombay **(1990) 2 SCC 203: 1990 (1) SCR 369 – held inapplicable.**

6. The assessee had submitted that the common parlance understanding of "ice-cream" can be inferred by its definition as appearing under the PFA; that according to Rule A 11.20.08 the milk fat content of "ice-cream" and "softy ice-cream" shall not be less than 8% by weight and hence, the term "ice-cream" under heading 21.05 had to be understood in light of the standards provided in the PFA, more so when selling "Ice-cream" with fat content of less than 10% would attract criminal action. The said

submission cannot be accepted. It is a settled principle in excise classification that the definition of one statute having a different object, purpose and scheme cannot be applied mechanically to another statute. The object of the Excise Act is to raise revenue for which various goods are differently classified in the Act. The conditions or restrictions contemplated by one statute having a different object and purpose should not be lightly and mechanically imported and applied to a fiscal statute for non-levy of excise duty, thereby causing a loss of revenue. The provisions of PFA, dedicated to food adulteration, would require a technical and scientific understanding of "Ice-cream" and thus, may require different standards for a good to be marketed as "ice-cream". These provisions are for ensuring quality control and have nothing to do with the class of goods which are subject to excise duty under a particular tariff entry under the Tariff Act. These provisions are not a standard for interpreting goods mentioned in the Tariff Act, the purpose and object of which is completely different. [Paras 42, 43] [398-F-H; 399-A-E]

Medley Pharmaceuticals Limited v. Commissioner of Central Excise and Customs, Daman **(2011) 2 SCC 601: 2011 (1) SCR 741;** *Commissioner of Central Excise, Nagpur v. Shree Baidyanath Ayurved Bhavan Limited* **(2009) 12 SCC 419: 2009 (5) SCR 879 – relied on.**

State of Maharashtra v. Baburao Ravaji Mharulkar & Ors. **(1984) 4 SCC 540: 1985 (1) SCR 1053 – referred to.**

7. There is no merit in the further contention of the assessee based on Rule 3(a) of the General Rules of Interpretation (which states that a specific entry shall prevail over a general entry) that 'soft serve' will fall under heading 04.04 since it is a specific entry. The assessee had himself contended that "ice-cream" was a

dairy product and would have been classified under heading 04.04 if heading 21.05 had not been inserted into the Tariff Act. In the presence of heading 21.05, "ice-cream" cannot be classified as a dairy product under heading 04.04. Hence, in relation to heading 04.04, heading 21.05 is clearly a specific entry. Therefore, one cannot subscribe to the claim that heading 04.04 is to be regarded as a specific entry under Rule 3(a) of the General Rules of Interpretation, since such an interpretation would be contrary to the statutory context of heading 21.05. In conclusion, the view taken by the Tribunal is rejected and it is held that 'soft serve' is to be classified as "ice-cream" under heading 21.05 of the Act. [Para 44] [399-F-G; 400-A-B]

8. Further, according to Trade Notice No. 45/2001 dated 11th June, 2001 of Mumbai Commissionerate IV, "softy ice-cream/soft serve" dispensed by vending machines, sold and consumed as "ice-cream", is classifiable under Entry 21.05 of the Tariff Act. While it is true that the trade notice is not binding upon this Court, it does indicate the commercial understanding of 'soft-serve' as 'softy ice- cream'. Further, as this trade notice is in no way contrary to the statutory provisions of the Act, there is no reason to diverge from what is mentioned therein. [Para 45] [400-C-D; 401-E]

9. It is thus clear that the Tribunal erred in law in classifying 'soft-serve' under tariff sub-heading 2108.91, as "Edible preparations not elsewhere specified or included", "not bearing a brand name". The 'soft serve' marketed by the assessee, during the relevant period, is to be classified under tariff sub-heading 2105.00 as "ice-cream". [Para 46] [401-F-G]

10. The last argument of the assessee that in the event 'soft serve' was classifiable under heading 21.05, the assessee was entitled to the benefit under

Notification No. 16/2003-CE (NT) dated 12th March 2003 cannot be taken into account since such a plea was not urged before the Tribunal in the first place. Given that this is a statutory appeal under Section 35L of the Act, it is not open to either party, at this stage of the appeal, to raise a new ground which was never argued before the Tribunal. Nonetheless, for the sake of argument, even if it is assumed that this ground had been urged before the Tribunal, the reliance on this notification is misplaced. Upon a reading of the notification it is clear that the exemption in the notification is granted for the whole of excise duty which was payable on such softy ice cream and non alcoholic beverages dispensed through vending machines, but was not being levied during the relevant period, which is not the case here. In the present case, three show cause notices had been issued to the assessee alleging that 'soft serve' was classifiable under heading 21.05 and attracted duty @ 16%. The show cause notices issued by the revenue also indicated that the assessee was liable to pay additional duty under Section 11A of the Act. This clearly shows that the excise duty was payable by the assessee and was being levied by the revenue. Therefore, the assessee's case does not fall within the ambit of the said notification and is not eligible for the exemption granted to "softy ice-cream", dispensed through a vending machine for the relevant period. [Para 47, 48] [401-G-H; 402-G-H; 403-A-E]

Case Law Reference:

1985 (1) SCR 1053	**referred to**	**Para 9, 42**
1990 (1) SCR 369	**held inapplicable**	**Paras 9, 39, 40,41**
1993 (3) SCR 378	**relied on**	**Paras 16, 18**
(1951) C.L.R. (Ex. Court) 122	**referred to**	**Para 19**

(1962) 1 SCR 279	**relied on**	**Para 20**
(1967) 2 SCR 720	**relied on**	**Para 21**
1976 (2) SCR 98	**relied on**	**Para 22**
1990 (3) Suppl. SCR 392	**relied on**	**Para 23**
1985 (1) Suppl. SCR 731	**relied on**	**Para 24**
1988 (3) Suppl. SCR 12	**relied on**	**Para 25**
1997 (1) Suppl. SCR 485	**relied on**	**Para 26**
(1996) 9 SCC 402	**relied on**	**Para 28**
2003 (5) Suppl. SCR 433	**relied on**	**Para 29**
1995 (3) SCR 1235	**relied on**	**Para 30**
2011 (1) SCR 741	**relied on**	**Para 43**
2009 (5) SCR 879	**relied on**	**Para 43**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5307-5038 of 2003.

From the Judgment & Order dated 29.1.2003 of the Custom, Excise and Gold (Control) Appellate Tribunal, New Delhi in Appeal No. E/5/2002-D and E/1939/2001-D]

WITH

C.A. No. 8097 of 2004.

R.P. Bhatt, Arijit Prasad, Shalini Kumar, Yatinder Chaudhary, A.K. Sharma for the Appellant.

N. Venkataraman, V. Lakshmi Kumaran, Alok Yadav, Rajesh Kumar, R. Satish Kumar, Parivesh Singh, Anjail Chauhan, V.N. Raghupathy for the Respndent.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. The short question of law for consideration in these appeals, filed by the revenue, under Section 35L of the Central Excise Act, 1944 (for short "the Act") is whether 'soft serve' served at the restaurants/outlets commonly and popularly known as McDonalds, is classifiable under heading 21.05 (as claimed by the revenue) or under heading 04.04 or 2108.91 (as claimed by the assessee) of the Central Excise and Tariff Act, 1985 (for short "the Tariff Act").

2. During the relevant period, the respondent-assessee was engaged in the business of selling burgers, nuggets, shakes, soft-serve etc. through its fast food chain of restaurants, named above. In so far as the manufacture and service of 'soft serve' is concerned, the assessee used to procure soft serve mix in liquid form from one M/s Amrit Foods, Ghaziabad; at Amrit Foods, raw milk was pasteurised, skimmed milk powder was added (the milk fat content in the said mixture is stated to be 4.9%, not exceeding 6% at any stage); sweetening agent in the form of sugar or glucose syrup and permitted stabilizers were added; the mixture, in liquid form, was then homogenized, packed in polyethylene pouches and stored at 0 to 40C. This material was then transported to the outlets under the same temperature control, where the liquid mix was pumped into a 'Taylor-make' vending machine; further cooled along with the infusion of air, and finally, the end product, 'soft serve', was drawn through the nozzle into a wafer cone or in a plastic cup and served to the customers at the outlet.

3. For the periods from April 1997 to March 2000, three show cause notices came to be issued to the assessee. These alleged that the 'soft serve' ice-cream was classifiable under Chapter 21, relating to "Miscellaneous Edible Preparations" of the Tariff Act, attracting 16% duty under heading 21.05, sub-heading 2105.00 -"Ice-cream and other edible ice, whether or not containing cocoa". Invoking the proviso to sub-section (1) of Section 11A of the Act, additional duty was also demanded. A proposal for imposing penalty on the assessee and on their

Managing Director was also initiated.

4. While adjudicating on the first show cause notice, vide order dated 31st May, 2000, the adjudicating authority held that : 'soft serve' was classifiable under heading 04.04. Describing the goods as "other dairy produce; edible products of animal origin, not elsewhere specified or included", it held that the process undertaken by the assessee amounted to manufacture and the extended period of limitation was not applicable. However, while adjudicating on the second show cause notice, vide order dated 28th September, 2001, the adjudicating authority concluded that: soft serve was classifiable under heading 21.05; the process undertaken by the assessee for conversion of soft serve mix to 'soft serve' amounted to manufacture and that the assessee was not entitled to small scale exemption because of use of the brand name "McDonalds". While adjudicating on the third show cause notice, the adjudicating authority reiterated that : 'soft serve' was classifiable under heading 21.05; the process undertaken by the assessee for conversion of soft serve mix to 'soft serve' amounted to manufacture and small scale exemption was not available to the assessee because of use of the brand name "McDonalds". In an appeal filed by the assessee, the Commissioner of Central Excise (Appeals) reversed the above finding and classified 'soft serve' under the sub-heading 2108.91.

5. Being aggrieved, cross appeals were filed, both by the revenue as also the assessee, before the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi, as it then existed, (for short "the Tribunal"). The appeals arising from the first two show cause notices were disposed of by the main order, dated 29th January, 2003. The appeal arising from the third show cause notice was disposed of by the Tribunal vide order dated 3rd August, 2004, following its earlier decision in order dated 29th January, 2003. The Tribunal came to the conclusion that the process undertaken by the assessee,

namely, conversion of soft serve mix to 'soft serve' amounted to manufacture and that 'soft serve' was classifiable under sub-heading 2108.91, describing the goods as "Edible preparations, not elsewhere specified or included" – "not bearing a brand name", attracting nil rate of duty. The Tribunal held thus :-

> "In view of the technical literature, ISI Specification and provisions made in Prevention of Food Adulteration Act, 1955 and Rules made thereunder, the impugned product cannot be classified as ice-cream merely on the ground that the consumer understood the same as ice-cream or the ingredients of both the products are same. The statement given by the Managing Director also cannot be a basis for determining the exact classification of the product in the Central Excise Tariff. The ratio of the decision in the case of Shree Baidyanath Ayurved Bhavan Limited case is not applicable to the facts of the present matter. The dispute in the said case was as to whether the 'Dant Manjan Lal' is Ayurvedic medicine or 'Tooth Powder'. In that context, the Supreme Court observed that resort should not be had to the scientific and technical meaning of the terms and expressions used but to their popular meaning, which does not mean that if a particular product is not ice-cream it can be classified as ice-cream because some consumers treated it as ice-cream. Accordingly, the product in question is not classifiable under Heading 21.05 of the Central Excise Tariff."

6. It is manifest that the Tribunal based its conclusion on the technical meaning and specifications of the product "ice-cream", stipulated in the Prevention of Food Adulteration Act, 1955 (for short "the PFA") and rejected the common parlance test, viz. the consumers' understanding of the product. Being aggrieved by the said approach, the revenue is before us in these appeals.

7. Mr. Arijit Prasad, learned counsel appearing for the

revenue, submitted that the enquiries conducted by the revenue revealed that in common trade parlance, 'soft serve' is known as "ice-cream"; all the ingredients used and the process of manufacture adopted for preparation of 'soft serve' is essentially the same as is adopted for manufacture of an "ice-cream"; and therefore, manufacture of 'soft serve' cannot be said to be distinct from the manufacture of "ice-cream". It was urged that the specifications for manufacture of "ice-cream" under the PFA are irrelevant in so far as the question of classification of goods under the Tariff Act is concerned. It was asserted that the identity of 'soft serve' is associated with how the public at large identifies it, and not by the parameters or specifications indicated in other statutes including the PFA in relation to "ice-cream". According to the learned counsel 'soft serve ice-cream', 'soft ice-cream' and 'Softies' are commonly taken as different kinds of "ice-cream". Finally, it was submitted that since the product is sold from the outlets of "McDonalds", the brand is in the customer's mind when he/she enters the outlet and therefore, it cannot be covered under sub-heading 2108.91, as erroneously held by the Tribunal.

8. Mr. V. Lakshmi Kumaran, learned counsel appearing for the assessee, on the other hand, asserted that but for heading 21.05, "ice-cream" itself was a dairy product and would have been classified under heading 04.04. Therefore, 'soft serve' would also be classifiable under heading 04.04. It was argued that 'soft serve' cannot be referred to as "ice-cream" even by applying the common parlance test, in as much as 'soft serve' is sold throughout the world not as "ice-cream" but only as 'soft serve'. "Ice-cream", the world over, is commonly understood to have milk fat content around 10% whereas 'soft serve' does not contain milk fat of more than 5%.

9. Referring to the technical meaning of "ice-cream", given in Kirk-Othmer Encyclopedia of Chemical Technology, Third Edition – Volume 15 and "Outlines of Dairy Technology" by Sukumar De, learned counsel vehemently submitted that all

these books describe "ice-cream" as a dessert, which is frozen to a hard stage, whereas, soft serve dispensed through the Taylor machine is served in a semi-solid state, by processing the pre-mix by blowing air into it. 'Soft serve' is not as hard as an ice-cream is, and thus, cannot be called as "ice cream" even if tested on the touchstone of the common parlance test. The main thrust of the submission of the learned counsel was that if the assessee markets 'soft serve' as "ice-cream", they will be liable to prosecution under the PFA, because the milk fat content in 'soft serve' is less than 10%, a statutory requirement for manufacture of "ice-cream". In support of the submission, learned counsel commended us to the decision of this Court in *State of Maharashtra Vs. Baburao Ravaji Mharulkar & Ors.*[1], wherein it was held that a person selling ice-cream with 5% milk fat content instead of minimum 10% milk fat, was selling adulterated ice-cream and was liable to prosecution. Reliance was also placed on the decision of this Court in *Akbar Badrudin Giwani Vs. Collector of Customs, Bombay*[2], to contend that in matters pertaining to classification of a commodity, technical and scientific meaning of the product is to prevail over the commercial parlance meaning.

10. Lastly, Mr. V. Lakshmi Kumaran urged that even if we were to hold that 'soft serve' is an "ice-cream", under notification No.16/2003-CE (NT) dated 12th March, 2003, granting exemption to "softy ice-cream" dispensed through a vending machine, issued under Section 11C of the Act, the assessee will not be liable to pay any Excise duty in respect of "softy ice-cream" during the relevant period.

11. In short, the case of the assessee is that "soft serve" is a product distinct and separate from "ice-cream" since the world over "ice-cream" is commonly understood to have milk fat content above 8% whereas 'soft serve' does not contain more than 5% of milk fat; it cannot be considered as "ice-cream" by common parlance understanding since it is marketed by the assessee the world over as 'soft serve'; "ice-cream" should be understood in its scientific and technical sense; and hence, for these reasons, 'soft serve' is to be classified under heading 04.04 as "other dairy produce" and not under heading 21.05. On the other hand, Revenue claims that "ice-cream" has not been defined under heading 21.05 or in any of the chapter notes of Chapter 21; upon conducting enquiries it was found that 'soft serve' is known as "ice-cream" in common parlance; and hence, it must be classified in the category of "ice-cream" under heading 21.05 of the Tariff Act.

12. Before we proceed to evaluate the rival stands, it would be necessary to notice the length and breadth of the relevant tariff entries that have been referred to by both the learned counsel.

"Chapter 4		Dairy Produce, etc.	312
04.04		Other dairy produce; Edible products of animal origin, not elsewhere specified or included	
		-Ghee :	
	0404.11	--Put up in unit containers and bearing a brand name	Nil
	0404.19	--Other	Nil
	0404.90	--Other	Nil

1. (1984) 4 SCC 540.
2. (1990) 2 SCC 203.

Heading No	Sub-. heading No	Description of goods	Rate of duty
(1)	(2)	(3)	(4)
21.05	2105.00	Ice cream and other edible ice, whether or not containing cocoa	16%
21.08		Edible preparations, not elsewhere specified or included	
	2108.91	-Not bearing a brand name	Nil”

13. Chapter 4 of the Tariff Act reads “dairy produce; edible products of animal origin, not elsewhere specified or included.” Heading 04.04 is applicable to “other dairy produce; or edible products of animal origin which are not specified or included elsewhere.” As is evident from Chapter note 4, the terms of heading 04.04 have been couched in general terms with wide amplitude. Chapter note 4 reads:

> “4. Heading No. 04.04 applies, inter alia, to butter-milk, curdled milk, cream, yogurt, whey, curd, and products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter or flavoured or containing added fruit or cocoa and includes fats and oils derived from milk (e.g. milkfat, butterfat and butteroil), dehydrated butter and ghee.”

14. On the other hand, Chapter 21 of the Act is applicable to “Miscellaneous Edible Preparations”. Heading 21.05 refers to “ice-cream and other edible ice”. It is significant to note that none of the terms have been defined in the chapter. Further heading 2108.91 is a residuary entry of wide amplitude applicable to “edible preparations, not elsewhere specified or included” and “not bearing a brand name”.

15. According to the rules of interpretation for the First Schedule to the Tariff Act, mentioned in Section 2 of the Tariff Act, classification of an excisable good shall be determined according to the terms of the headings and any corresponding chapter or section notes. Where these are not clearly determinative of classification, the same shall be effected according to Rules 3, 4 and 5 of the general rules of interpretation. However, it is also a well known principle that in the absence of any statutory definitions, excisable goods mentioned in tariff entries are construed according to the common parlance understanding of such goods.

16. The general rules of interpretation of taxing statutes were succinctly summarized by this Court in *Oswal Agro Mills Ltd. & Ors. Vs. Collector of Central Excise & Ors.*[3]; as follows:

> “4. The provisions of the tariff do not determine the relevant entity of the goods. They deal whether and under what entry, the identified entity attracts duty. The goods are to be identified and then to find the appropriate heading, sub-heading under which the identified goods/products would be classified. To find the appropriate classification description employed in the tariff nomenclature should be appreciated having regard to the terms of the headings read with the relevant provisions or statutory rules or interpretation put up thereon. For exigibility to excise duty the entity must be specified in positive terms under a particular tariff entry. In its absence it must be deduced from a proper construction of the tariff entry. There is neither intendment nor equity in a taxing statute. Nothing is implied. Neither can we insert nor can we delete anything but it should be interpreted and construed as per the words the legislature has chosen to employ in the Act or rules. There is no room for assumption or presumptions. The object of the Parliament has to be gathered from the language used in the statute…….. ..

3. 1993 Supp (3) SCC 716 at page 720.

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…Therefore, one has to gather its meaning in the legal setting to discover the object which the Act seeks to serve and the purpose of the amendment brought about.

The task of interpretation of the statute is not a mechanical one. It is more than mere reading of mathematical formula. It is an attempt to discover the intention of the legislature from the language used by it, keeping always in mind, that the language is at best an imperfect instrument for the expression of actual human thoughts. It is also idle to expect that the draftsman drafted it with divine prescience and perfect and unequivocal clarity. Therefore, court would endeavour to eschew literal construction if it produces manifest absurdity or unjust result. In *Manmohan Das v. Bishun Das :* (1967) 1 SCR 836, a Constitution Bench held as follows:

"…The ordinary rule of construction is that a provision of a statute must be construed in accordance with the language used therein unless there are compelling reasons, such as, where a literal construction would reduce the provision to absurdity or prevent manifest intention of the legislature from being carried out."

17. Therefore, in order to find an appropriate entry for the classification of 'soft serve', it would be necessary to first construe the true scope of the relevant headings. As noted above, none of the terms in heading 04.04 and heading 21.05 have been defined and no technical or scientific meanings have been given in the chapter notes. Evidently, 'soft serve' is not defined in any of the chapters aforesaid. Under these circumstances, it becomes imperative to examine if the subject good could come under the purview of any of the classification descriptions employed in the Tariff Act. Having regard to the nature of the pleadings, the issue is whether the term "ice-cream" in heading 21.05 includes within its ambit the product

'soft serve'. That leads us to the pivotal question, whether, in the absence of a statutory definition, the term "ice-cream" under heading 21.05 is to be construed in light of its scientific and technical meaning, or, whether we are to consider this term in its common parlance understanding to determine whether its amplitude is wide enough to include 'soft serve' within its purview.

Common Parlance Test :

18. Time and again, the principle of common parlance as the standard for interpreting terms in the taxing statutes, albeit subject to certain exceptions, where the statutory context runs to the contrary, has been reiterated. The application of the common parlance test is an extension of the general principle of interpretation of statutes for deciphering the mind of the law maker; "it is an attempt to discover the intention of the legislature from the language used by it, keeping always in mind, that the language is at best an imperfect instrument for the expression of actual human thoughts." [(See *:Oswal Agro Mills Ltd* (supra)].

19. A classic example on the concept of common parlance is the decision of the Exchequer Court of Canada in *The King Vs. Planter Nut and Chocolate Company Ltd.*[4]. The question involved in the said decision was whether salted peanuts and cashew nuts could be considered to be "fruit" or "vegetable" within the meaning of the Excise Tax Act. Cameron J., delivering the judgment, posed the question as follows:

"...would a householder when asked to bring home fruit or vegetables for the evening meal bring home salted peanuts, cashew or nuts of any sort? The answer is obviously `no'."

Applying the test, the Court held that the words "fruit" and "vegetable" are not defined in the Act or any of the Acts in pari

4. (1951) C.L.R. (Ex. Court) 122.

materia. They are ordinary words in every-day use and are therefore, to be construed according to their popular sense.

20. *In Ramavatar Budhaiprasad Etc. Vs. Assistant Sales Tax Officer, Akola*[5], the issue before this Court was whether betel leaves could be considered as "vegetables" in the Schedule of the C.P. & Berar Sales Tax Act, 1947 for availing the benefit of exemption. While construing the import of the word "vegetables" and holding that betel leaves could not be held to be "vegetables", the Court observed thus :

"…But this word must be construed not in any technical sense nor from the botanical point of view but as understood in common parlance. It has not been defined in the Act and being a word of every day use it must be construed in its popular sense meaning "that sense which people conversant with the subject matter with which the statute is dealing would attribute to it."

21. In *Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh*[6], the Court had to decide whether "charcoal" could be classified as "coal" under Entry I of Part III of Schedule II of the Madhya Pradesh General Sales Tax Act, 1958. Answering the question in the affirmative, it was observed as follows :

> "3. Now, there can be no dispute that while coal is technically understood as a mineral product, charcoal is manufactured by human agency from products like wood and other things. But it is now well-settled that while interpreting items in statutes like the Sales Tax Acts, resort should be had not to the scientific or the technical meaning of such terms but to their popular meaning or the meaning attached to them by those dealing in them, that is to say, to their commercial sense……"

5. (1962) 1 SCR 279.

6. (1967) 2 SCR 720.

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> "5. The result emerging from these decisions is that while construing the word 'coal' in Entry I of Part III of Schedule II, the test that would be applied is what would be the meaning which persons dealing with coal and consumers purchasing it as fuel would give to that word. A sales tax statute is being one levying a tax on goods must in the absence of a technical term or a term of science or art, be presumed to have used an ordinary term as coal according to the meaning ascribed to it in common parlance. Viewed from that angle both a merchant dealing in coal and a consumer wanting to purchase it would regard coal not in its geological sense but in the sense as ordinarily understood and would include 'charcoal' in the term 'coal'. It is only when the question of the kind or variety of coal would arise that a distinction would be made between coal and charcoal; otherwise, both of them would in ordinary parlance as also in their commercial sense be spoken as coal."

22. In *Dunlop India Ltd. Vs. Union of India & Ors.*[7], at page 251, while holding that VP Latex was to be classified as "raw rubber" under Item 39 of the Indian Tariff Act, 1934, this Court observed:

> **"29.** It is well established that in interpreting the meaning of words in a taxing statute, the acceptation of a particular word by the trade and its popular meaning should commend itself to the authority."

> **"34.** We are, however, unable to accept the submission. It is clear that meanings given to articles in a fiscal statute must be as people in trade and commerce, conversant with the subject, generally treat and understand them in the usual course. But once an article is classified and put

7. (1976) 2 SCC 241.

under a distinct entry, the basis of the classification is not open to question. Technical and scientific tests offer guidance only within limits. Once the articles are in circulation and come to be described and known in common parlance, we then see no difficulty for statutory classification under a particular entry."

23. In *Shri Bharuch Coconut Trading Co. and Ors. Vs. Municipal Corporation of the City of Ahmedabad & Ors.*[8], this Court applied the test as "would a householder when asked to bring some fresh fruits or some vegetable for the evening meal, bring coconut too as vegetable (sic)?" The Court held that when a person goes to a commercial market to ask for coconuts, "no one will consider brown coconut to be vegetable or fresh fruit much less a green fruit. No householder would purchase it as a fruit." Therefore, the meaning of the word 'brown coconut', and whether it was a green fruit, had to be "understood in its ordinary commercial parlance." Accordingly it was held that brown coconut would not be considered as green fruit.

24. In *Indian Aluminium Cables Ltd. Vs. Union of India & Ors.*[9], this Court observed the following:

"…This Court has consistently taken the view that, in determining the meaning or connotation of words and expressions describing an article in a tariff schedule, one principle which is fairly well-settled is that those words and expressions should be construed in the sense in which they are understood in the trade, by the dealer and the consumer. The reason is that it is they who are concerned with it and, it is the sense in which they understand it which constitutes the definitive index of the legislative intention".

25. In *Collector of Central Excise, Kanpur Vs. Krishna*

8. 1992 Suppl.(1) SCC 298.

9. (1985) 3 SCC 284.

Carbon Paper Co.[10], this Court has opined thus :

"12. It is a well settled principle of construction, as mentioned before, that where the word has a scientific or technical meaning and also an ordinary meaning according to common parlance, it is in the latter sense that in a taxing statute the word must be held to have been used, unless contrary intention is clearly expressed by the legislature…..

…But there is a word of caution that has to be borne in mind in this connection, the words must be understood in popular sense, that is to say, these must be confined to the words used in a particular statute and then if in respect of that particular items, as artificial definition is given in the sense that a special meaning is attached to particular words in the statute then the ordinary sense or dictionary meaning would not be applicable but the meaning of that type of goods dealt with by that type of goods in that type of market, should be searched."

26. In *Reliance Cellulose Products Ltd., Hyderabad Vs. Collector of Central Excise, Hyderabad-I Division, Hyderabad*[11], it was observed:

"20. In other words, if the word used in a fiscal statute is understood in common parlance or in the commercial world in a particular sense, it must be taken that the Excise Act has used that word in the commonly understood sense. That sense cannot be taken away by attributing a technical meaning to the word. But if the legislature itself has adopted a technical term, then that technical term has to be understood in the technical sense. In other words, if in the fiscal statute, the article in question falls within the ambit of a technical term used under a particular entry, then that article cannot be taken away from that entry and placed

10. (1989) 1 SCC 150.

11. (1997) 6 SCC 464.

under the residuary entry on the pretext that the article, even though it comes within the ambit of the technical term used in a particular entry, has acquired some other meaning in market parlance. For example, if a type of explosive (RDX) is known in the market as Kala Sabun by a section of the people who uses these explosives, the manufacturer or importer of these explosives cannot claim that the explosives must be classified as soap and not as explosive."

27. There is a catena of decisions that has dealt with the classification of Ayurvedic products between the categories of medicaments and cosmetics and in the process made significant pronouncements on the common parlance test.

28. In *Shree Baidyanath Ayurved Bhavan Ltd. Vs. Collector of Central Excise, Nagpur*[12], at page 404 this Court while applying the common parlance test held that the appellant's product "Dant Lal Manjan" could not qualify as a medicament and held as follows:

"The Tribunal rightly points out that in interpreting statutes like the Excise Act the primary object of which is to raise revenue and for which purpose various products are differently classified, resort should not be had to the scientific and technical meaning of the terms and expressions used but to their popular meaning, that is to say the meaning attached to them by those using the product. It is for this reason that the Tribunal came to the conclusion that scientific and technical meanings would not advance the case of the appellants if the same runs counter to how the product is understood in popular parlance."

29. In *Naturalle Health Products (P) Ltd. Vs. Collector of Central Excise, Hyderabad*[13], two appeals were under

12. (1996) 9 SCC 402.

13. (2004) 9 SCC 136.

consideration. One was with respect to Vicks Vapo Rub and Vicks Cough Drops while the other was with respect to Sloan's Balm and Sloan's Rub. It was observed that when there is no definition of any kind in the relevant taxing statute, the articles enumerated in the tariff schedules must be construed as far as possible in their ordinary or popular sense, that is, how the common man and persons dealing with it understand it. The Court held that in both the cases the customers, the practitioners in Ayurvedic medicine, the dealers and the licensing officials treated the products in question as Ayurvedic medicines and not as Allopathic medicines, which gave an indication that they were exclusively Ayurvedic medicines or that they were used in the Ayurvedic system of medicine, though they were patented medicines. Consequently, it was held that the said products had to be classified under the Chapter dealing with medicaments.

30. *B.P.L. Pharmaceuticals Ltd. Vs. Collector of Central Excise, Vadodara*[14] was a case in which product "Selsun Shampoo" was under consideration for the purpose of classification under the Tariff Act. According to the manufacturers this shampoo was a medicated shampoo meant to treat dandruff which is a disease of the hair. This Court held that having regard to the preparation, label, literature, character, common and commercial parlance, the product was liable to be classified as a medicament. It was not an ordinary shampoo which could be of common use by common people. The shampoo was meant to cure a particular disease of hair and after the cure it was not meant to be used in the ordinary course.

31. Therefore, what flows from a reading of the afore-mentioned decisions is that in the absence of a statutory definition in precise terms; words, entries and items in taxing statutes must be construed in terms of their commercial or trade understanding, or according to their popular meaning. In other words they have to be constructed in the sense that the people

14. (1995) Suppl. 3 SCC 1.

conversant with the subject-matter of the statute, would attribute to it. Resort to rigid interpretation in terms of scientific and technical meanings should be avoided in such circumstances. This, however, is by no means an absolute rule. When the legislature has expressed a contrary intention, such as by providing a statutory definition of the particular entry, word or item in specific, scientific or technical terms, then, interpretation ought to be in accordance with the scientific and technical meaning and not according to common parlance understanding.

Classification of 'Soft-Serve'

32. In light of these principles, we may now advert to the question at hand, viz. classification of 'soft serve' under the appropriate heading. As aforesaid, the Tribunal has held that in view of the technical literature and stringent provisions of the PFA, 'soft serve' cannot be classified as "ice-cream" under Entry 21.05 of the Tariff Act. We are of the opinion, that in the absence of a technical or scientific meaning or definition of the term "ice-cream" or 'soft serve', the Tribunal should have examined the issue at hand on the touchstone of the common parlance test.

33. As noted before, headings 04.04 and 21.05 have been couched in non-technical terms. Heading 04.04 reads "other dairy produce; edible products of animal origin, not elsewhere specified or included" whereas heading 21.05 reads "ice-cream and other edible ice". Neither the headings nor the chapter notes/section notes explicitly define the entries in a scientific or technical sense. Further, there is no mention of any specifications in respect of either of the entries. Hence, we are unable to accept the argument that since 'soft serve' is distinct from "ice-cream" due to a difference in its milk fat content, the same must be construed in the scientific sense for the purpose of classification. The statutory context of these entries is clear and does not demand a scientific interpretation of any of the headings. Therefore, in the absence of any statutory definition or technical description, we see no reason to deviate from the

application of the common parlance principle in construing whether the term "ice-cream" under heading 21.05 is broad enough to include 'soft serve' within its import.

34. The assessee has averred that 'soft serve' cannot be regarded as "ice-cream" since the former is marketed and sold around the world as 'soft serve'. We do not see any merit in this averment. The manner in which a product may be marketed by a manufacturer, does not necessarily play a decisive role in affecting the commercial understanding of such a product. What matters is the way in which the consumer perceives the product at the end of the day notwithstanding marketing strategies. Needless to say the common parlance test operates on the standard of an average reasonable person who is not expected to be aware of technical details relating to the goods. It is highly unlikely that such a person who walks into a "McDonalds" outlet with the intention of enjoying an "ice-cream", 'softy' or 'soft serve', if at all these are to be construed as distinct products, in the first place, will be aware of intricate details such as the percentage of milk fat content, milk non-solid fats, stabilisers, emulsifiers or the manufacturing process, much less its technical distinction from "ice-cream". On the contrary, such a person would enter the outlet with the intention of simply having an "ice-cream" or a 'softy ice-cream', oblivious of its technical composition. The true character of a product cannot be veiled behind a charade of terminology which is used to market a product. In other words, mere semantics cannot change the nature of a product in terms of how it is perceived by persons in the market, when the issue at hand is one of excise classification.

35. Besides, as noted above, learned senior counsel, appearing for the assessee quoted some culinary authorities for the submission that ice cream must necessarily contain more than 10% milk fat content and be served only in a frozen to hard stage for it to qualify as "ice cream". It was argued that classifying 'soft serve', containing 5% milk fat content, as "ice cream", would make their product stand foul of requirements

of the PFA which demands that an "ice-cream" must have at least 10% milk fat content.

36. Such a hard and fast definition of a culinary product like "ice- cream" that has seen constant evolution and transformation, in our view, is untenable. Food experts suggest that the earliest form of ice cream may have been frozen syrup. According to Maguelonne Toussaint-Samat in her History of Food, "They poured a mixture of snow and saltpeter over the exteriors of containers filled with syrup, for, in the same way as salt raises the boiling-point of water, it lowers the freezing-point to below zero." The author charters the evolution of "ice cream" in the landmark work from its primitive syrupy form to its contemporary status with more than hundred different forms, and categorizes 'soft serve' as one such form.

37. Noted author C. Clarke states the following in "The Science of Ice Cream":

> "The legal definition of ice cream varies from country to country. In the UK 'ice cream' is defined as a frozen food product containing a minimum of 5% fat and 7.5% milk solids other than fat (i.e. protein, sugars and minerals), which is obtained by heat-treating and subsequently freezing an emulsion of fat, milk solids and sugar (or sweetener), with or without other substances. 'Dairy ice cream' must in addition contain no fat other than milk fat, with the exception of fat that is present in another ingredient, for example egg, flavouring, or emulsifier.' In the USA, ice cream must contain at least 10% milk fat and 20% total milk solids, and must weigh a minimum of 0.54 kg I-'.Until 1997, it was not permitted to call a product 'ice cream' in the USA if it contained vegetable fat.
>
> Ice cream is often categorized as premium, standard or economy. Premium ice cream is generally made from best quality ingredients and has a relatively high amount of dairy fat and a low amount of air (hence it is relatively expensive), whereas economy ice cream is made from cheaper ingredients (e.g. vegetable fat) and contains more air. However, these terms have no legal standing within the UK market, and one manufacturer's economy ice cream may be similar to a standard ice cream from another."

Therefore, while some authorities are strict in their classification of products as "ice cream" and base it on milk fat content, others are more liberal and identify it by other characteristics. There is, thus, no clear or unanimous view regarding the true technical meaning of "ice cream". In fact, there are different forms of "ice cream" in different parts of the world that have varying characteristics.

38. On the basis of the authorities cited on behalf of the assessee, it cannot be said that "ice cream" ought to contain more than 10% milk fat content and must be served only frozen and hard. Besides, even if we were to assume for the sake of argument that there is one standard scientific definition of "ice cream" that distinguishes it from other products like 'soft serve', we do not see why such a definition must be resorted to in construing excise statutes. Fiscal statutes are framed at a point of time and meant to apply for significant periods of time thereafter; they cannot be expected to keep up with nuances and niceties of the gastronomical world. The terms of the statutes must be adapted to developments of contemporary times rather than being held entirely inapplicable. It is for precisely this reason that this Court has repeatedly applied the "common parlance test" every time parties have attempted to differentiate their products on the basis of subtle and finer characteristics; it has tried understanding a good in the way in which it is understood in common parlance.

39. Learned counsel for the assessee had strongly relied on *Akbar Badrudin Giwani* (supra) to buttress his claim, that in matters pertaining to classification of commodity taxation, technical and scientific meaning of the product will prevail rather than the commercial parlance, and hence on this basis,

headings 04.04 and 21.05 were to be harmoniously construed so that 'soft serve' would be classified under heading 04.04. We are afraid, reliance on this judgment is misplaced and out of context. It would be useful to draw a distinction between the contexts of *Akbar Badrudin Giwani* (supra) and the present factual matrix.

40. In *Akbar Badrudin Giwani* (supra) the issue was whether the slabs of calcareous stones (which were in commercial parlance known as marble) being imported by the Appellant were to be regarded as "marble" under Item No. 62 of the List of Restricted Items, Appendix 2, Part 8 of Import and Export Policy given that Item No. 25.15 (Appendix 1-B, Schedule I to the Import (Control) Order, 1955 referred to "marble, travertine, ecaussine and other calcareous monumental or building stone of an apparent specific gravity of 2.5 or more and Alabaster…". Hence, the controversy revolved around whether "marble" should be construed in its scientific and technical meaning, or according to its commercial understanding, in order to determine whether the appellant's goods would come within the ambit of Entry No. 62 of List of Restricted Items. The Court examined both the entries and opined that Item No. 25.15 referred specifically not only to marble but also to other calcareous stones having specific gravity of 2.5, whereas, Entry No. 62 referred to the restricted item "marble" only. The content of Item No. 25.15 had been couched in scientific and technical terms and therefore, "marble" had to be construed according to its scientific meaning and not in the sense as commercially understood or meant in trade parlance. Hence, in this context this Court held that the general principle of interpretation of tariff entries is of a commercial nomenclature but the said doctrine of commercial nomenclature or trade understanding should be departed from in a case where the statutory content in which the tariff entry appears, requires such a departure. In other words, a trade understanding or commercial nomenclature can be given only in cases where the word in the tariff entry has not been used in

a scientific or technical sense and where there is no conflict between the words used in the tariff entry and any other entry in the Tariff Schedule. Thus, these observations of the Court were made in a context where one of the tariff entries was couched in a scientific and technical sense and had to be harmonized with the other entry. It would have run counter to the statutory content of the legislation, to construe the term "marble" in its commercial sense.

41. It is significant to note that the question of classification of 'soft serve' is based on a different set of facts in a different context. Heading 21.05 which refers to "ice cream and other edible ice" is not defined in a technical or scientific manner, and hence, this does not occasion the need to construe the term "ice-cream" other than in its commercial or trade understanding. Since, the first condition itself has not been fulfilled; the question of harmonizing heading 21.05 with 04.04 by resort to the scientific and technical meaning of the entries does not arise at all. Hence, we are of the opinion that the ratio of *Akbar Badrudin Giwani* (supra) does not apply to the facts of the present case.

42. Learned counsel for the assessee had vociferously submitted that the common parlance understanding of "ice-cream" can be inferred by its definition as appearing under the PFA. According to Rule A 11.20.08 the milk fat content of "ice-cream" and "softy ice-cream" shall not be less than 8% by weight. Hence, according, to the learned counsel, the term "ice-cream" under heading 21.05 had to be understood in light of the standards provided in the PFA, more so when selling "Ice-cream" with fat content of less than 10% would attract criminal action, as held in *Baburao Ravaji Mharulkar* (supra).

43. We are unable to persuade ourselves to agree with the submission. It is a settled principle in excise classification that the definition of one statute having a different object, purpose and scheme cannot be applied mechanically to another statute. As aforesaid, the object of the Excise Act is

to raise revenue for which various goods are differently classified in the Act. The conditions or restrictions contemplated by one statute having a different object and purpose should not be lightly and mechanically imported and applied to a fiscal statute for non-levy of excise duty, thereby causing a loss of revenue. [See: *Medley Pharmaceuticals Limited Vs. Commissioner of Central Excise and Customs, Daman*[15] and *Commissioner of Central Excise, Nagpur Vs. Shree Baidyanath Ayurved Bhavan Limited*[16]]. The provisions of PFA, dedicated to food adulteration, would require a technical and scientific understanding of "Ice-cream" and thus, may require different standards for a good to be marketed as "ice-cream". These provisions are for ensuring quality control and have nothing to do with the class of goods which are subject to excise duty under a particular tariff entry under the Tariff Act. These provisions are not a standard for interpreting goods mentioned in the Tariff Act, the purpose and object of which is completely different.

44. Learned counsel for the assessee also contended that based on Rule 3(a) of the General Rules of Interpretation which states that a specific entry shall prevail over a general entry, 'soft serve' will fall under heading 04.04 since it is a specific entry. We do not see any merit in this contention. The learned counsel for the assessee had himself contended that "ice-cream" was a dairy product and would have been classified under heading 04.04 if heading 21.05 had not been inserted into the Tariff Act. However, in the presence of heading 21.05, "ice-cream" cannot be classified as a dairy product under heading 04.04. Hence, it is obvious that in relation to heading 04.04, heading 21.05 is clearly a specific entry. Therefore, we cannot subscribe to the claim that heading 04.04 is to be regarded as a specific entry under Rule 3(a) of the General Rules of Interpretation, since such an interpretation would be

15. (2011) 2 SCC 601.

16. (2009) 12 SCC 419.

contrary to the statutory context of heading 21.05. In conclusion, we reject the view taken by the Tribunal and hold that 'soft serve' is to be classified as "ice-cream" under heading 21.05 of the Act.

45. At this stage it may be relevant to refer to Trade Notice No. 45/2001 dated 11th June, 2001 of Mumbai Commissionerate IV which came to our notice. According to the said notification, "softy ice-cream/soft serve" dispensed by vending machines, sold and consumed as "ice-cream", is classifiable under Entry 21.05 of the Act. The same is reproduced below:

"Classification of Softy Ice Cream being sold in restaurant etc. dispensed by vending machine —

[Mumbai Commissionerate IV Trade Notice No.45/2001, dt. 11.6.2001]

Ice Cream dispensed by vending machine falling under chapter 21 has been made liable to nil rate of duty vide Sl. No.8 of Notification No.3/2001-CE dated 1.3.2001.

Doubts have been raised as regards to the classification of softy ice cream/soft serve dispensed by vending machine and soft serve mix used for its manufacture prior to 1.3.2001. A manufacturer was obtaining soft serve mix and processing it in his restaurant for manufacture of softy ice cream. The process involved lowering of temperature so that it changes its form from liquid to semi-solid state and incorporation of air, which results in production of overrun, in Tylor Vending Machine.

The product that emerges after this process is a completely different product and is ready to be consumed immediately. It has all the ingredients of an ice cream. The product is sold and consumed as ice cream.

In the circumstances, it is clarified by the Board that

softy ice cream is correctly classifiable under heading 21.05 of Central Excise Tariff. As per HSN Explanatory Notes, heading 19.01 also cover mix bases (e.g. powders) for making ice cream. It has been further clarified that soft serve mix will be correctly classifiable under heading 19.01.

All the trade associations are requested to bring the contents of this trade notice to the attention of their member manufacturers in particular, and trade in general.

Sd/-
(Neelam Rattan Negi)
Commissioner
Central Excise, Mumbai-IV"

While it is true that the trade notice is not binding upon this Court, it does indicate the commercial understanding of 'soft-serve' as 'softy ice- cream'. Further, as this trade notice is in no way contrary to the statutory provisions of the Act, we see no reason to diverge from what is mentioned therein.

46. In view of the aforegoing discussion, we are of the opinion that the Tribunal erred in law in classifying 'soft-serve' under tariff sub-heading 2108.91, as "Edible preparations not elsewhere specified or included", "not bearing a brand name". We hold that 'soft serve' marketed by the assessee, during the relevant period, is to be classified under tariff sub-heading 2105.00 as "ice-cream".

47. Lastly, learned counsel for the assessee had also contended that in the event 'soft serve' was classifiable under heading 21.05, the assessee was entitled to the benefit under Notification No. 16/2003-CE (NT) dated 12th March 2003. The notification reads:

"Notification: 16/2003-C.E. (N.T.) dated 12-Mar-2003

Softyicecream and non- alcoholic beverage dispensed through vending machine

exempted during period 1-3-1997 to 28-2-2001

Whereas the Central Government is satisfied that a practice that was generally prevalent regarding levy of duty of excise (including non-levy thereof) under section 3 of the Central Excise Act, 1944 (1 of 1944) (hereinafter referred to as the said Act), on softy ice cream and non-alcoholic beverages dispensed through vending machines, falling under Chapters 20, 21 or 22 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), and that such softy ice cream and non-alcoholic beverages dispensed through vending machines were liable to duty of excise which was not being levied according to the said practice during the period commencing on and from the 1st day of March, 1997 and ending with 28th February, 2001.

Now, therefore, in exercise of the powers conferred by section 11C of the said Act, the Central Government hereby directs that the whole of the duty of excise payable on such softy ice cream and non alcoholic beverage dispensed through vending machines, but for the said practice, shall not be required to be paid in respect of such softy ice cream and non alcoholic beverages on which the said duty of excise was not being levied during the aforesaid period in accordance with the said practice."

48. We are afraid we are unable to take this argument into account since such a plea was not urged before the Tribunal in the first place. Given that this is a statutory appeal under Section 35L of the Act, it is not open to either party, at this stage of the appeal, to raise a new ground which was never argued before the Tribunal. Our scrutiny of the arguments advanced has to be limited only to those grounds which were argued by the parties and addressed by the Tribunal in its impugned order. Since, the impugned orders at hand do not reflect the argument raised by the learned counsel for the assessee; we do not find any justification to entertain this submission. Nonetheless, for

the sake of argument, even if we assume that this ground had been urged before the Tribunal, in our view, learned counsel's reliance on this notification is misplaced. Upon a reading of the notification it is clear that the exemption in the notification is granted for the whole of excise duty which was payable on such softy ice cream and non alcoholic beverages dispensed through vending machines, but was not being levied during the relevant period, which is not the case here. In the present case, as aforenoted, three show cause notices had been issued to the assessee alleging that 'soft serve' was classifiable under heading 21.05 and attracted duty @ 16%. The show cause notices issued by the revenue also indicated that the assessee was liable to pay additional duty under Section 11A of the Act. This clearly shows that the excise duty was payable by the assessee and was being levied by the revenue. Therefore, the assessee's case does not fall within the ambit of the said notification and is not eligible for the exemption granted to "softy ice-cream", dispensed through a vending machine for the relevant period.

49. For the view we have taken, it is unnecessary to examine the issue whether the product in question bears a brand name.

50. Resultantly, the appeals are allowed and the impugned orders of the Tribunal are set aside, leaving the parties to bear their own costs.

B.B.B. Appeals allowed.

SUMIT TOMAR

v.

THE STATE OF PUNJAB

(Criminal Appeal Nos.1690-1691 of 2012)

OCTOBER 19, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Narcotic Drugs & Psychotropic Substances, Act, 1985 – s.15 – Search and seizure – Independent witness – Non-examination of – Effect – Appellant allegedly found driving a car loaded with bags of contraband (poppy straw) – Convicted on the basis of evidence of official witnesses – Conviction challenged on the ground that 'K', an independent witness was not examined – Held: In a case of this nature, it is better if the prosecution examines at least one independent witness to corroborate its case – However, in absence of any such witness, if the statements of police officers/official witnesses are reliable and no animosity is established against them by the accused, conviction based on such statements cannot be faulted with – In the instant case 'K' had witnessed the recovery and the prosecution had taken necessary steps to summon him for examination, but he did not appear – Besides, no animosity was established on the part of the official witnesses by the accused in defence – Conviction of appellant accordingly affirmed in view of the evidence of the official witnesses; the owner of the car involved in the offence i.e. PW2 and the FSL report – Further, since 70 kgs. of poppy straw was involved which was more than commercial quantity, the Special Judge rightly imposed the minimum sentence (RI of 10 years) and fine in terms of s.15(c) of the Act.

Narcotic Drugs & Psychotropic Substances, Act, 1985 – s.15 – Search and seizure – Taking out of samples – Procedure – Appellant allegedly found driving a car loaded

with two bags of contraband (poppy straw) and thereafter convicted – Conviction challenged on the ground that after the alleged seizure of contraband in two separate bags, there was no need for the officers to mix both and then take out two samples, and this was an irregularity which went against the prosecution case – Held:S.15 of the Act speaks about punishment for contravention in relation to poppy straw – Merely because different punishments have been prescribed therein depending on the quantity of contraband, mixing of the said two bags did not cause any prejudice to the appellant – Even after taking two samples of 250 grams each, the quantity of remaining contraband came to 69.50 kgs which was more than commercial quantity – Plea that the police should have taken two samples each from the two bags without mixing, not tenable.

According to the prosecution, a police party found the appellant driving a car in which two bags of contraband were loaded. The police officials mixed the contents of both the bags and thereafter two samples of 250 gms. each were taken out. The samples were sent to the Forensic Science Laboratory (FSL) for examination. On the same day, FIR was lodged by the police against the appellant and another accused under Sections 8, 15, 60, and 61 of the Narcotic Drugs & Psychotropic Substances, Act, 1985. During the pendency of the case, the other accused died. The Special Court convicted the appellant under Section 15 of the NDPS Act and sentenced him to undergo rigorous imprisonment (RI) for 10 years. The conviction and sentence was upheld by the High Court in appeal.

In the instant appeals, the appellant challenged his conviction on various grounds viz. i) that one 'K', an independent witness, who was allegedly joined by the prosecution was not examined and thus the entire story of the prosecution is liable to be rejected; ii) that in

absence of an independent witness, the conviction based on official witnesses cannot be sustained; and iii) that after the alleged seizure of contraband in two separate bags, there was no need for the officers to mix both, and then take out two samples and this was an irregularity which went against the prosecution case.

Dismissing the appeals, the Court

HELD: 1.1. It is the case of the prosecution that while 'K' was just passing through, he met the police party who had laid a special *nakabandi* near Basantpur Bus-stand for nabbing the anti-social elements. In such circumstance, his presence cannot be doubted, on the other hand, his presence seems to be natural and a perusal of the consent memo, the recovery memo and the arrest memo shows that he was present at the time when the recovery was effected from the accused. His signatures appended in all these memos show that he has witnessed the recovery. It is true that the prosecution could have examined him, but for this, it is the stand of the prosecution that inspite of necessary steps taken by issuing summons, he did not appear for which the prosecution case cannot be thrown out. [Para 8] [411-C-E]

1.2. In a case of this nature, it is better if the prosecution examines at least one independent witness to corroborate its case. However, in the absence of any animosity between the accused and the official witnesses, there is nothing wrong in relying on their testimonies and accepting the documents placed for basing conviction. After taking into account the entire materials relied on by the prosecution, no animosity is established on the part of the official witnesses by the accused in defence and also no infirmity is found in the prosecution case. It is not in dispute that the appellant (A-2) was driving the car in question which carried the

contraband. PW-2, owner of the car was also examined and proved its ownership and deposed that the appellant demanded the said car for personal use. In view of the above, it is clear that though it is desirable to examine independent witness, however, in the absence of any such witness, if the statements of police officers are reliable and when there is no animosity established against them by the accused, conviction based on their statement cannot be faulted with. On the other hand, the procedure adopted by the prosecution is acceptable and permissible, particularly, in respect of the offences under the NDPS Act. [Para 9] [411-H; 412-A-E]

2. There is no substance in the contention that the prosecution committed an irregularity by mixing up the contraband found in the two bags loaded in the car driven by the appellant and thereafter taking the samples. Section 15 of the NDPS Act speaks about punishment for contravention in relation to poppy straw. As per sub-section (a) where the contravention involves small quantity, the rigorous imprisonment may extend to six months or with fine which may extend to ten thousand rupees or with both whereas under sub-section (b) where the contravention involves quantity lesser than commercial quantity but greater than small quantity, rigorous imprisonment may extend to 10 years and with fine which may extend to one lakh rupees. Sub-section (c) provides that where the contravention involves commercial quantity, the rigorous imprisonment shall not be less than 10 years but which may extend to 20 years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. Merely because different punishments have been prescribed depending on the quantity of contraband, mixing the said two bags has not caused any prejudice to the appellant. Even after taking two samples of 250 grams each, the quantity measured comes to 69.50 kgs which is

more than commercial quantity (small quantity 1000 gms/ commercial quantity 50 kgs. and above). In view of the same, the contention that the police should have taken two samples each from the two bags without mixing is liable to be rejected. [Para 10] [412-F-H; 413-A-D]

3. Taking note of all the materials, the evidence of official witnesses, PW-2, the owner of the car which was involved in the offence, possession of commercial quantity, FSL report which shows that the contraband is poppy straw and is a prohibited item, this Court is in entire agreement with the conclusion arrived at by the trial Court and affirmed by the High Court. Further, taking note of the fact that the quantity involved is 70 kgs. of poppy straw which is more than a commercial quantity, the Special Judge rightly imposed minimum sentence and fine in terms of Section 15(c) of the NDPS Act. [Para 11] [413-E-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1690-1691 of 2012.

From the Judgment & Order of the High Court of Punjab and Haryana at Chandigarh dated 31.01.2011 in Criminal Appeal No. 2079 SB of 2009 and dated 17.05.2011 in Criminal Misc. No. 26283 of 2011.

V. Giri, Nagendra Singh, Vishwa Pal Singh for the Appellant.

Noopur Singhal, Anil Grover, Kuldip Singh for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. These appeals are directed against the judgment and

order dated 31.01.2011 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 2079 SB of 2009 whereby the High Court dismissed the criminal appeal filed by the appellant herein and also of the order dated 17.05.2011 passed by the High Court in Crl.M. No. 26283 of 2011 regarding correction of the date in the judgment.

3. Brief facts:

(i) According to the prosecution, on 27.06.2004, at about 5.00 p.m., a special barricading was set up by the police party at Basantpur Bus Stand, Patiala. At that time, the police party signaled to stop a silver colour Indica Car bearing No. DL-7CC-0654 which was coming from the side of Rajpura. The driver of the said car (appellant herein), accompanied with one Vikas Kumar (since deceased), who was sitting next to him, instead of stopping the car tried to run away, but the police party immediately blocked the way and managed to stop the car. On suspicion, the police checked the car and found two plastic bags containing 'bhooki' opium powder from the dickey of the said vehicle. The contents of both the bags were mixed and two samples of 250 gms. each were taken out. The remaining contraband weighing 69.50 kgs. was sealed in two bags and the samples were sent to the Forensic Science Laboratory (FSL) for examination.

(ii) On the same day, i.e., 27.06.2004, a First Information Report (FIR) being No. 105 of 2004 was lodged by the police against the appellant herein and Vikas Kumar under Sections 8, 15, 60, and 61 of the Narcotic Drugs & Psychotropic Substances, Act, 1985 (in short "the NDPS Act").

(iii) On receipt of the report of the Chemical Examiner and after completion of all the formalities relating to investigation, the case was committed to the Special Court, Patiala and numbered as Sessions Case No. 118T/06.09.04/17.11.08. During the pendency of the case, Vikas Kumar died. The Special Court, Patiala, by order dated 20.08.2009, convicted

the appellant herein under Section 15 of the NDPS Act and sentenced him to undergo rigorous imprisonment (RI) for 10 years alongwith a fine of Rs. One lakh, in default, to further undergo R.I. for one year.

(iv) Being aggrieved, the appellant herein filed Criminal Appeal No. 2079 SB of 2009 before the High Court of Punjab & Haryana. Learned single Judge of the High Court, by impugned order dated 31.01.2011, dismissed the said appeal. Questioning the same, the appellant has filed these appeals by way of special leave before this Court.

4. Heard Mr. V. Giri, learned senior counsel for the appellant and Ms. Noopur Singhal, learned counsel for the respondent-State.

5. Mr. V. Giri, learned senior counsel for the appellant raised the following contentions:

i) one Kaur Singh, an independent witness, was allegedly joined by the prosecution but has not been examined. Though the prosecution claimed that the presence of Kaur Singh at the spot was natural, since he was not examined, the entire story of the prosecution has to be rejected;

ii) in the absence of independent witness, conviction based on official witnesses, cannot be sustained; and

iii) inasmuch as after the alleged seizure of contraband in two separate bags, there is no need for the officers to mix both the samples which was an irregularity and goes against the prosecution case.

6. On the other hand, Ms. Noopur Singhal, learned counsel for the State submitted that the person who was present at the time of seizure was Kaur Singh and, hence, he is a natural witness and to show their bona fide, the prosecution summoned him for examination, but he failed to appear. She further submitted that mixing of poppy husk found in two bags is not

an irregularity, on the other hand, according to her, the prosecution has proved its case beyond reasonable doubt and prayed for confirmation of the order of conviction and sentence.

7. We have carefully considered the rival submissions and perused all the relevant materials.

8. As regards the first two contentions raised by learned senior counsel for the appellant, it is true that Kaur Singh, according to the prosecution, is an independent witness, however, he was not examined on the side of the prosecution. It is the case of the prosecution that on 27.06.2004 while Kaur Singh was just passing through, he met the police party who had laid a special nakabandi near Basantpur Bus-stand for nabbing the anti-social elements. In such circumstance, his presence cannot be doubted, on the other hand, his presence seems to be natural and a perusal of the consent memo, the recovery memo and the arrest memo shows that he was present at the time when the recovery was effected from the accused. His signatures appended in all these memos show that he has witnessed the recovery. It is true that the prosecution could have examined him. For this, it is the stand of the prosecution that in spite of necessary steps taken by issuing summons, he did not appear for which the prosecution case cannot be thrown out.

9. In order to substantiate its claim, the prosecution examined Shri Lakhwinder Singh, Head Constable as PW-1, Shri Devinder Kumar, owner of the car as PW-2, Shri Gurdeep Singh, Assistant Sub-inspector of Police as PW-3 and Shri Mohan Singh, Head Constable as PW-6. The Special Court as well as the High Court, on going through the evidence of the above-mentioned official witnesses and the documents, namely, FIR, seizure memo, FSL report etc., accepted the case of the prosecution. Even before us, learned senior counsel for the appellant took us through the evidence of the above-mentioned prosecution witnesses and the connected materials. In a case of this nature, it is better if the prosecution examines at least

one independent witness to corroborate its case. However, in the absence of any animosity between the accused and the official witnesses, there is nothing wrong in relying on their testimonies and accepting the documents placed for basing conviction. After taking into account the entire materials relied on by the prosecution, there is no animosity established on the part of the official witnesses by the accused in defence and we also do not find any infirmity in the prosecution case. It is not in dispute that the present appellant (A-2) was driving the car in question which carried the contraband. PW-2, owner of the car was also examined and proved its ownership and deposed that Sumit Tomar demanded the said car for personal use. In view of the above discussion, we hold that though it is desirable to examine independent witness, however, in the absence of any such witness, if the statements of police officers are reliable and when there is no animosity established against them by the accused, conviction based on their statement cannot be faulted with. On the other hand, the procedure adopted by the prosecution is acceptable and permissible, particularly, in respect of the offences under the NDPS Act. Accordingly, we reject both the contentions.

10. The next contention, according to the learned senior counsel for the appellant, is that the prosecution has committed an irregularity by mixing up the contraband found in the bags and taking samples thereafter. We find no substance in the said argument. The present appellant was driving the car in which two bags of contraband were loaded. He further pointed out that in view of Section 15 (c) of the NDPS Act, which prescribes minimum sentence of 10 years and which may extend to 20 years where the contravention involves commercial quantity, the mixing of two bags is a grave irregularity which affects the interest of the appellant. We are unable to accept the said contention. It is true that Section 15 of the NDPS Act speaks about punishment for contravention in relation to poppy straw. As per sub-section (a) where the contravention involves small quantity, the rigorous imprisonment may extend to six months

or with fine which may extend to ten thousand rupees or with both whereas under sub-section (b) where the contravention involves quantity lesser than commercial quantity but greater than small quantity, rigorous imprisonment may extend to 10 years and with fine which may extend to one lakh rupees. Sub-section (c) provides that where the contravention involves commercial quantity, the rigorous imprisonment shall not be less than 10 years but which may extend to 20 years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. Merely because different punishments have been prescribed depending on the quantity of contraband, we are satisfied that by mixing the said two bags, the same has not caused any prejudice to the appellant. Even after taking two samples of 250 grams each, the quantity measured comes to 69.50 kgs which is more than commercial quantity (small quantity 1000 gms/ commercial quantity 50 kgs. and above). In view of the same, the contention that the police should have taken two samples each from the two bags without mixing is liable to be rejected.

11. Taking note of all the materials, the evidence of official witnesses, PW-2, owner of the car which was involved in the offence, possession of commercial quantity, FSL report which shows that the contraband is poppy straw and is a prohibited item, we are in entire agreement with the conclusion arrived at by the trial Court and affirmed by the High Court. Further, taking note of the fact that the quantity involved is 70 kgs. of poppy straw which is more than a commercial quantity, the Special Judge rightly imposed minimum sentence and fine in terms of Section 15(c) of the NDPS Act. We are in agreement with the said conclusion.

12. In the light of the above discussion, we do not find any merit in the appeals, consequently, the same are dismissed.

B.B.B. Appeals dismissed.

K. SURESH
v.
NEW INDIA ASSURANCE CO. LTD. AND ANR.
(Civil Appeal No. 7603 of 2012)

OCTOBER 19, 2012

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

Motor Vehicles Act, 1988 – s.168 – Determination of compensation – Just compensation – Concept of – Explained.

Motor Vehicles Act, 1988 – ss.166 and 168 – Accident with auto resulting in multiple grievous injuries and fractures all over the body of the appellant – Held: Victim-appellant entitled to compensation for loss of earning capacity as well as for permanent disability – View of High Court that no compensation can be granted towards permanent disability once compensation is computed for the loss of earning capacity and loss of future earnings is unsustainable – On facts, appellant entitled to compensation on the headings: transport charges, extra-nourishment, medical expenses, additional medical expenses, additional transport charges, pain and suffering, loss of earning capacity and permanent disability and accordingly awarded total compensation of Rs.13.48 lakhs with interest @ 7.5%.

The appellant was hit by an auto driven in a rash and negligent manner causing multiple grievous injuries and fractures all over his body. The tribunal assessed the permanent disability of the appellant at 75% and awarded Rs.25,00,000/- under various heads, namely, transport charges, extra nourishment, medical expenses, additional medical expenses, pain and sufferings suffered by family members of the claimant, mental agony, additional transport charges, inability of the appellant to participate

in public functions, loss of marital life, pain and suffering, permanent disability and loss of earning capacity. Before the High Court as serious objections were raised pertaining to percentage of disability, the appellant was referred to the Medical Board and it was found that he had compression fracture which had healed with persistence of pain in the back with root involvement causing grade IV power in left lower limb and, accordingly, the Board fixed the permanent disability at 40%. The High Court adverted to the concept of "just compensation" and opined that the quantum of damages fixed should be in proportionate to the injuries caused. It opined that Rs.2,00,000/- towards medical expenses, Rs.5,000/- each for transport charges and extra nourishment, Rs.2,50,000/- towards pain and suffering, Rs.50,000/- for medical expenses and Rs.4,68,000/- towards loss of earning capacity would be the just amount of compensation and thus, reduced the total amount of compensation to Rs.9,78,000/-. The High Court also reduced the interest to 7.5% from 9% as granted by the tribunal.

In the instant appeal, the appellant contended that the High Court had erroneously held that there cannot be grant of compensation under two heads, namely, "permanent disability" and "loss of earning power"; that the tribunal had correctly appreciated the evidence on record and fixed certain sum under various heads but the High Court on unacceptable reasons deleted the same and also that the High Court without ascribing any cogent reasons reduced the expenses for continuous treatment from Rs.2,00,000/- to Rs.50,000/- as a result of which the amount had been substantially reduced and the concept of "just compensation" lost its real characteristics.

The question which therefore arose for consideration was whether the analysis made by the High Court in not granting compensation under certain heads and further

reducing the amount on certain scores, was justified.

Partly allowing the appeal, the Court

HELD: 1.1. Despite many a pronouncement in the field, it still remains a challenging situation warranting sensitive as well as dispassionate exercise how to determine the incalculable sum in calculable terms of money in cases of personal injuries. In such assessment neither sentiments nor emotions have any role. There cannot be actual compensation for anguish of the heart or for mental tribulations. The quintessentiality lies in the pragmatic computation of the loss sustained which has to be in the realm of realistic approximation. Therefore, Section 168 of the Motor Vehicles Act, 1988 stipulates that there should be grant of "just compensation". Thus, it becomes a challenge for a court of law to determine "just compensation" which is neither a bonanza nor a windfall, and simultaneously, should not be a pittance. [Para 2] [423-G-H; 424-A-B]

1.2. While assessing the damages there is a command to exclude considerations which are in the realm of speculation or fancy though some guess work or some conjecture to a limited extent is inevitable. Thus, some guess work, some hypothetical considerations and some sympathy come into play but, a significant one, the ultimate determination is to be viewed with some objective standards. Neither the tribunal nor a court can take a flight in fancy and award an exorbitant sum, for the concept of conventional sum, fall of money value and reasonableness are to be kept in view. Ergo, in conceptual eventuality "just compensation" plays a dominant role. The conception of "just compensation" is fundamentally concretized on certain well established principles and accepted legal parameters as well as principles of equity and good conscience. [Paras 6 and 7]

1.3. An adjudicating authority, while determining quantum of compensation, has to keep in view the sufferings of the injured person which would include his inability to lead a full life, his incapacity to enjoy the normal amenities which he would have enjoyed but for the injuries and his ability to earn as much as he used to earn or could have earned. Hence, while computing compensation the approach of the tribunal or a court has to be broad based. It would involve some guesswork as there cannot be any mathematical exactitude or a precise formula to determine the quantum of compensation. In determination of compensation the fundamental criterion of "just compensation" should be inhered. [Para 10] [428-E-G]

Jai Bagwan v. Laxman Singh and others **(1994) 5 SCC 5;** *Nagappa v. Gurudayal Singh and others* **(2003) 2 SCC 274: 2002 (4) Suppl. SCR 499;** *C.K. Subramania Iyer v. T. Kunhikuttan Nair* **AIR 1970 SC 376: 1970 (2) SCR 688;** *Yadav Kumar v. Divisional Manager, National Insurance Company Limited and another* **(2010) 10 SCC 341: 2010 (10) SCR 746;** *Concord of India Insurance Co. Ltd. v. Nirmala Devi* **(1979) 4 SCC 365: 1979 (3) SCR 694;** *Mrs. Helen C. Rebello and others v. Maharashtra State Road Transport Corpn. and another* **AIR 1998 SC 3191: 1998 (1) Suppl. SCR 684 and** *State of Haryana and another v. Jasbir Kaur and Others* **(2003) 7 SCC 484: 2003 (2) Suppl. SCR 245 – relied on.**

Davies v. Powell Duffryn Associate Collieries Ltd. **1942 AC 601;** *H. West & Son, Ltd. v. Shephard* **(1963) 2 All ER 625;** *Lim Poh Choo v. Camden and Islington Area Health Authority* **(1979) 1 All ER 332 and** *Ward v. James* **(1965) 1 All ER 563 – referred to.**

Clerk and Lindsell on Torts **(16th Edn.) – referred to.**

2.1. The incapacity or disability to earn a livelihood

would have to be viewed not only *in praesenti* but *in futuro* on reasonable expectancies and taking into account deprival of earnings of a conceivable period. This head being totally different cannot overlap the grant of compensation under the head of pain, suffering and loss of enjoyment of life. One head relates to the impairment of person's capacity to earn, the other relates to the pain and suffering and loss of enjoyment of life by the person himself. It is true that compensation for loss of earning power/capacity has to be determined based on various aspects including permanent injury/disability, but at the same time, it cannot be construed that that compensation cannot be granted for permanent disability of any nature. In a case of a non-earning member of a family who has been injured in an accident and sustained permanent disability due to amputation of leg or hand, it cannot be construed that no amount needs to be granted for permanent disability. It cannot be disputed that apart from the fact that the permanent disability affects the earning capacity of the person concerned, undoubtedly, one has to forego other personal comforts and even for normal avocation they have to depend on others. Thus, the view of the High Court that no compensation can be granted towards permanent disability once compensation is computed for the loss of earning capacity and loss of future earnings is unsustainable. As is perceivable, the High Court has computed the loss of earning power at Rs.4,68,000/- instead of Rs.5,00,000/- as determined by the tribunal and deleted sum of Rs.3,00,000/- that was awarded by the tribunal towards permanent disability. The total deletion is absolutely unjustified and, in fact, runs counter to the principles laid down by this Court in *Ramesh Chandra* and *B. Kothandapani*. Grant of compensation towards permanent disability is permissible. Regard been had to the totality of the facts and circumstances, compensation of Rs.2,50,000/- should be granted towards permanent disability and Rs.2,00,000/

- towards pain and suffering. It is being so held as the injury is of serious nature and under the heading of non-pecuniary damages compensation is awardable under the headings of pain and suffering and damages for loss of amenities of life on account of injury. If the victim of an accident suffers permanent or temporary disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the pain, suffering and trauma caused due to accident, loss of earnings and victim's inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident. [Paras 18, 19, 20 and 28] [432-D-E-F-H; 433-A-C; 437-H; 438-A-B-D]

2.2. It is obligatory on the part of the court or the tribunal to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. He is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. [Para 23] [434-G; 435-A-B]

2.3. Permanent disability can be either partial or total and the assessment of compensation under the heads of loss of future earnings would depend upon the factum and impact of such permanent disability on his earning capacity. The tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, i.e., the percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage

of permanent disability. However, in some cases on appreciation of evidence and assessment the percentage of loss of earning capacity as a result of the permanent disability would be approximately the same as the percentage of permanent disability in which case, of course, the court or tribunal would adopt the said percentage for determination of compensation. [Para 25] [436-D-H]

2.4. In the case at hand the High Court has determined the loss of earning capacity on the base of multiplier method and reduced the quantum awarded by the tribunal from Rs.5,00,000/- to Rs.4,68,000/-. Applying the ratio in *Yadav Kumar* and *Arvind Kumar Mishra* **and also *Raj Kumar* and regard being had to the serious nature of injury, no error is found in the said method of calculation and, accordingly, the method of computation as well as the quantum is upheld. [Para 26] [437-A-B]**

2.5. The High Court has reduced the additional medical expenses from Rs.2,00,000/- to Rs.50,000/-. The same is not correct as there is ample evidence on record as regards the necessity for treatment in future. It is demonstrable that pedicle screws were passed into pedicles of D11 vertebra; pedicle screws were passed into pedicles of L1 vertebra; and two screws on left thigh were connected using a rod each. That may be required to be removed or scanned from time to time depending upon other aspects. That apart, there is persistent pain and as medically advised physiotherapy is necessary and hence, continuous treatment has to be availed of. Thus, the High Court was not justified in reducing the said amount. [Para 27] [437-C-E]

2.6. The High Court maintained the award in respect of transport charges, extra nourishment, medical expenses and, accordingly, they are maintained. The High Court deleted the additional transport charges.

While availing treatment the said expenses would be imperative. Hence, there was no justification to reduce the same and, accordingly, it is restored. [Paras 28, 29] [437-F; 438-F]

2.7. The High Court deleted the amount awarded under the head of pain and suffering by family members of the claimant and the amount granted towards loss of marital life. There is no iota of evidence with regard to loss of marital life, hence, there is no error in the said deletion. As far as grant of compensation on the score of pain and suffering suffered by the family members of claimant is concerned, the same is not permissible and, accordingly, it was correctly deleted. [Para 30] [438-G-H; 439-A]

2.8. The High Court deleted an amount of Rs.3,00,000/- and a sum of Rs.2,00,000/- towards mental agony and inability on the part of the claimant to participate in public functions respectively. Since this Court has already determined Rs.2,00,000/- under the heading of pain and suffering already suffered and to be suffered and Rs.2,50,000/- under the heading of permanent disability and hence, no different sum need be awarded under the heading of mental agony. As far as participation in public functions is concerned, there is no evidence in that regard and, therefore, the finding of the High Court on that score is totally justified and does not call for any interference. [Para 31] [439-B-D]

2.9. Calculated on the aforesaid base, the compensation would be payable on the headings, namely, transport charges, extra-nourishment, medical expenses, additional medical expenses, additional transport charges, pain and suffering, loss of earning capacity and permanent disability and the amount on the aforesaid scores would be, in toto, Rs.13,48,000/-. The said amount shall carry interest at the rate of 7.5% from

the date of application till the date of payment. [Para 32] [439-E-F]

Ramesh Chandra v. Randhir Singh **(1990) 3 SCC 723: 1990 (3) SCR 1;** *B. Kothandapani v. Tamil Nadu State Transport Corporation Ltd.* **(2011) 6 SCC 420: 2011 (6) SCR 791;** *R.D. Hattangadi v. Pest Control (India) Pvt. Ltd. and others* **(1995) 1 SCC 551: 1995 (1) SCR 75;** *Arvind Kumar Mishra v. New India Assurance Company Limited and another* **(2010) 10 SCC 254: 2010 (11) SCR 857;** *Kerala SRTC v. Susamma Thomas* **(1994) 2 SCC 176;** *Raj Kumar v. Ajay Kumar and Another* **(2011) 1 SCC 343: 2010 (13) SCR 179;** *Yadav Kumar v. Divisional Manager, National Insurance Company Limited and another* **(2010) 10 SCC 341: 2010 (10) SCR 746 and** *Laxman v. Divisional Manager, Oriental Insurance Co. Ltd. and another* **2012 ACJ 191 – relied on.**

Cholan Roadways Corporation Ltd. v. Ahmed Thambi **(2006) 4 CTC 433 (Mad) – referred to.**

Baker v. Willoughby **1970 AC 467: (1970) 2 WLR 50 – referred to.**

Case Law Reference:

1942 AC 601	**referred to**	**Para 2**
(1994) 5 SCC 5	**relied on**	**Para 3**
(1963) 2 All ER 625	**referred to**	**Para 3**
2002 (4) Suppl. SCR 499	**relied on**	**Para 4**
(1979) 1 All ER 332	**referred to**	**Para 4**
(1965) 1 All ER 563	**referred to**	**Para 5**
1970 (2) SCR 688	**relied on**	**Para 6, 23**
2010 (10) SCR 746	**relied on**	**Para 7, 25, 26**

1979 (3) SCR 694	**relied on**	**Para 8**
1998 (1) Suppl. SCR 684	**relied on**	**Para 9**
2003 (2) Suppl. SCR 245	**relied on**	**Para 9**
2011 (6) SCR 791	**relied on**	**Para 17, 20**
(2006) 4 CTC 433 (Mad)	**referred to**	**Para 17**
1990 (3) SCR 1	**relied on**	**Para 15, 18, 20**
1995 (1) SCR 75	**relied on**	**Para 21,23**
2010 (11) SCR 857	**relied on**	**Para 22, 25, 26**
(1994) 2 SCC 176	**relied on**	**Para 22**
2010 (13) SCR	**relied on**	**Para 23, 26**
(1970) 2 WLR 50	**referred to**	**Para 20**
2012 ACJ 191	**relied on**	**Para 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7603 of 2012.

From the Judgment and Order dated 27.01.2010 of the High Court of Judicature at Madras in Civil Miscellaneous Appeal No. 1989 of 2005.

Vipin Nair, Udayaditya Banerjee (For Temple Law Firm) for the Appellant.

Aishwarya Bhati, Sanjay Mittal, Aditya Dhawan, Chander Shekhar Ashri for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. Despite many a pronouncement in the field, it still remains a challenging situation warranting sensitive as well as dispassionate exercise how to determine the incalculable sum in calculable terms of money in cases of personal injuries. In such assessment neither sentiments nor emotions have any

role. It has been stated in *Davies v. Powell Duffryn Associate Collieries Ltd.*[1] that it is a matter of Pounds, Shillings and Pence. There cannot be actual compensation for anguish of the heart or for mental tribulations. The quintessentiality lies in the pragmatic computation of the loss sustained which has to be in the realm of realistic approximation. Therefore, Section 168 of the Motor Vehicles Act, 1988 (for brevity 'the Act') stipulates that there should be grant of "just compensation". Thus, it becomes a challenge for a court of law to determine "just compensation" which is neither a bonanza nor a windfall, and simultaneously, should not be a pittance.

3. In *Jai Bhagwan v. Laxman Singh and Others*[2], a three-Judge Bench of this Court, while considering the assessment of damages in personal-injury-actions, reproduced the following passage from the decision by the House of Lords in *H. West & Son, Ltd. v. Shephard*[3]:-

> "My Lords, the damages which are to be awarded for a tort are those which 'so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act' [*Admiralty Comrs. v. Susquehanna (Owners), The Susquehanna*[4]]. The words 'so far as money can compensate' point to the impossibility of equating money with human suffering or personal deprivations. A money award can be calculated so as to make good a financial loss. Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some

1. 1942 AC 601.
2. (1994) 5 SCC 5.
3. (1963) 2 All ER 625.
4. (1926) All ER 124 : 1926 AC 655.

uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

In the said case reference was made to a passage from *Clerk and Lindsell on Torts* (16th Edn.) which is apposite to reproduce as it relates to the awards for non-pecuniary losses:-

"In all but a few exceptional cases the victim of personal injury suffers two distinct kinds of damage which may be classed respectively as pecuniary and non-pecuniary. By pecuniary damage is meant that which is susceptible of direct translation into money terms and includes such matters as loss of earnings, actual and prospective, and out-of-pocket expenses, while non-pecuniary damage includes such immeasurable elements as pain and suffering and loss of amenity or enjoyment of life. In respect of the former, it is submitted, the court should and usually does seek to achieve restitutio in integrum in the sense described above, while for the latter it seeks to award 'fair compensation'. This distinction between pecuniary and non-pecuniary damage by no means corresponds to the traditional pleading distinction between 'special' and 'general' damages, for while the former is necessarily concerned solely with pecuniary losses - notably accrued loss of earnings and out-of-pocket expenses - the latter comprises not only non-pecuniary losses but also prospective loss of earnings and other future pecuniary damage."

4. In this regard, we may refer with profit the decision of this Court in *Nagappa v. Gurudayal Singh and others*[5] wherein the observations of Lord Denning M.R. in *Lim Poh Choo v.*

Camden and Islington Area Health Authority[6] were quoted with approval. They read thus:-

"The practice is now established and cannot be gainsaid that, in personal injury cases, the award of damages is assessed under four main heads: first, special damages in the shape of money actually expended; second, cost of future nursing and attendance and medical expenses; third, pain and suffering and loss of amenities; fourth, loss of future earnings."

5. While having respect for the conventional determination there has been evolution of a pattern and the same, from time to time, has been kept in accord with the changes in the value of money. Therefore, in the case of *Ward v. James*[7] it has been expressed thus:-

"Although you cannot give a man so gravely injured much for his 'lost years', you can, however, compensate him for his loss during his shortened span, that is, during his expected 'years of survival'. You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to a back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet judges and juries have to do the best they can and give him what they think is fair. No wonder they find it well nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The judges have worked out a pattern, and they keep it in line with the changes in the value of money."

5. (2003) 2 SCC 274.
6. (1979) 1 All ER 332.
7. (1965) 1 All ER 563.

6. While assessing the damages there is a command to exclude considerations which are in the realm of speculation or fancy though some guess work or some conjecture to a limited extent is inevitable. That is what has been stated in *C.K. Subramania Iyer v. T. Kunhikuttan Nair*[8]. Thus, some guess work, some hypothetical considerations and some sympathy come into play but, a significant one, the ultimate determination is to be viewed with some objective standards. To elaborate, neither the tribunal nor a court can take a flight in fancy and award an exorbitant sum, for the concept of conventional sum, fall of money value and reasonableness are to be kept in view. Ergo, in conceptual eventuality "just compensation" plays a dominant role.

7. The conception of "just compensation" is fundamentally concretized on certain well established principles and accepted legal parameters as well as principles of equity and good conscience. In *Yadav Kumar v. Divisional Manager, National Insurance Company Limited and Another*[9], a two-Judge Bench, while dealing with the facet of "just compensation", has stated thus: -

> "It goes without saying that in matters of determination of compensation both the tribunal and the court are statutorily charged with a responsibility of fixing a "just compensation". It is obviously true that determination of just compensation cannot be equated to a bonanza. At the same time the concept of "just compensation" obviously suggests application of fair and equitable principles and a reasonable approach on the part of the tribunals and the courts. This reasonableness on the part of the tribunal and the court must be on a large peripheral field."

8. In *Concord of India Insurance Co. Ltd. v. Nirmala Devi*[10] this Court has expressed thus:-

8. AIR 1970 SC 376.

9. (2010) 10 SCC 341.

10. (1979) 4 SCC 365.

> "The determination of the quantum must be liberal, not niggardly since the law values life and limb in free country in generous scales."

9. In *Mrs. Helen C. Rebello and Others v. Maharashtra State Road Transport Corpn. and Another*[11], while dealing with concept of "just compensation", it has been ruled that the word 'just', as its nomenclature, denotes equitability, fairness and reasonableness having large peripheral field. The largeness is, of course, not arbitrary; it is restricted by the conscience which is fair, reasonable and equitable, if it exceeds; it is termed as unfair, unreasonable, unequitable, not just. The field of wider discretion of the tribunal has to be within the said limitations. It is required to make an award determining the amount of compensation which in turn appears to be "just and reasonable", for compensation for loss of limbs or life can hardly be weighed in golden scales as has been stated in "*State of Haryana and Another v. Jasbir Kaur and Others*"[12].

10. It is noteworthy to state that an adjudicating authority, while determining quantum of compensation, has to keep in view the sufferings of the injured person which would include his inability to lead a full life, his incapacity to enjoy the normal amenities which he would have enjoyed but for the injuries and his ability to earn as much as he used to earn or could have earned. Hence, while computing compensation the approach of the tribunal or a court has to be broad based. Needless to say, it would involve some guesswork as there cannot be any mathematical exactitude or a precise formula to determine the quantum of compensation. In determination of compensation the fundamental criterion of "just compensation" should be inhered.

11. Keeping in view the aforesaid aspects we shall proceed to state the factual score. The factual matrix as

11. AIR 1998 SC 3191.

12. (2003) 7 SCC 484.

unfurled, exposits that on 11.3.2002 about 4.00 p.m. the claimant-appellant (hereinafter referred to as 'the claimant) was hit from the behind by an auto bearing registration number TN-9 C 7755 which was driven in a rash and negligent manner and in the accident he sustained triple fracture in spinal cord, fracture in left leg neck of femur, fracture in right hand shoulder, deep cut and degloving injury over right left thigh bone and multiple injuries all over the body.

12. After the accident the claimant was admitted in M.R. Hospital where he availed treatment. After the treatment, the dislocation of the bones got reduced, pedical screws were inserted into pedicles of D11 vertebra and pedicle screws were passed into pedicles of L1 vertebra. Two screws on left thigh were fixed using a rod each. That apart, decompression of D12 vertebra was done and bone chips were placed in the intertransverse area on both sides. He was hospitalized for 28 days. The victim had numbness below the knee joint and was facing difficulty to stand and sit comfortably. As the evidence on record would reveal he has been constantly availing physiotherapy treatment facing difficulty in carrying out his normal activities. A disability certificate contained as Ex.P4 was filed before the tribunal which showed permanent disability at 75%.

13. The tribunal, as it appears from the award, had also assessed the permanent disability at 75% as fixed by PW-4, Dr. Thiagarajan. It had awarded Rs.25,00,000/- under various heads, namely, transport charges, extra nourishment, medical expenses, additional medical expenses, pain and sufferings suffered by family members of the claimant, mental agony, additional transport charges, inability of the appellant to participate in public functions, loss of marital life, pain and suffering, permanent disability and loss of earning capacity.

14. Before the High Court as serious objections were raised pertaining to percentage of disability, the claimant was

referred to the Medical Board and it was found that he had compression fracture which had healed with persistence of pain in the back with root involvement causing grade IV power in left lower limb and, accordingly, the Board fixed the permanent disability at 40%. The High Court adverted to the concept of "just compensation" and opined that the quantum of damages fixed should be in proportionate to the injuries caused. It referred to certain authorities and opined that Rs.2,00,000/- towards medical expenses, Rs.5,000/- each for transport charges and extra nourishment, Rs.2,50,000/- towards pain and suffering, Rs.50,000/- for medical expenses and Rs.4,68,000/- towards loss of earning capacity would be the just amount of compensation. Thus, the total amount as determined by the High Court came to Rs.9,78,000/-. The High Court reduced the interest to 7.5% from 9% as granted by the tribunal. Be it noted, the said judgment and order dated 27.1.2010 passed by the High Court of Judicature at Madras in Civil Miscellaneous Appeal No. 1989 of 2005 whereby the High Court has reduced the compensation granted by the Motor Accident Claims Tribunal (II Small Causes Court), Chennai, on an application being moved under Section 166 of the Act is the subject-matter of challenge herein.

15. Mr. Vipin Nair, learned counsel appearing for the appellant, has contended that the High Court has erroneously held that there cannot be grant of compensation under two heads, namely, "permanent disability" and "loss of earning power". It is urged by him that the tribunal had correctly appreciated the evidence on record and fixed certain sum under various heads but the High Court on unacceptable reasons has deleted the same. It is also canvassed by him that the High Court without ascribing any cogent reasons has reduced the expenses for continuous treatment from Rs.2,00,000/- to Rs.50,000/- as a result of which the amount had been substantially reduced and the concept of "just compensation" has lost its real characteristics.

16. Ms. Aishwarya Bhati, learned counsel appearing for the respondent No. 1, supported the order passed by the High Court contending, inter alia, that the analysis made by the learned single Judge is absolutely flawless and the interference in the quantum cannot be faulted inasmuch as the tribunal has awarded a large sum on certain heads which are totally impermissible in law. It is also urged by her that certain sums had been allowed by the tribunal without any material on record and, therefore, the High Court has correctly interfered with the award.

17. The seminal issues that really emanate for consideration are whether the analysis made by the High Court in not granting compensation under certain heads and further reduing the amount on certain scores, are justified. Regard being had to the fundamental essence of "just compensation", we shall presently deal with the manner in which the High Court has dwelled upon various heads in respect of which the tribunal had granted certain sums towards compensation. On a perusal of the order passed by the High Court, it is manifest that the High Court relying on certain authorities of the said court has expressed the view that once a particular amount has been awarded towards `permanent disability', no further amount can be awarded relating to `loss of earning capacity'. The learned counsel for the appellant has commended us to the pronouncement of this Court in *B. Kothandapani v. Tamil Nadu State Transport Corporation Ltd.*[13], wherein the High Court had placed reliance on the Full Bench decision in *Cholan Roadways Corporation Ltd. v. Ahmed Thambi*[14]. This Court referred to the pronouncement in *Ramesh Chandra v. Randhir Singh*[15], wherein it has been stated thus:-

> "With regard to ground 19 covering the question that the sum awarded for pain, suffering and loss of enjoyment of life, etc. termed as general damages should be taken to be covered by damages granted for loss of earnings is concerned that too is misplaced and without any basis. The pain and suffering and loss of enjoyment of life which is a resultant and permanent fact occasioned by the nature of injuries received by the claimant and the ordeal he had to undergo."

13. (2011) 6 SCC 420.

14. (2006) 4 CTC 433 (Mad).

15. (1990) 3 SCC 723.

18. In *Ramesh Chandra* (supra) the learned Judges proceeded to address the issue of difficulty or incapacity to earn and how it stands on a different footing than pain and suffering affecting enjoyment of life and stated as under:-

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

19. After referring to the said passage, the Bench proceeded to state that it is true that compensation for loss of earning power/capacity has to be determined based on various aspects including permanent injury/disability, but at the same time, it cannot be construed that that compensation cannot be granted for permanent disability of any nature. It has been mentioned by way of an example that in a case of a non-earning member of a family who has been injured in an accident and sustained permanent disability due to amputation of leg or hand, it cannot be construed that no amount needs to be granted for permanent disability. It cannot be disputed that apart from the fact that the permanent disability affects the earning capacity of the person concerned, undoubtedly, one has to forego other

personal comforts and even for normal avocation they have to depend on others.

20. In view of the aforesaid enunciation of law, the view of the High Court that no compensation can be granted towards permanent disability once compensation is computed for the loss of earning capacity and loss of future earnings is unsustainable. As is perceivable, the High Court has computed the loss of earning power at Rs.4,68,000/- instead of Rs.5,00,000/- as determined by the tribunal and deleted sum of Rs.3,00,000/- that was awarded by the tribunal towards permanent disability. In our considered opinion, total deletion is absolutely unjustified and, in fact, runs counter to the principles laid down by this Court in *Ramesh Chandra* (supra) and *B. Kothandapani* (supra).

21. At this juncture, we think it seemly to state that it is a case where the victim has suffered serious injuries. As far as the injuries are concerned, there is concurrence of opinion by the tribunal as well as by the High Court. The High Court has only reduced the percentage of permanent disability on the basis of assessment made by the Medical Board as there was a serious cavil with regard to the said percentage. While determining compensation payable to a victim of an accident the parameters which are to be kept in view have been succinctly stated in *R.D. Hattangadi v. Pest Control (India) Pvt. Ltd. and Others*[16]:-

> "9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to

16. (1995) 1 SCC 551.

> appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include (i) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life."

22. In *Arvind Kumar Mishra v. New India Assurance Company Limited and Another*[17] a two-Judge Bench referred to the authority in *Kerala SRTC v. Susamma Thomas*[18] and applied the principle of multiplier for future earnings in a case of permanent disability. We have referred to this decision solely for the purpose that multiplier principle has been made applicable to an application preferred under Section 166 of the Act.

23. In this context it is useful to refer to *Raj Kumar v. Ajay Kumar and Another*[19], wherein a two-Judge Bench after referring to the award of compensation in personal injury cases reiterated the concepts of pecuniary damages (special damages) and non-pecuniary damages (general damages). The Bench referred to the decisions in *C.K. Subramania Iyer* (supra), *R.D. Hattangadi* (supra) and *Baker v. Willoughby*[20] and expressed the view that it is obligatory on the part of the court or the tribunal to assess the damages objectively and

17. (2010) 10 SCC 254.

18. (1994) 2 SCC 176.

19. (2011) 1 SCC 343.

20. 1970 AC 467 : (1970) 2 WLR 50 : (1969) 3 All ER 1528 (HL).

exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. He is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned.

24. It is worthy noting that the Bench referred to the pecuniary damages and non-pecuniary damages and opined thus:-

"Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity)."

25. After so stating the Bench proceeded to opine that assessment of pecuniary damages under Item (i) and under Item (ii)(a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future medical expenses-Item (iii)-depends upon specific medical evidence regarding need for further treatment and cost thereof. Assessment of non-pecuniary damages-Items (iv), (v) and (vi)-involves determination of lump sum amounts with reference to circumstances such as age, nature of injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant. It has been observed therein that what usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability-Item (ii)(a). Thereafter, the Bench adverted to the features which are necessary while assessing the loss of future earnings on account of permanent disability. In the said case it has been opined that permanent disability can be either partial or total and the assessment of compensation under the heads of loss of future earnings would depend upon the factum and impact of such permanent disability on his earning capacity. It has been laid down that the tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. It has been further observed that in most of the cases, the percentage of economic loss, i.e., the percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. However, in some cases on appreciation of evidence and assessment the percentage of loss of earning capacity as a result of the permanent disability would be approximately the same as the percentage of permanent disability in which case, of course, the court or tribunal would adopt the said percentage for determination of compensation. To arrive at the said conclusion reliance was placed on *Arvind Kumar Mishra* (supra) and *Yadav Kumar* (supra).

26. In the case at hand the High Court has determined the loss of earning capacity on the base of multiplier method and reduced the quantum awarded by the tribunal from Rs.5,00,000/- to Rs.4,68,000/-. Applying the ratio in *Yadav Kumar* (supra) and *Arvind Kumar Mishra* (supra) and also *Raj Kumar* (supra) and regard being had to the serious nature of injury we do not find any error in the said method of calculation and, accordingly, we uphold the method of computation as well as the quantum.

27. Presently to the grant of compensation on other scores. It is noticeable that the High Court has reduced the additional medical expenses from Rs.2,00,000/- to Rs.50,000/-. In our considered opinion, the same is not correct as there is ample evidence on record as regards the necessity for treatment in future. It is demonstrable that pedicle screws were passed into pedicles of D11 vertebra; pedicle screws were passed into pedicles of L1 vertebra; and two screws on left thigh were connected using a rod each. That may be required to be removed or scanned from time to time depending upon other aspects. That apart, there is persistent pain and as medically advised physiotherapy is necessary and hence, continuous treatment has to be availed of. Thus, the High Court was not justified in reducing the said amount.

28. The High Court has maintained the award in respect of transport charges, extra nourishment, medical expenses and, accordingly, they are maintained. It has enhanced the award from Rs.2,00,000/- to Rs.2,50,000 on the head of pain and suffering, but has deleted the amount awarded on permanent disability from the total compensation awarded by the tribunal by relying on the decision in *Cholan Roadways Corporation Ltd.* (supra). As has been stated earlier, the said decision has been considered in *B. Kothandapani* (supra) and is not accepted, and this Court has expressed the view that grant of compensation towards permanent disability is permissible. Regard been had to the totality of the facts and circumstances, we are inclined to think that compensation of

Rs.2,50,000/- should be granted towards permanent disability and Rs.2,00,000/- towards pain and suffering. We have so held as the injury is of serious nature and under the heading of non-pecuniary damages compensation is awardable under the headings of pain and suffering and damages for loss of amenities of life on account of injury. In the case of *R.D. Hattangadi* (supra) this Court has granted compensation under two heads, namely, "pain and suffering" and "loss of amenities of life". Quite apart from that compensation was granted towards future earnings. In *Laxman v. Divisional Manager, Oriental Insurance Co. Ltd. and another*[21] it has been ruled thus:-

> "The ratio of the above noted judgments is that if the victim of an accident suffers permanent or temporary disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the pain, suffering and trauma caused due to accident, loss of earnings and victim's inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident."

Thus, the deletion by the High Court was not justified. However, we have restricted to the amount as stated hereinbefore.

29. The High Court has deleted the additional transport charges. We are disposed to think that while availing treatment the said expenses would be imperative. Hence, there was no justification to reduce the same and, accordingly, we restore it.

30. It is perceptible that the High Court has deleted the amount awarded under the head of pain and suffering by family members of the claimant and the amount granted towards loss of marital life. There is no iota of evidence with regard to loss of marital life, hence, we do not find any error in the said

21. 2012 ACJ 191.

deletion. As far as grant of compensation on the score of pain and suffering suffered by the family members of claimant is concerned, the same is not permissible and, accordingly, we hold that that has been correctly deleted.

31. The High Court has deleted an amount of Rs.3,00,000/- and a sum of Rs.2,00,000/- towards mental agony and inability on the part of the claimant to participate in public functions respectively. We have already determined Rs.2,00,000/- under the heading of pain and suffering already suffered and to be suffered and Rs.2,50,000/- under the heading of permanent disability and hence, no different sum need be awarded under the heading of mental agony. As far as participation in public functions is concerned, there is no evidence in that regard and, therefore, we are disposed to think that the finding of the High Court on that score is totally justified and does not call for any interference.

32. Calculated on the aforesaid base, the compensation would be payable on the headings, namely, transport charges, extra-nourishment, medical expenses, additional medical expenses, additional transport charges, pain and suffering, loss of earning capacity and permanent disability and the amount on the aforesaid scores would be, in toto, Rs.13,48,000/-. The said amount shall carry interest at the rate of 7.5% from the date of application till the date of payment. The same shall be deposited before the tribunal within a period of two months and the tribunal shall disburse 50% of the amount in favour of the claimant and the rest of the amount shall be deposited in a nationalized bank for a period of three years. Be it clarified if the earlier awarded sum has been deposited, the differential sum shall be deposited within the stipulated time as mentioned hereinabove and the disbursement shall take place accordingly.

33. Consequently, the appeal is allowed in part leaving the parties to bear their respective costs.

B.B.B. Appeal partly allowed.

UNION OF INDIA & ORS.
v.
DINESH PRASAD
(Civil Appeal No. 1961 of 2010)

OCTOBER 30, 2012

[R.M. LODHA AND ANIL R. DAVE, JJ.]

Army Act, 1950 – s.116 – Respondent, washerman/ rifleman in the Assam Rifles, charge-sheeted for remaining absent without leave for more than two years – Dismissal of respondent by summary court-martial – Challenged, on ground of violation of the principles of natural justice – Competence of the commanding officer of the respondent, who had signed and issued the charge sheet, to convene and conduct the summary court-martial against the respondent questioned – High Court held that the summary court-martial proceedings held against the respondent were vitiated on account of likelihood of bias, and thus, set aside his dismissal – On appeal, held: Col. 'S', the commanding officer of the respondent, did not suffer from any disability, ineligibility or disqualification to serve on the summary court-martial to try the respondent despite the fact that he had signed and issued the charge sheet against the respondent – As a matter of fact, the competence or eligibility of Col. 'S' to serve on the summary court-martial for trial of the respondent was not at all put in issue by the respondent in the entire writ petition – It was only in the course of arguments before the High Court that such a submission was made on behalf of the respondent – No plea of actual or likelihood of bias was raised in the writ petition – There was also no plea taken in the writ petition that the respondent was denied fair trial in the course of summary court-martial – Further, and more importantly, High Court overlooked and ignored the statutory provisions – Respondent was served with the charge sheet which was in

conformity with the Army Rules and the Army Act – Neither constitution of the summary court-martial nor the procedure followed by that court could be said to suffer from any illegality – There was no violation of principles of natural justice – Respondent pleaded guilty before the summary court-martial and the summary court-martial found him guilty – It was only then that the order of dismissal of respondent was passed – The order of dismissal, in the facts and circumstances of the case, could not be said to be disproportionate or oppressive or founded on extraneous consideration – Army Rules, 1954 – Rule 31 and 39.

Army Act, 1950 – s.108 – Court-martial – Kinds of – Held: The courts-martial are of four kinds, (a) general court-martial; (b) district court-martial; (c) summary general court-martial; and (d) summary court-martial.

The respondent was a washerman/rifleman in the Assam Rifles. While in active service, he unauthorizedly remained absent for 808 days. He was served with a charge sheet under Section 39(a) of the Army Act, 1950 and a summary court-martial was constituted to try him. The respondent pleaded guilty whereafter the summary court-martial passed order dismissing respondent from service. The punishment of dismissal was confirmed by the Reviewing Officer.

The respondent filed writ petition challenging the punishment of dismissal. He explained in the writ petition the reason for his absence stating that he had lost his mental balance while in service and was suffering from mental depression. However, at the time of arguments before a Single Judge of the High Court, he submitted that the very Commandant of the Battalion, who had signed and issued the charge sheet to him, convened and presided over the summary court-martial and on conclusion thereof the punishment of dismissal from service was imposed, which vitiated the court-martial

proceedings as the respondent was denied a fair trial.

The Single Judge held that while issuing a charge sheet the Commandant had tentatively made up his mind that there was some material against the delinquent and accordingly, after having issued charge sheet, the Commandant ought not to have convened the court-martial and in any event ought not to have conducted the proceedings of the court-martial leading to the dismissal of respondent. The Single Judge held that in the facts of the case, the proceedings of the summary court-martial held against the respondent were vitiated on account of likelihood of bias and accordingly set aside his dismissal. The Division Bench of the High Court declined to interfere with the conclusion reached by the Single Judge, and therefore the instant appeal.

Allowing the appeal, the Court

HELD: 1. Section 3(v) of the Army Act, 1950 defines 'commanding officer'. Section 108 of the Army Act describes the kinds of courts-martial. Section 116 provides that the summary court-martial may be held by the commanding officer of any corps, department or detachment of the regular Army, and he shall alone constitute the court. As per sub-section (2) of Section 116, the proceedings shall be attended throughout by two other persons who shall be officers or junior commissioned officers or one of either, and who shall not as such, be sworn or affirmed. Section 71 provides for punishments awardable by courts-martial. One of the punishments awardable by the courts-martial is dismissal of the delinquent from service. [Paras 6, 9, 10 and 11] [448-F; 450-C-F-G]

2. The Army Rules, 1954 were framed by the Central Government in exercise of its powers under Section 191 for the purposes of carrying into effect the provisions of the Army Act. Rule 31 of the Army Rules provides that the

charge sheet shall be signed by the commanding officer of the accused and shall contain the place and date of such signature. Rule 39 deals with ineligibility and disqualification of officers for court-martial. Rules 106 to 133 of the Army Rules provide for the proceedings for conduct of summary court-martial. The summary court-martial has to follow the procedure provided in these Rules. Arraignment of the accused is provided in Rule 111. Rule 115 deals with general plea of 'guilty' or 'not guilty'. Rule 116 deals with the procedure after plea of 'guilty'. Rule 123 provides for procedure on conviction and Rule 124 deals with the sentence. Rule 187(3)(a) provides that every battalion is 'corps' for the purpose of summary court-martial. [Paras 12, 13, 14 and 15] [450-H; 451-A-B-C; 452-B-C; 453-H; 454-A]

3. Section 4 of the Army Act makes applicable its provisions to certain forces under the Central Government. By virtue of Section 4 of the Army Act read with S.R.O.318 dated 6.12.1962 (as amended by S.R.O. 325 dated 31.08.1977), the Army Act has been made applicable to the Assam Rifles. The respondent was thus subject to the provisions of the Army Act. [Paras 7, 16] [449-B-C; 454-B]

4. The courts-martial are of four kinds, (a) general courts-martial; (b) district courts-martial; (c) summary general courts-martial; and (d) summary courts-martial as per Section 108. Rule 39 of the Army Rules deals with ineligibility and disqualification of officers for court-martial. In terms of this Rule, an officer is disqualified for serving on general court-martial or district court-martial if he is an officer who convened the court. A commanding officer of the accused or of the corps to which the accused belongs is also disqualified for serving on general court-martial or district court-martial. However, no disqualification is attached to the officer who convened the court or the commanding officer of the accused or of

the corps to which the accused belongs for serving on the other two kinds of courts-martial, namely, summary general courts-martial or summary courts-martial. There is neither any impediment nor embargo in the Army Act or the Army Rules for an officer who convened the summary general courts-martial or summary courts-martial or the commanding officer of the accused or of the corps to which the accused belongs to serve on such court. Section 116 of the Army Act rather provides that a summary court-martial may be held by the commanding officer of any corps, department or detachment of the regular Army and he shall alone constitute the court (summary court-martial). [Para 17] [454-D-H; 455-A]

5.1. If the provision contained in Section 116 of the Army Act is read with Rules 31 and 39 of the Army Rules, there remains no manner of doubt that Col. 'S', the commanding officer of the respondent, did not suffer from any disability, ineligibility or disqualification to serve on the summary court-martial to try the respondent despite the fact that he signed and issued the charge sheet against the respondent. [Para 17] [455-A]

5.2. As a matter of fact, the competence or eligibility of Col. 'S' to serve on the summary court-martial for trial of the respondent was not at all put in issue by the respondent in the entire writ petition. It was only in the course of arguments before the Single Judge that such a submission was made on behalf of the respondent. The Single Judge was clearly in error in allowing the said argument. Firstly, the argument was raised without any foundation in the writ petition. No plea of actual or likelihood of bias was raised in the writ petition. There was also no plea taken in the writ petition that he was denied fair trial in the course of summary court-martial. Secondly, and more importantly, the Single Judge overlooked and ignored the statutory provisions. The Division Bench also failed in considering the matter in

right perspective and in light of the provisions in the Army Act and the Army Rules. [Para 18] [455-F-H; 456-A-B]

5.3. Absence without leave is one of the offences under the Army Act. On conviction by the court-martial of the said offence, the offender is liable to suffer imprisonment for a term which may extend to three years. Alternatively, for such offence any of the punishments provided in Section 71 may be awarded by the court-martial. Clause (e) of Section 71 provides dismissal from the service as one of the punishments awardable by the court-martial for such an offence. The respondent was served with the charge sheet which was in conformity with Rule 31 of the Army Rules and Sections 39 and 116 of the Army Act. The respondent admittedly absented himself from unit line for 808 days. He did not obtain any leave. He pleaded guilty before the summary court-martial. The summary court-martial followed the procedure provided under Rule 116 of the Army Rules and awarded punishment of his dismissal from service. Neither constitution of the summary court-martial nor the procedure followed by that court can be said to suffer from any illegality. The facts are eloquent inasmuch as respondent remained absent without leave for more than two years in the service of about five years. The order of dismissal, in the facts and circumstances of the case, by no stretch of imagination, can be said to be disproportionate or oppressive or founded on extraneous consideration. There was no violation of principles of natural justice. No illegality was committed in convening the summary court-martial by the commanding officer nor there was any illegality in the conduct of the summary court- martial. The respondent pleaded guilty to the charge before the summary court-martial and the summary court-martial found him guilty. It was only then that the order of dismissing the respondent from service was passed. Further, no reasons were required to be

recorded by the court-martial. [Paras 19, 22] [456-B-F; 458-D-F]

Vidya Parkash v. Union of India and Ors. **(1988) 2 SCC 459: 1988 (2) SCR 953 – held applicable.**

Punjab National Bank and Ors. v. Kunj Behari Misra **(1998) 7 SCC 84: 1998 (1) Suppl. SCR 22;** *Maneka Gandhi v. Union of India & Anr.* **AIR 1978 SC 597: 1978 (2) SCR 621 and** *Roop Singh Negi v. Punjab National Bank & Ors.* **(2009) 2 SCC 570: 2008 (17) SCR 1476 – held inapplicable.**

Case Law Reference:

1988 (2) SCR 953	**held applicable**	**Para 20**
1998 (1) Suppl. SCR 22	**held inapplicable**	**Para 21**
1978 (2) SCR 621	**held inapplicable**	**Para 21**
2008 (17) SCR 1476	**held inapplicable**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1961 of 2010.

From the Judgment & Order dated 28.08.2008 of the High Court of Gauhati at Gauhati in Writ Appeal No. 364 of 2007.

R. Balasubramanium, Asha G. Nair, Vikash Malhotra, Santosh Kumar (For B. Krishna Prasad) for the Appellants.

Apurb Lal, Daleep Singh (For Susmita Lal) for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. This appeal raises the question of the competence of the commanding officer of the accused, who signed and issued the charge sheet, to convene and conduct the summary court-martial against that very accused.

2. The above question arises in this way. The respondent, Dinesh Prasad, joined the 11th Assam Rifles as washerman/ rifleman in 1995. For the period between 26.07.1998 and 11.10.2000 (FN), he absented himself from unit unauthorisedly while in active service. On 03.08.2001, Col. A.S. Sehrawat, Commandant, under his signature served a charge sheet under Section 39(a) of the Army Act, 1950 (for short, 'Army Act') on the respondent for the absence without leave for 808 days. The Commandant constituted summary court-martial to try the respondent for the above charge. The respondent pleaded guilty to the charge before the summary court-martial. The summary court- martial, after taking into consideration the facts and circumstances of the case, passed an order on 04.08.2001 dismissing the respondent from service. The Reviewing Officer has confirmed the punishment of dismissal from the service awarded to the respondent.

3. The respondent challenged the punishment awarded to him by the summary court-martial in a writ petition before the Gauhati High Court. The respondent (petitioner therein) explained in the writ petition the reason for his absence. According to him, he lost his mental balance while in service and was suffering from mental depression. At the time of arguments before the Single Judge, it was submitted on his behalf that the very Commandant of the Battalion, who signed and issued the charge sheet to him, convened and presided over the summary court-martial and on conclusion of which the punishment of dismissal from service was imposed which vitiated the court-martial proceedings as he was denied a fair trial.

4. The learned Single Judge held that while issuing a charge sheet the Commandant tentatively made up his mind that there was some material against the delinquent and accordingly, after having issued charge sheet, Col. A.S. Sehrawat, who was Commandant of the Battalion, ought not to have convened the court-martial and in any event ought not to

have conducted the proceedings of the court-martial leading to the punishment of dismissal from the service. The Single Judge held that in the facts of the case, the proceedings of the summary court-martial held against the delinquent were vitiated on account of likelihood of bias. By the judgment and order dated 07.09.2006, the Single Judge allowed the writ petition and set aside the respondent's dismissal from service. It was observed, however, that it would be open for the concerned authority to proceed in the matter afresh in accordance with law, if it so desired.

5. Being not satisfied with the judgment and order dated 07.09.2006, the present appellants preferred writ appeal. The Division Bench of the Gauhati High Court found that under Section 116 of the Army Act, the summary court-martial proceedings could be held by the commanding officer of any corps, department or detachment of the regular Army and it need not necessarily be the commanding officer of the Battalion in which the accused was serving. The Division Bench thus in its order of 28.08.2008 was of the view that there was no justification to interfere with the view taken and the conclusion reached by the Single Judge in the impugned judgment. It is from this order that the present appeal by special leave has arisen.

6. It is necessary to refer to the relevant statutory provisions in the Army Act and the Army Rules, 1954 (for short, 'Army Rules') for consideration of the question raised before us. Section 3(v) defines 'commanding officer' as under:

> "S.3(v)- "commanding officer", when used in any provision of this Act, with reference to any separate portion of the regular army or to any department thereof, means the officer whose duty it is under the regulations of the regular Army, or in the absence of any such regulations, by the custom of the service, to discharge with respect to that portion of the regular Army or that department, as the case

may be, the functions of a commanding officer in regard to matters of the description referred to in that provision".

7. Section 4 of the Army Act makes applicable its provisions to certain forces under the Central Government. In exercise of the powers conferred by sub-section (1) of Section 4 of the Army Act, the Central Government has issued SRO 117 dated 28.03.1960 and SRO 318 dated 6.12.1962. SRO 318 has been subsequently amended by SRO 325 dated 31.8.1977. SRO 318 dated 6.12.1962 (as amended by SRO 325 dated 31.8.1977) reads as follows:

"S.R.O. 318 dated 6th December, 1962 (as amended by S.R.O. No. 325 dated 31st August, 1977). - In exercise of the powers conferred by sub-section (1) of Section 4 of the Army Act, 1950 and in supersession of the notification of the Government of India in the late Affair Department No. 93-X dated 25th June 1942, as subsequently amended, the Central Government hereby -

(i) Applies to every unit of the Assam Rifles, (and to recruits and personnel or the said Assam Rifles when undergoing training in any army training establishments) being a force raised and maintained in India under authority of the Central Government, all the provisions of the said Act, except those specified in Part A of the Schedule annexed hereto, subject to the modifications set forth in Part B of the that (sic) Schedule, when attached to or acting with any body of the regular army; and

(ii) suspends, while this notification remains in force the operation of sections 6,7,8 and 9 of the Assam Rifles Act, 1941 (5 of 1941)".

8. Chapter VI of the Army Act deals with the offences. Sections 34 to 70 fall under Chapter VI. Section 39, to the extent it is relevant, reads as under:-

"39. Absence without leave.- Any person subject to this Act who commits any of the following offences, that is to say, -

(a) absents himself without leave; or

(b) to (g) .....

shall on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as is in this Act mentioned".

9. Section 108 describes the kinds of courts-martial. The said provision reads as under:

"108. Kinds of courts-martial. - For the purposes of this Act there shall be four kinds of courts-martial, that is to say, -

(a) general courts-martial;

(b) district courts-martial;

(c) summary general courts-martial; and

(d) summary courts-martial".

10. Section 116 provides that the summary court-martial may be held by the commanding officer of any corps, department or detachment of the regular Army, and he shall alone constitute the court. As per sub-section (2) of Section 116, the proceedings shall be attended throughout by two other persons who shall be officers or junior commissioned officers or one of either, and who shall not as such, be sworn or affirmed.

11. Section 71 provides for punishments awardable by courts-martial. One of the punishments that is awardable by the courts-martial is dismissal of the delinquent from service.

12. The Army Rules have been framed by the Central

Government in exercise of its powers under Section 191 for the purposes of carrying into effect the provisions of the Army Act. The powers of the commanding officers in relation to investigation of charges and trial by court-martial are provided in Chapter V of the Army Rules. Rule 31 provides that the charge sheet shall be signed by the commanding officer of the accused and shall contain the place and date of such signature.

13. Rule 39 deals with ineligibility and disqualification of officers for court-martial. It reads as under:

"39 Ineligibility and disqualification of officers for court-martial;

(1) An officer is not eligible for serving on a court-martial if he is not subject to the Act.

(2) An officer is disqualified for serving on a general or district court-martial if he--

(a) is an officer who convened the Court; or

(b) is the prosecutor or a witness for the prosecution; or

(c) investigated the charges before trial, or took down the summary of evidence, or was a member of a court of inquiry respecting the matters on which the charges against the accused are founded, or was the squadron, battery, company, or other commander, who made preliminary inquiry into the case, or was a member of a previous court-martial which tried the accused in respect of the same offence; or

(d) is the commanding officer of the accused, or of the corps to which the accused belongs; or

(e) has a personal interest in the case.

(3) The provost-marshal or assistant provost-marshal is disqualified from serving on a general court-martial or district court-martial."

14. Rules 106 to 133 of the Army Rules provide for the proceedings for conduct of summary court-martial. The summary court-martial has to follow the procedure provided in these Rules. Arraignment of the accused is provided in Rule 111. Rule 115 deals with general plea of 'guilty' or 'not guilty'. Rule 116 deals with the procedure after plea of 'guilty'. Rule 116 provides as follows:

"116 Procedure after plea of "Guilty":-

(1) Upon the record of the plea of "Guilty", if there are other charges in the same charge-sheet to which the plea is "Not Guilty", the trial shall first proceed with respect to the latter charges, and, after the finding of these charges, shall proceed with the charges on which a plea of "Guilty" has been entered; but if they are alternative charges, the Court may either proceed with respect to all the charges as if the accused had not pleaded "Guilty" to any charge, or may, instead of trying him, record a finding upon any one of the alternative charges to which he has pleaded "Guilty" and a finding of "Not Guilty" upon all the other alternative charges.

(2) After the record of the plea of "Guilty" on a charge (if the trial does not proceed on any other charges), the Court shall read the summary of evidence, and annex it to the proceedings or if there is no such summary, shall take and record sufficient evidence to enable it to determine the sentence, and the reviewing officer to know all the circumstances connected with the offence. The evidence shall be taken in like manner as is directed by these rules in case of a plea of "Not Guilty".

(3) After such evidence has been taken, or the summary

of evidence has been read, as the case may be, the accused may address the Court in reference to the charge and in mitigation of punishment and may call witnesses as to his character.

(4) If from the statement of the accused, or from the summary of evidence, or otherwise, it appears to the Court that the accused did not understand the effect of his plea of "Guilty", the court shall alter the record and enter a plea of "Not Guilty", and proceed with the trial accordingly."

(5) If a plea of "Guilty" is recorded and the trial proceeds with respect to other charges in the same charge-sheet, the proceedings under sub-rules (2) and (3) shall take place when the findings on the other charges in the same charge-sheet are recorded.

(6) When the accused states anything in mitigation of punishment which in the opinion of the Court requires to be proved, and would, if proved, effect the amount of punishment, the court may permit the accused to call witnesses to prove the same.

(7) In any case where the Court is empowered by section 139 to find the accused guilty of an offence other than that charged, or guilty of committing an offence in circumstances involving a less degree of punishment, or where it could, after hearing the evidence, have made a special finding of guilty subject to exceptions of variations in accordance with sub-rule (3) of rule 121, it may, if it is satisfied of the justice of such course accept and record a plea of guilty of such other offence, or of the offence as having been committed in circumstances involving such less degree of punishment, or of the offence charged subject to such exceptions or variations".

15. Rule 123 provides for procedure on conviction and Rule

124 deals with the sentence. Rule 187(3)(a) provides that every battalion is 'corps' for the purpose of summary court-martial.

16. It may be immediately stated that by virtue of Section 4 of the Army Act read with S.R.O.318 dated 6.12.1962 (as amended by S.R.O. 325 dated 31.08.1977), the Army Act has been made applicable to the Assam Rifles. The respondent was thus subject to the provisions of the Army Act.

17. That the Commandant, Col. A.S. Sehrawat, signed and issued the charge sheet to the respondent and convened and presided over the summary court-martial is not in dispute. It is also not in dispute that the summary court-martial presided over by Col. A.S. Sehrawat awarded to the respondent the punishment of dismissal from service. Whether the above procedure has vitiated the court-martial proceedings against the respondent is the question. The courts-martial are of four kinds, (a) general courts-martial; (b) district courts-martial; (c) summary general courts-martial; and (d) summary courts-martial as per Section 108. Rule 39 of the Army Rules deals with ineligibility and disqualification of officers for court-martial. In terms of this Rule, an officer is disqualified for serving on general court-martial or district court-martial if he is an officer who convened the court. A commanding officer of the accused or of the corps to which the accused belongs is also disqualified for serving on general court-martial or district court-martial. However, no disqualification is attached to the officer who convened the court or the commanding officer of the accused or of the corps to which the accused belongs for serving on the other two kinds of courts-martial, namely, summary general courts-martial or summary courts-martial. There is neither any impediment nor embargo in the Army Act or the Army Rules for an officer who convened the summary general courts-martial or summary courts- martial or the commanding officer of the accused or of the corps to which the accused belongs to serve on such court. Section 116 of the Army Act rather provides that a summary court-martial may be

held by the commanding officer of any corps, department or detachment of the regular Army and he shall alone constitute the court (summary court-martial). If the provision contained in Section 116 of the Army Act is read with Rules 31 and 39 of the Army Rules, there remains no manner of doubt that Col. A.S. Sehrawat, who was commanding officer of the respondent, did not suffer from any disability, ineligibility or disqualification to serve on the summary court-martial to try the respondent despite the fact that he signed and issued the charge sheet against the respondent.

18. As a matter of fact, the competence or eligibility of Col. A.S. Sehrawat to serve on the summary court-martial for trial of the respondent was not at all put in issue by the respondent in the entire writ petition. The petitioner therein set up the following grounds, namely; (1) the charge against the petitioner for absenting himself without leave being an offence under Section 39(a) of the Army Act has to be proved beyond reasonable doubt; (2) the petitioner's absence from Unit Headquarters was not willful and intentional; it was for the reason beyond his control; and (3) the punishment awarded by the summary court-martial was not rational and commensurate with the offence proved; it did not maintain the proportion; the punishment was oppressive and out of tune of the occasion. It was only in the course of arguments before the learned Single Judge that a submission was made on behalf of the petitioner that the very Commandant of the Battalion, who signed and issued the charge sheet to him, convened and presided over the summary court-martial and on conclusion of which the punishment of dismissal from service was imposed which vitiated the court-martial proceedings as he was denied a fair trial. In our view, the learned Single Judge was clearly in error in allowing such argument. Firstly, the argument was raised without any foundation in the writ petition. No plea of actual or likelihood of bias was raised in the writ petition. There was also no plea taken in the writ petition that he was denied fair trial in the course of summary court-martial. Secondly, and more

importantly, the learned Single Judge overlooked and ignored the statutory provisions referred to hereinabove. The Division Bench also failed in considering the matter in right perspective and in light of the provisions in the Army Act and the Army Rules.

19. Absence without leave is one of the offences under the Army Act. On conviction by the court-martial of the said offence, the offender is liable to suffer imprisonment for a term which may extend to three years. Alternatively, for such offence any of the punishments provided in Section 71 may be awarded by the court-martial. Clause (e) of Section 71 provides dismissal from the service as one of the punishments awardable by the court-martial for such an offence. The respondent was served with the charge sheet which was in conformity with Rule 31 of the Army Rules and Sections 39 and 116 of the Army Act. The respondent admittedly absented himself from unit line for 808 days. He did not obtain any leave. He pleaded guilty before the summary court-martial. The summary court-martial followed the procedure provided under Rule 116 of the Army Rules and awarded punishment of his dismissal from service. Neither constitution of the summary court-martial nor the procedure followed by that court can be said to suffer from any illegality. The facts are eloquent inasmuch as respondent remained absent without leave for more than two years in the service of about five years. The order of dismissal, in the facts and circumstances of the case, by no stretch of imagination, can be said to be disproportionate or oppressive or founded on extraneous consideration.

20. The decision of this Court in *Vidya Parkash v. Union of India and Ors*[1]. squarely applies to the present situation. Unfortunately, the judgment in *Vidya Parkash*[1] was not brought to the notice of the Single Judge and the Division Bench. The facts in *Vidya Parkash*[1] were these: the appellant was posted as Jawan in Panagarh. He left Panagarh with his wife and

1. (1988) 2 SCC 459.

children for Kanpur without taking any leave. According to Vidya Parkash, he became unwell and he was under treatment of a doctor. When he reported to Panagarh unit with his fitness certificate, he was served with a charge sheet wherein it was ordered by Major P.S. Mahant that he would be tried by summary court-martial. The summary court-martial which was presided over by Major P.S. Mahant ordered his dismissal from service. Vidya Parkash challenged that order in a writ petition before Delhi High Court. Inter alia, a plea was set up that the commanding officer Major P.S. Mahant was not legally competent to preside over a summary court-martial. The Division Bench of the Delhi High Court dismissed the writ petition. It was held that no objection was taken as to the competence of Major P.S. Mahant to act as a Judge in summary court-martial. It was from the order of the Delhi High Court that the matter reached this Court. This Court considered Sections 108 and 116 of the Army Act, Rule 39(2) of the Army Rules and held that the summary court martial held by the commanding officer Major P.S. Mahant was in accordance with the provisions of Section 116 of the Army Act. This Court further observed :

> "13 - The Commanding Officer of the Corps, Department or Detachment of the Regular Army to which the appellant belongs, is quite competent in accordance with the provisions of Section 116 of the said Act and as such the constitution of the summary court martial by the Commanding Officer of the Corps cannot be questioned as illegal or incompetent. It is neither a general court martial nor a district court martial where the appellant's case was tried and decided. In case of general court martial or district court martial Rule 39(2) of the Army Rules, 1954 is applicable and the Commanding Officer is not competent to convene general or district court martial. The summary court martial was held by the Commanding Officer of the corps, Major P.S. Mahant and there are two other officers including Capt. K.J. Singh and another officer to attend the proceedings. In such circumstances, the summary court martial having been convened by the Commanding Officer of the corps according to the provisions of the Army Act, 1950, the first submission made on behalf of the appellant fails."

21. The legal position exposited by this Court in *Vidya Parkash*[1] renders the impugned judgments unsustainable.

22. Learned counsel for the respondent placed heavy reliance upon the decisions of this Court in *Punjab National Bank and Ors. v. Kunj Behari Misra*[2], *Maneka Gandhi v. Union of India & Anr.*[3] and *Roop Singh Negi v. Punjab National Bank & Ors.*[4], in support of his submission that the order of dismissal from service by the summary court-martial was in violation of principles of natural justice. We are afraid none of these decisions has any application to the facts of the present case. There is no violation of principles of natural justice. No illegality has been committed in convening the summary court-martial by the commanding officer nor there is any illegality in the conduct of the summary court- martial. The respondent pleaded guilty to the charge before the summary court-martial and the summary court-martial found him guilty. It was only then that the order of dismissing the respondent from service was passed. It is now settled that no reasons are required to be recorded by the court-martial.

23. Civil appeal is allowed. The judgment and order of the Single Judge dated 7.09.2006 and the order of the Division Bench dated 28.08.2008 are set aside. No order as to costs.

B.B.B. Appeal Allowed.

2. (1998) 7 SCC 84.
3. AIR 1978 SC 597.
4. (2009) 2 SCC 570.

GURCHARAN SINGH

v.

SURJIT SINGH AND ANR.

I.A. Nos.2 to 6

in

Special Leave Petition (C) No.7735 of 2010

NOVEMBER 2, 2012

[A.K. PATNAIK, J.]

Code of Civil Procedure, 1908 – Order XXII – Whether an application for substitution of a respondent who was dead when the Special Leave Petition was filed was maintainable, and if not, what is the remedy of the petitioner when he comes to learn that the respondent was actually dead when he filed the Special Leave Petition – Held: Where the respondent was dead when the Special Leave Petition was filed, the Court can, in the interest of justice, allow an application for amendment of the Special Leave Petition and condone the delay in filing such an application for amendment if the delay is satisfactorily explained – Rules 8 and 9 in Order XVI of the Supreme Court Rules, which provide for substitution and addition of parties, will apply where at the time of filing of the Special Leave Petition, the respondent was alive and after the filing of the Special Leave Petition his legal representatives are sought to be substituted, but will not apply where the respondent was dead when the Special Leave Petition was filed – Supreme Court Rules, 1966 – Order XVI, Rules 8 and 9.

Bank of Commerce Ltd., Khulna v. Protab Chandra Ghose and Others **AIR (33) 1946 Federal Court 13;** *(Adusumilli) Gopalakrishnayya & Anr. v. Adivi Lakshmana Rao* **AIR 1925 Madras 1210 and** *State of West Bengal v. Manisha Maity and Others* **AIR 1965 Calcutta 459– referred to.**

Govind Kavirai Purohito v. Gauranga Sa **AIR (1924) Madras 56 – held overruled.**

H.H; Darbar Alabhai Vajsurbhai & Ors. v. Bhura Bhaya & Ors. **AIR 1937 Bombay 401;** *Sachindra Chandra Chakravarti v. Jnanendra Narayan Singh Roy & Anr.* **AIR 1963 Calcutta 417;** *Angadi Veettil Sreedharan vs. Cheruvalli Illath Sreedharan Embrandiri Manoor* **AIR 1968 Kerala 196;** *Vantaku Appalanaidu & Ors. v. Peddinti Demudamma & Anr.* **AIR 1982 A.P. 281;** *Karuppaswamy and Others v. C. Ramamurthy* **AIR 1993 SC 2324: 1993 (1) Suppl. SCR 121 and** *Ram Kala v. Deputy Director (Consolidation) and Others* **(1997) 7 SCC 498 – cited.**

Case Law Reference:

AIR (33) 1946 Federal Court 13	**referred to**	**Paras 2, 3**
AIR 1925 Madras 1210	**referred to**	**Paras 2, 4**
AIR 1937 Bombay 401	**cited**	**Para 2**
AIR 1963 Calcutta 417	**cited**	**Para 2**
AIR 1965 Calcutta 459	**referred to**	**Paras 2, 5**
AIR 1968 Kerala 196	**cited**	**Para 2**
AIR 1982 A.P. 281	**cited**	**Para 2**
1993 (1) Suppl. SCR 121	**cited**	**Para 2**
(1997) 7 SCC 498	**cited**	**Para 2**
AIR (1924) Madras 56	**held overruled**	**Para 4**

CIVIL APPELLATE JURISDICTION : I.A. Nos. 2-6

IN

Special Leave Petition (Civil) No. 7735 of 2010.

From the Judgment & Order dated 17.08.2009 of the High Court of Punjab and Haryana at Chandigarh in C.R. No. 6025 of 2008.

Sushil Kumar Jain, Puneet Jain, Gagan Gupta for the Petitioner.

The following Order of the Court was delivered by

O R D E R

1. These interlocutory applications have been filed by the petitioner in Special Leave Petition No.7735 of 2010. I.A. No. 2 of 2011 is an application for substitution of legal representatives of deceased respondent No.1. As respondent no.1 died on 09.06.2009 and the application for substitution has been filed on 05.09.2011, I.A. No.3 of 2011 has been filed for condonation of delay in filing the application for substitution of legal representatives of the deceased respondent No.1. The question which I have to decide is whether an application for substitution of a respondent who was dead when the Special Leave Petition was filed was maintainable, and if not, the remedy of the petitioner when he comes to learn that the respondent was actually dead when he filed the Special Leave Petition.

2. Learned counsel for the petitioner relied on the provisions of Order XXII of the Code of Civil Procedure, 1908 (for short "the CPC") as well as the amendments made thereto by the High Court of Punjab and Haryana and submitted that even where the respondent was dead when the Special Leave Petition was filed, his legal heirs can be substituted under these provisions of the C.P.C. He also relied on the decisions in *Bank of Commerce Ltd., Khulna v. Protab Chandra Ghose and Others* [AIR (33) 1946 Federal Court 13], (Adusumilli) *Gopalakrishnayya & Anr. v. Adivi Lakshmana Rao* [AIR 1925 Madras 1210], *H.H. Darbar Alabhai Vajsurbhai & Ors. v. Bhura Bhaya & Ors.* [AIR 1937 Bombay 401], *Sachindra*

Chandra Chakravarti v. Jnanendra Narayan Singh Roy & Anr. [AIR 1963 Calcutta 417], *State of West Bengal v. Manisha Maity and Others* [AIR 1965 Calcutta 459], *Angadi Veettil Sreedharan vs. Cheruvalli Illath Sreedharan Embrandiri Manoor* [AIR 1968 Kerala 196], *Vantaku Appalanaidu & Ors. v. Peddinti Demudamma & Anr.* [AIR 1982 A.P. 281], *Karuppaswamy and Others v. C. Ramamurthy* [AIR 1993 SC 2324] and *Ram Kala v. Deputy Director (Consolidation) and Others* [(1997) 7 SCC 498].

3. I have perused the aforesaid decisions cited by learned counsel for the petitioner and I find that in *Bank of Commerce Ltd., Khulna vs. Protab Chandra Ghose and Others* (supra), the Federal Court took the view that where an appeal has to be preferred for the first time against the legal heir of a person in whose favour the lower Court had passed a decree, the mere fact that an appeal had already been preferred as against other persons will not justify the application being treated merely as one to add a party because it is in substance an appeal preferred against him for the first time. After taking this view, the Federal Court held that an application for substitution of legal representatives of a respondent, who was dead before the filing of the appeal, must be treated as if appeal is filed for the first time against legal representatives of the deceased respondent and the delay in making the application is only to be excused under Section 5 of the Limitation Act if the delay is satisfactorily explained.

4. In *(Adusumilli) Gopalakrishnayya & Anr. v. Adivi Lakshmana Rao* (supra), the facts were that an appeal had been presented by the appellant against a person who was dead at the time of presentation and the Full Bench of the Madras High Court took the view that although such an appeal may be incompetent owing to the wrong person being named as respondent, the Court which deals with it has full power under Section 153 of the CPC to direct an amendment of the appeal memorandum and if the appeal is out of time against the legal

representatives, the Court will have to excuse the delay in presentation of the appeal before it in exercise of its discretion. The Full Bench overruled the contrary view of a Division Bench of the Madras High Court in *Govind Kaviraj Purohito v. Gauranga Sa* [AIR 1924 Madras 56] that an appeal filed against a dead person has to be dismissed. The Full Bench of the Madras High Court further held that Rule 6 of Order 15 of the Federal Court Rules, 1942, which dealt with substitution of the representative of one who is a party to an appeal and for addition of party did not apply to a party who was dead at the time of filing of the appeal.

5. The Calcutta High Court has taken a similar view in *State of West Bengal v. Manisha Maity* (supra) that Order XXII, Rule 4 of the CPC providing for the procedure for substitution of the heirs and legal representatives of the deceased defendants has no application when the appeal itself was preferred against a dead person. The Division Bench of the Calcutta High Court, however, has suggested that in such a case:

> "The remedy of an appellant, who has unknowingly filed an appeal against a dead person, is to file an application for presentation of the appeal against the heirs of the dead person afresh. If the time for filing the appeal was in the meantime over, he is to present an application, under Section 5 of the Limitation Act, therein explaining the delay in presenting the appeal afresh against the heirs of the dead person. If he can make out sufficient cause for making the belated prayer, the Court may allow the same, amend the cause title of the memorandum of appeal by incorporation of the names of the heirs and legal representatives of the dead person and treat the appeal as a freshly presented appeal against the heirs."

6. Thus, the aforesaid authorities are clear that where a party has been impleaded as respondent in an appeal but such respondent was dead before filing of the appeal, the remedy

of the appellant is not to file an application for substitution of legal representatives of such respondent, but to file an application for an amendment of the appeal memorandum and in a case where such application for amendment is filed beyond the limitation prescribed for filing the appeal, the appellant must also file an application under Section 5 of the Limitation Act for condonation of delay in filing the application for amendment and if the Court is satisfied with the explanation given by the appellant for the delay, the Court can condone the delay and allow the amendment of the appeal memorandum.

7. Order XVI of the Supreme Court Rules, 1966 is titled "Appeals by Special Leave". Rules 8 and 9 in Order XVI which provide for substitution and addition of parties are extracted hereinbelow:

> "8. Where any person is sought to be impleaded in the petition as the legal representative of any party to the proceedings in the Court below, the petition shall contain a prayer for bringing on record such person as the legal representative and shall be supported by an affidavit setting out the facts showing him to be the proper person to be entered on the record as such legal representative.
>
> 9. Where at any time between the filing of the petition for special leave to appeal and the hearing thereof the record becomes defective by reason of the death or change of status of a party to the appeal or for any other reason, an application shall be made to the Court stating who is the proper person to be substituted or entered on the record in place of or in addition to the party on record. Provisions contained in rule 33 of Order XV shall apply to the hearing of such applications."

Considering the authorities discussed above, the aforesaid provisions of Order XVI Rules 8 and 9 will apply where at the time of filing of the Special Leave Petition, the respondent was alive and after the filing of the Special Leave Petition his legal

representatives are sought to be substituted, but will not apply where the respondent was dead when the Special Leave Petition was filed. Where the respondent was dead when the Special Leave Petition was filed, the Court can, in the interest of justice, allow an application for amendment of the Special Leave Petition and condone the delay in filing such an application for amendment if the delay is satisfactorily explained.

8. I.A. No.2 of 2011 is, therefore, treated as an application for amendment of the Special Leave Petition and as the delay in filing the application for amendment of the Special Leave Petition has been satisfactorily explained in I.A. No.3 of 2011, the delay is condoned and in the interests of justice, I.A. Nos. 2 and 3 of 2011 are allowed. The prayers in I.A. Nos. 4 and 5 are for exemption from filing official translation and from filing death certificate of the deceased and are allowed. I.A. No.6 of 2011 is for deletion of proforma respondent No.2 Ajaib Singh, who appears to be the attorney of the contesting respondent No.1, and is allowed at the risk of the petitioner. The I.As. stand disposed of.

B.B.B. I.As disposed of.

M/S. LAXMI DYECHEM

v.

STATE OF GUJARAT & ORS.

(Criminal Appeal Nos. 1870-1909 of 2012 etc.)

NOVEMBER 27, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Negotiable Instruments Act, 1881:

ss. 138 and 139 – Dishonour of cheques for mismatching of signatures – Held: Just as dishonour of a cheque on the ground that the account has been closed is a dishonour falling in the first contingency referred to in s.138, so also dishonour on the ground that the "signatures do not match" or that the "image is not found", which too implies that the specimen signatures do not match the signatures on the cheque, would constitute a dishonour within the meaning of s.138 – So long as the change is brought about with a view to preventing the cheque being honoured the dishonour would become an offence u/s.138 subject to other conditions prescribed being satisfied – Allegations of fraud and the like are matters that cannot be investigated by a court u/s 482 Cr.P.C. and shall have to be left to be determined at the trial after the evidence is adduced by the parties – Code of Criminal Procedure, 1973 – s.482.

ss.138 and 139 – Dishonour of cheque – Presumption in favour of holder – Held: Is rebuttable – Return of cheque by bank on ground of 'stop payment' although has been held to constitute an offence, s.138 cannot be applied in isolation ignoring s.139 – The category of cases of 'stop payment' instructions where the account holder has sufficient funds in his account to discharge the debt, would be subject to rebuttal and the accused can show that the stop payment instructions were not issued because of insufficiency or paucity of funds,

but for other valid causes including the reason that there was no existing debt or liability in view of bonafide dispute between the drawer and drawee of the cheque – If that be so, then offence u/s 138 although would be made out, the same will attract s.139 leaving the burden of proof of rebuttal on the drawer of the cheque – Thus, in cases arising out of 'stop payment' situation, ss. 138 and 139 will have to be given a harmonious construction, otherwise s.139 would be rendered nugatory.

The instant appeals were filed by the payee firm, challenging the orders of the High Court whereby it quashed the criminal proceedings holding that dishonour of a cheque on the ground that the signature of the drawer of the cheque did not match the specimen signatures available with the bank, would not attract the penal provisions of s.138 of the Negotiable Instruments Act, 1881. The question for consideration before the Court was: "whether dishonour of a cheque would constitute an offence only in one of the two contingencies envisaged u/s 138 of the Act, namely, "either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank"?

Allowing the appeals, the Court

HELD: (Per T.S. Thakur, J.)

1.1. Chapter XVII comprising ss. 138 to 142 of the Negotiable Instruments Act, 1881 was introduced in the statute by Act 66 of 1988. The object underlying the provision contained in the said Chapter was aimed at inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business and day to day transactions by making dishonour of such instruments an offence. A negotiable instrument

whether the same is in the form of a promissory note or a cheque is by its very nature a solemn document that carries with it not only a representation to the holder in due course of any such instrument but also a promise that the same shall be honoured for payment. To that end s. 139 of the Act raises a statutory presumption that the cheque is issued in discharge of a lawfully recoverable debt or other liability. This presumption is no doubt rebuttable at trial but there is no gainsaying that the same favours the complainant and shifts the burden to the drawer of the instrument (in case the same is dishonoured) to prove that the instrument was without any lawful consideration. It is also noteworthy that s.138 while making dishonour of a cheque an offence punishable with imprisonment and fine also provides for safeguards to protect drawers of such instruments where dishonour may take place for reasons other than those arising out of dishonest intentions. It envisages service of a notice upon the drawer of the instrument calling upon him to make the payment covered by the cheque and permits prosecution only after the expiry of the statutory period and upon failure of the drawer to make the payment within the said period. [Para 6] [480-F-H; 481-A-D]

1.2 There is no room for holding that the two contingencies envisaged u/s 138 of the Act must be interpreted strictly or literally. In *NEPC Micon Ltd.** **this Court has held that the expression "amount of money is insufficient" appearing in s.138 of the Act is a genus and dishonour for reasons such as "account closed", "payment stopped", "referred to the drawer" are only species of that genus. Just as dishonour of a cheque on the ground that the account has been closed is a dishonour falling in the first contingency referred to in s.138, so also dishonour on the ground that the "signatures do not match" or that the "image is not**

found", which too implies that the specimen signatures do not match the signatures on the cheque would constitute a dishonour within the meaning of s.138 of the Act. There is no qualitative difference between a situation where the dishonour takes place on account of the substitution by a new set of authorised signatories resulting in the dishonour of the cheques already issued and another situation in which the drawer of the cheque changes his own signatures or closes the account or issues instructions to the bank not to make the payment. So long as the change is brought about with a view to preventing the cheque being honoured the dishonour would become an offence u/s.138 subject to other conditions prescribed being satisfied. [Para 15] [487-G-H; 488-A-C-F-G]

***NEPC Micon Ltd. v. Magma Leasing Ltd*. 1999 (2) SCR 932 = (1999) 4 SCC 253 – relied on**

Kanwar Singh v. Delhi Administration **1965 SCR 7 = AIR 1965 SC 871;** *Swantraj v. State of Maharashtra* **1974 (3) SCR 287 = (1975) 3 SCC 322;** *State of Tamil Nadu v. M.K. Kandaswami* **1976 (1) SCR 38 = (1975) 4 SCC 745;** *M.M.T.C. Ltd. and Anr. v. Medchl Chemicals and Pharma (P) Ltd. and Anr*. **2001 (5) Suppl. SCR 265 = (2002) 1 SCC 234;** *Goaplast (P) Ltd. v. Chico Ursula D'souza and Anr.* **2003 (2) SCR 712 = (2003) 3 SCC 232;** *Rangappa v. Sri Mohan* **2010 (6) SCR 507 = (2010) 11 SCC 441 – referred to**

Seaford Court Estates Ltd. v. Asher **(1949 2 All E.R. 155) – referred to.**

1.3. There may indeed be situations where a mismatch between the signatories on the cheque drawn by the drawer and the specimen available with the bank may result in dishonour of the cheque even when the drawer never intended to invite such a dishonour. It is only when the drawer despite receipt of a statutory notice

and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount that the dishonour would be considered a dishonour constituting an offence. Even in such cases, the question whether or not there was a lawfully recoverable debt or liability for discharge whereof the cheque was issued would be a matter that the trial court will examine having regard to the evidence adduced before it and keeping in view the statutory presumption that unless rebutted the cheque is presumed to have been issued for a valid consideration. [Para 15] [488-H; 489-A-C-E]

1.4. Dishonour on the ground that the payment has been stopped, regardless whether such stoppage is with or without notice to the holder, and regardless whether the stoppage of payment is on the ground that the amount lying in the account was not sufficient to meet the requirement of the cheque, would attract the provisions of s.138. [Para 16] [489-H; 490-A]

Modi Cements Ltd. v. Kuchil Kumar Nandi **1998 (1) SCR 192 = (1998) 3 SCC 249 – relied on.**

Electronics Trade & Technology Development Corporation Ltd. v. Indian Technologists and Engineers (Electronics) (P) Ltd. **1996 (1) SCR 843 = (1996) 2 SCC 739 – stood overruled.**

K.K Sidharthan v. T.P. Praveena Chandran **1996 (7) Suppl. SCR 248 = (1996) 6 SCC 369 and** *Vinod Tanna & Anr. v. Zaher Siddiqui & Ors.* **(2002) 7 SCC 541; *and*** *Mustafa Surka v. M/s. Jay Ambe Enterprise & Anr.* **2010 (1) Bombay Cases Reporter (Crl.) 758 – referred to.**

2.1. As regards the plea that the respondent-company had offered to issue new cheques to the appellant upon settlement of the accounts and that a

substantial payment has been made towards the outstanding amount, it cannot be said that such an offer would render illegal a prosecution that is otherwise lawful. The offer made by the respondent-company was in any case conditional and subject to the settlement of accounts. So also whether the cheques were issued fraudulently by the authorised signatory for amounts in excess of what was actually payable to the appellant is a matter for examination at the trial. That the cheques were issued under the signatures of the persons who were authorised to do so on behalf of the respondent-company being admitted would give rise to a presumption that they were meant to discharge a lawful debt or liability. Allegations of fraud and the like are matters that cannot be investigated by a court u/s 482 Cr.P.C. and shall have to be left to be determined at the trial after the evidence is adduced by the parties. [Para 17] [490-B-E]

2.2. The signatories of the cheques dishonoured cannot say that the dishonour took place after they had resigned from their positions and that the failure of the company to honour the commitment implicit in the cheques cannot be construed an act of dishonesty on the part of the signatories of the cheques. Just because the authorised signatories of the cheques have taken a different line of defence than the one taken by the company does not justify quashing of the proceedings against them. [Para 18] [490-F-G]

National Small Industries Corporation Limited v. Harmeet Singh Paintal and Anr. **2010 (2) SCR 805 = (2010) 3 SCC 330 and** *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla & Anr.* **2005 (3) Suppl. SCR 371= (2005) 8 SCC 89 – relied on.**

2.3. The judgments and orders passed by the High Court are set aside. The trial court shall proceed with the trial of the complaints filed by the appellants expeditiously. [Para 19] [491-E-F]

Per Gyan Sudha Misra, J. (Concurring):

1.1. It is significant to note that the Legislature while incorporating the provisions of Chapter XVII, ss.138 to 142 inserted in the NI Act (Amendment Act 1988) intends to punish only those who know fully well that they have no amount in the bank and yet issue a cheque in discharge of debt or liability already borrowed/incurred - which amounts to cheating, and not to punish those who refused to discharge the debt for bona fide and sustainable reason. [Para 2] [492-D-F]

1.2. Section 138 of the NI Act cannot be applied in isolation ignoring s.139 which envisages a right of rebuttal before an offence could be made out u/s 138 of the Act as the Legislature already incorporates the expression "unless the contrary is proved" which means that the presumption of law shall stand and unless it is rebutted or disproved, the holder of a cheque shall be presumed to have received the cheque of the nature referred to in s.138 for the discharge of a debt or other liability. Therefore, unless the contrary is proved, the presumption shall be made that the holder of a negotiable instrument is holder in due course. [Para 8] [497-D-F]

1.3. If the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the accused may not need to adduce the evidence of his/her own. If however, the accused/drawer of a cheque in question neither raises a probable defence nor is able to contest existence of a legally enforceable debt or liability, obviously statutory presumption u/s 139 of the NI Act regarding commission of the offence comes into play if the same is not rebutted

with regard to the materials submitted by the complainant. [para 5] [495-C-E]

1.4. Dishonour of a cheque due to the return of the same by the bank to its drawee/holder on the ground of 'stop payment' although has been held to constitute an offence within the meaning of ss. 118 and 138 of the NI Act, the presumption is a 'rebuttable presumption' u/s 139 of the NI Act itself since the accused issuing the cheque is at liberty to prove to the contrary. The cases arising out of stop payment situation where the drawer of cheques has sufficient funds in his account and yet stops payment for bona fide reasons, the same cannot be put on par with other variety of cases where the cheque has bounced on account of insufficiency of funds or where it exceeds the amount arranged to be paid from that account. However, in order to escape liability under s.139, the accused has to show that dishonour was not due to insufficiency of funds but there was valid cause, including absence of any debt or liability for the stop payment instruction to the bank. Therefore, complaint filed in such a case although might not be quashed at the threshold before trial, heavy onus lies on the court issuing summons in such cases as the trial is summary in nature. [Para 1, 2 and 8] [492-A-C, G-H; 493-E-F; 494-C-D]

1.5. In view of s.139, it has to be presumed that a cheque is issued in discharge of any debt or other liability. But the presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. However, this presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by counter-manding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of s.138 of the Act. Therefore, in order to hold that the stop payment instruction to the bank would not constitute an

offence, it is essential that there must have been sufficient funds in the accounts in the first place on the date of signing of the cheque, the date of presentation of the cheque, the date on which stop payment instructions were issued to the bank. [Para 3] [493-G-H; 494-A-C]

M.M.T.C. Ltd. And Anr vs. Medchl Chemical and Pharma (P) Ltd. And Anr. **2001 (5) Suppl. SCR 265 = (2002) 1 SCC 234;** *Rangappa vs. Sri Mohan* **2010 (6) SCR 507 = (2010) 11 SCC 441;** *Goaplast (P) Ltd. vs. Chico Ursula D'Souza And Anr.* **2003 (2) SCR 712 = (2003) 3 SCC 232 – relied on.**

1.6. Thus, although a petition u/s 482 of the Cr.P.C. may not be entertained by the High Court for quashing such proceedings, yet the judicious use of discretion by the trial judge whether to proceed in the matter or not would be enormous in view of s.139 of the NI Act; and if the drawer of the cheque discharges the burden even at the stage of enquiry that he had bona fide reasons to stop the payment and not make the said payment even within the statutory time of 15 days provided under the NI Act, the trial court might be justified in refusing to issue summons to the drawer of the cheque by holding that ingredients to constitute offence u/s 138 of the NI Act are missing where the account holder has sufficient funds to discharge the debt. Thus, the category of 'stop payment cheques' would be a category which is subject to rebuttal and, therefore, would be an offence only if the drawer of the cheque fails to discharge the burden of rebuttal. [Para 9] [497-G-H; 498-A-C]

1.7. The accused can show that the stop payment instructions were not issued because of insufficiency or paucity of funds, but for other valid causes including the reason that there was no existing debt or liability in view of bonafide dispute between the drawer and drawee of the cheque. If that be so, then offence u/s 138 although

would be made out, the same will attract s.139 leaving the burden of proof of rebuttal by the drawer of the cheque. Thus, in cases arising out of 'stop payment' situation, ss. 138 and 139 will have to be given a harmonious construction as in that event s.139 would be rendered nugatory. [Para 10] [498-D-F]

1.8. The instant matter however does not relate to a case of 'stop payment' instruction to the bank as the cheque in question had been returned due to mismatching of the signatures but more than that the petitioner having neither raised nor proved to the contrary as envisaged u/s 139 of the NI Act that the cheques were not for the discharge of a lawful debt nor making the payment within fifteen days of the notice assigning any reason as to why the cheques had at all been issued if the amount had not been settled, obviously the plea of rebuttal envisaged u/s 139 does not come to his rescue so as to hold that the same would fall within the realm of rebuttable presumption envisaged u/s 139 of the Act. [Para 11] [498-G-H; 499-A-B]

1.9. Presumption u/s 139 of the NI Act in favour of the holder of a cheque has been held by the NI Act as also by this Court to be a rebuttable presumption which may be discharged by the accused/drawer of the cheque even at the threshold where the magistrate examines a case at the stage of taking cognizance as to whether a prima facie case has been made out or not against the drawer of the cheque. [Para 11] [499-C-D]

Case Law Reference:

Per T.S. Thakur, J.

(2002) 7 SCC 541	**referred to**	**para 2**
2010 (1) Bombay Cases Reporter (Crl.) 758	**referred to**	**para 5**
1965 SCR 7	**referred to**	**para 9**
1974 (3) SCR 287	**referred to**	**para 9**
1976 (1) SCR 38	**referred to**	**para 9**
1999 (2) SCR 932	**relied on**	**para 9**
(1949 2 All E.R. 155)	**referred to**	**para 9**
1998 (1) SCR 192	**relied on**	**para 10**
1996 (1) SCR 843	**stood overruled**	**para 11**
1996 (7) Suppl. SCR 248	**referred to**	**para 11**
2001 (5) Suppl. SCR 265	**relied on**	**para 12**
2010 (6) SCR 507	**relied on**	**para 14**
2003 (2) SCR 712	**relied on**	**para 13**
2010 (2) SCR 805	**relied on**	**para 18**
2005 (3) Suppl. SCR 371	**relied on**	**para 18**

As per Gyan Sudha Misra, J.

2001 (5) Suppl. SCR 265	**relied on**	**para 2**
2003 (2) SCR 712	**relied on**	**para 3**
2010 (6) SCR 507	**relied on**	**para 4**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1870-1909 of 2012.

From the Judgment & Order dated 27.08.2010 of the High Court of Gujarat at Ahmedabad in SCRLA Nos. 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934 & 935 of 2010.

WITH

Crl. A. Nos. 1910-1949 of 2012.

Pallav Shishodia, Nikhil Goel, Marsook Bafaki, Naveen Goel, A.V. Balan, H. Chandra Sekhar for the Appellant.

A. Sharan, Swaraj Kaushal, Hemantika Wahi, Rojalin Pradhan, P.M. Rustom Khan, Shirin Khajuria, V. Madhukar, Bansuri Swaraj, Paritosh Anil, Saurabh Ajay Gupta for the Respondents.

The Judgments of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. These appeals are directed against orders dated 19th April, 2010 and 27th August, 2010 passed by the High Court of Gujarat at Ahmedabad whereby the High Court has quashed 40 different complaints under Section 138 of the Negotiable Instruments Act, 1881 filed by the appellant against the respondents. Relying upon the decision of this Court in *Vinod Tanna & Anr. v. Zaher Siddiqui & Ors.* (2002) 7 SCC 541, the High Court has taken the view that dishonour of a cheque on the ground that the signatures of the drawer of the cheque do not match the specimen signatures available with the bank, would not attract the penal provisions of Section 138 of the Negotiable Instruments Act. According to the High Court, the provisions of Section 138 are attracted only in cases where a cheque is dishonoured either because the amount of money standing to the credit to the account maintained by the drawer is insufficient to pay the cheque amount or the cheque amount exceeds the amount arranged to be paid from account maintained by the drawer by an agreement made with the bank. Dishonour of a cheque on the ground that the signatures of the drawer do not match the specimen signatures available with the bank does not, according to the High Court, fall in either of these two contingencies, thereby rendering the prosecution of

the respondents legally impermissible. Before we advert to the merits of the contentions urged at the Bar by the learned counsels for the parties, we may briefly set out the factual backdrop in which the controversy arises.

3. The appellant is a proprietorship firm engaged in the sale of chemicals. It has over the past few years supplied Naphthalene Chemicals to the respondent-company against various invoices and bills issued in that regard. The appellant's case is that a running account was opened in the books of account of the appellant in the name of the respondent-company in which the value of the goods supplied was debited from time to time as per the standard accounting practice. A sum of Rs.4,91,91,035/- (Rupees Four Crore Ninety One Lac Ninety One Thousand Thirty Five only) was according to the appellant outstanding against the respondent-company in the former's books of accounts towards the supplies made to the latter. The appellant's further case is that the respondent-company issued under the signatures of its authorised signatories several post dated cheques towards the payment of the amount aforementioned. Several of these cheques (one hundred and seventeen to be precise) when presented were dishonoured by the bank on which the same were drawn, on the ground that the drawers' signatures were incomplete or that no image was found or that the signatures did not match. The appellant informed the respondents about the dishonour in terms of a statutory notice sent under Section 138 and called upon them to pay the amount covered by the cheques. It is common ground that the amount covered by the cheques was not paid by the respondents although according to the respondents the company had by a letter dated 30.12.2008, informed the appellant about the change of the mandate and requested the appellant to return the cheques in exchange of fresh cheques. It is also not in dispute that fresh cheques signed by the authorised signatories, according to the new mandate to the Bank, were never issued to the appellant ostensibly because the offer to issue such cheques was subject

to settlement of accounts, which had according to the respondent been bungled by the outgoing authorised signatories. The long and short of the matter is that the cheques remained unpaid despite notice served upon the respondents that culminated in the filing of forty different complaints against the respondents under Section 138 of the Negotiable Instruments Act before the learned trial court who took cognizance of the offence and directed issue of summons to the respondents for their appearance. It was at this stage that Special Criminal Applications No.2118 to 2143 of 2009 were filed by Shri Mustafa Surka accused No.5 who happened to be one of the signatories to the cheques in question. The principal contention urged before the High Court in support of the prayer for quashing of the proceedings against the signatory to the cheques was that the dishonour of cheques on account of the signatures 'not being complete' or 'no image found' was not a dishonour that could constitute an offence under Section 138 of the Negotiable Instrument Act.

4. By a common order dated 19th April, 2010, the High Court allowed the said petitions, relying upon the decision of this Court in *Vinod Tanna's* case (supra) and a decision delivered by a Single Judge Bench of the High Court of Judicature at Bombay in Criminal Application No.4434 of 2009 and connected matters. The Court observed:

> "In the instant case, there is no dispute about the endorsement that "drawers signature differs from the specimen supplied" and/or "no image found-signature" and/or "incomplete signature/illegible" and for return/ dishonour of cheque on the above endorsement will not attract ingredients of Section 138 of the Act and insufficient fund as a ground for dishonouring cheque cannot be extended so as to cover the endorsement "signature differed from the specimen supplied" or likewise. If the cheque is returned/bounced/dishonoured on the endorsement of "drawers signature differs from the specimen supplied" and/or "no image found-signature" and/or "incomplete signature / illegible", the complaint filed under Section 138 of the Act is not maintainable. Hence, a case is made out to exercise powers under Section 482 of the Code of Criminal Procedure, 1973 in favour of the petitioner".

5. Special Criminal Applications No.896 to 935 of 2010 were then filed by the remaining accused persons challenging the proceedings initiated against them in the complaints filed by the petitioner on the very same ground as was taken by Mustafa Surka. Reliance was placed by the petitioners in the said petitions also upon the decision of this Court in *Vinod Tanna's* case (supra) and the decision of the Single Judge Bench of High Court of Bombay in *Mustafa Surka v. M/s. Jay Ambe Enterprise & Anr.* [2010 (1) Bombay Cases Reporter (Crl.) 758]. The High Court has, on the analogy of its order dated 19th April, 2010 passed in the earlier batch of cases which order is the subject matter of SLP Nos.1780-1819 of 2011, quashed the proceedings and the complaints even qua the remaining accused persons, respondents herein. The present appeals, as noticed above, assail the correctness of both the orders passed by the High Court in the two batch of cases referred toabove.

6. Chapter XVII comprising Sections 138 to 142 of the Negotiable Instruments Act was introduced in the statute by Act 66 of 1988. The object underlying the provision contained in the said Chapter was aimed at inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business and day to day transactions by making dishonour of such instruments an offence. A negotiable instrument whether the same is in the form of a promissory note or a cheque is by its very nature a solemn document that carries with it not only a representation to the holder in due course of any such instrument but also a promise that the same shall be honoured for payment. To that end Section 139 of the

Act raises a statutory presumption that the cheque is issued in discharge of a lawfully recoverable debt or other liability. This presumption is no doubt rebuttable at trial but there is no gainsaying that the same favours the complainant and shifts the burden to the drawer of the instrument (in case the same is dishonoured) to prove that the instrument was without any lawful consideration. It is also noteworthy that Section 138 while making dishonour of a cheque an offence punishable with imprisonment and fine also provides for safeguards to protect drawers of such instruments where dishonour may take place for reasons other than those arising out of dishonest intentions. It envisages service of a notice upon the drawer of the instrument calling upon him to make the payment covered by the cheque and permits prosecution only after the expiry of the statutory period and upon failure of the drawer to make the payment within the said period.

7. The question that falls for our determination is whether dishonour of a cheque would constitute an offence only in one of the two contingencies envisaged under Section 138 of the Act, which to the extent the same is relevant for our purposes reads as under:

> "138. **Dishonour of cheque for insufficiency, etc., of funds in the account.**—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment of a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both."

8. From the above, it is manifest that a dishonour would constitute an offence only if the cheque is retuned by the bank 'unpaid' either because the amount of money standing to the credit of the drawer's account is insufficient to honour the cheque or that the amount exceeds the amount arranged to be paid from that account by an agreement with that bank. The High Court was of the view and so was the submission made on behalf of the respondent before us that the dishonour would constitute an offence only in the two contingencies referred to in Section 138 and none else. The contention was that Section 138 being a penal provision has to be construed strictly. When so construed, the dishonour must necessarily be for one of the two reasons stipulated under Section 138 & none else. The argument no doubt sounds attractive on the first blush but does not survive closer scrutiny. At any rate, there is nothing new or ingenious about the submission, for the same has been noticed in several cases and repelled in numerous decisions delivered by this Court over the past more than a decade. We need not burden this judgment by referring to all those pronouncements. Reference to only some of the said decisions should, in our opinion, suffice.

9. In *NEPC Micon Ltd. v. Magma Leasing Ltd.* (1999) 4 SCC 253, the cheques issued by the appellant-company in discharge of its liability were retuned by the company with the comments 'account closed'. The question was whether a dishonour on that ground for that reason was culpable under Section 138 of the Negotiable Instruments Act. The contention of the company that issued the cheque was that Section 138 being a penal provision ought to be strictly construed and when so interpreted, dishonour of a cheque on ground that the account was closed was not punishable as the same did not fall in any of the two contingencies referred to in Section 138. This Court noticed the prevalent cleavage in the judicial opinion, expressed by different High Courts in the country and rejected the contention that Section 138 must be interpreted strictly or in disregard of the object sought to be achieved by the statute.

Relying upon the decision of this Court in *Kanwar Singh v. Delhi Administration* (AIR 1965 SC 871), and *Swantraj v. State of Maharashtra* (1975) 3 SCC 322 this Court held that a narrow interpretation of Section 138 as suggested by the drawer of the cheque would defeat the legislative intent underlying the provision. Relying upon the decision in *State of Tamil Nadu v. M.K. Kandaswami* (1975) 4 SCC 745, this Court declared that while interpreting a penal provision which is also remedial in nature a construction that would defeat its purpose or have the effect of obliterating it from the statute book should be eschewed and that if more than one constructions are possible the Court ought to choose a construction that would preserve the workability and efficacy of the statute rather than an interpretation that would render the law otiose or sterile. The Court relied upon the much quoted passage from the *Seaford Court Estates Ltd. v. Asher* (1949 2 All E.R. 155) wherein Lord Denning, L.J. observed:

> "The English language is not an instrument of mathematical precision. Our literature would be much poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. ... A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do so as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

10. Relying upon a three-Judge Bench decision of this Court in *Modi Cements Ltd. v. Kuchil Kumar Nandi* (1998) 3 SCC 249, this Court held that the expression "the amount of money ..... is insufficient to honour the cheque" is a genus of which the expression 'account being closed' is a specie.

11. In *Modi Cements Ltd.* (supra) a similar question had arisen for the consideration of this Court. The question was whether dishonour of a cheque on the ground that the drawer had stopped payment was a dishonour punishable under Section 138 of the Act. Relying upon two earlier decisions of this Court in *Electronics Trade & Technology Development Corporation Ltd. v. Indian Technologists and Engineers (Electronics) (P) Ltd.* (1996) 2 SCC 739 and *K.K Sidharthan v. T.P. Praveena Chandran* (1996) 6 SCC 369, it was contended by the drawer of the cheque that if the payment was stopped by the drawer, the dishonour of the cheque could not constitute an offence under Section 138 of the Act. That contention was specifically rejected by this Court. Not only that, the decision in *Electronics Trade & Technology Development Corporation Ltd.* (supra) to the extent the same held that dishonour of the cheque by the bank after the drawer had issued a notice to the holder not to present the same would not constitute an offence, was overruled. This Court observed:

> "18. The aforesaid propositions in both these reported judgments, in our considered view, with great respect are contrary to the spirit and object of Sections 138 and 139 of the Act. If we are to accept this proposition it will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque

against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Further the following observations in Electronics Trade & Technology Development Corpn. Ltd. "Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induce the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly" (emphasis supplied) in our opinion, do not also lay down the law correctly.

20. On a careful reading of Section 138 of the Act, we are unable to subscribe to the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque if he without sufficient funds to his credit in his bank account to honour the cheque issues the same and, therefore, this amounts to an offence under Section 138 of the Act. For the reasons stated hereinabove, we are unable to share the viewsPage 12 expressed by this Court in the above two cases and we respectfully differ with the same regarding interpretation of Section 138 of the Act to the limited extent as indicated above."

12. We may also at this stage refer to the decisions of this Court in *M.M.T.C. Ltd. and Anr. v. Medchl Chemicals and Pharma (P) Ltd. and Anr.* (2002) 1 SCC 234, where too this Court considering an analogous question held that even in cases where the dishonour was on account of "stop payment" instructions of the drawer, a presumption regarding the cheque being for consideration would arise under Section 139 of the Act. The Court observed:

"19. Just such a contention has been negatived by this Court in the case of *Modi Cements Ltd. v. Kuchil Kumar Nandi.* It has been held that even though the cheque is

dishonoured by reason of "stop-payment" instruction an offence under Section 138 could still be made out. It is held that the presumption under Section 139 is attracted in such a case also. The authority shows that even when the cheque is dishonoured by reason of stop-payment instructions by virtue of Section 139 the court has to presume that the cheque was received by the holder for the discharge, in whole or in part, of any debt or liability. Of course this is a rebuttable presumption. The accused can thus show that the "stop-payment" instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there were sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop-payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused. Thus a court cannot quash a complaint on this ground."

13. To the same effect is the decision of this Court in *Goaplast (P) Ltd. v. Chico Ursula D'souza and Anr.* (2003) 3 SCC 232, where this Court held that 'stop payment instructions' and consequent dishonour of the cheque of a post-dated cheque attracts provision of Section 138. This Court observed:

"Chapter XVII containing Sections 138 to 142 was introduced in the Act by Act 66 of 1988 with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions. The said provisions were intended to discourage people from not honouring their commitments by way of payment through cheques. The court should lean in favour of an interpretation which serves the object of the statute. A post-dated cheque will lose its credibility and

acceptability if its payment can be stopped routinely. The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of a postdated cheque.

In view of Section 139, it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong."

(emphasis supplied)

14. A three-Judge Bench of this Court in *Rangappa v. Sri Mohan* (2010) 11 SCC 441 has approved the above decision and held that failure of the drawer of the cheque to put up a probable defence for rebutting the presumption that arises under Section 139 would justify conviction even when the appellant drawer may have alleged that the cheque in question had been lost and was being misused by the complainant.

15. The above line of decisions leaves no room for holding that the two contingencies envisaged under Section 138 of the Act must be interpreted strictly or literally. We find ourselves in respectful agreement with the decision in *NEPC Micon Ltd.* (supra) that the expression "amount of money ..... is

insufficient" appearing in Section 138 of the Act is a genus and dishonour for reasons such "as account closed", "payment stopped", "referred to the drawer" are only species of that genus. Just as dishonour of a cheque on the ground that the account has been closed is a dishonour falling in the first contingency referred to in Section 138, so also dishonour on the ground that the "signatures do not match" or that the "image is not found", which too implies that the specimen signatures do not match the signatures on the cheque would constitute a dishonour within the meaning of Section 138 of the Act. This Court has in the decisions referred to above taken note of situations and contingencies arising out of deliberate acts of omission or commission on the part of the drawers of the cheques which would inevitably result in the dishonour of the cheque issued by them. For instance this Court has held that if after issue of the cheque the drawer closes the account it must be presumed that the amount in the account was nil hence insufficient to meet the demand of the cheque. A similar result can be brought about by the drawer changing his specimen signature given to the bank or in the case of a company by the company changing the mandate of those authorised to sign the cheques on its behalf. Such changes or alteration in the mandate may be dishonest or fraudulent and that would inevitably result in dishonour of all cheques signed by the previously authorised signatories. There is in our view no qualitative difference between a situation where the dishonour takes place on account of the substitution by a new set of authorised signatories resulting in the dishonour of the cheques already issued and another situation in which the drawer of the cheque changes his own signatures or closes the account or issues instructions to the bank not to make the payment. So long as the change is brought about with a view to preventing the cheque being honoured the dishonour would become an offence under Section 138 subject to other conditions prescribed being satisfied. There may indeed be situations where a mismatch between the signatories on the cheque drawn by the drawer and the specimen available with

the bank may result in dishonour of the cheque even when the drawer never intended to invite such a dishonour. We are also conscious of the fact that an authorised signatory may in the ordinary course of business be replaced by a new signatory ending the earlier mandate to the bank. Dishonour on account of such changes that may occur in the course of ordinary business of a company, partnership or an individual may not constitute an offence by itself because such a dishonour in order to qualify for prosecution under Section 138 shall have to be preceded by a statutory notice where the drawer is called upon and has the opportunity to arrange the payment of the amount covered by the cheque. It is only when the drawer despite receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount that the dishonour would be considered a dishonour constituting an offence, hence punishable. Even in such cases, the question whether or not there was a lawfully recoverable debt or liability for discharge whereof the cheque was issued would be a matter that the trial Court will examine having regard to the evidence adduced before it and keeping in view the statutory presumption that unless rebutted the cheque is presumed to have been issued for a valid consideration.

16. In the case at hand, the High Court relied upon a decision of this Court in *Vinod Tanna's* case (supra) in support of its view. We have carefully gone through the said decision which relies upon the decision of this Court in *Electronics Trade & Technology Development Corporation Ltd.* (supra). The view expressed by this Court in *Electronics Trade & Technology Development Corporation Ltd.* (supra) that a dishonour of the cheque by the drawer after issue of a notice to the holder asking him not to present a cheque would not attract Section 138 has been specifically overruled in *Modi Cements Ltd.* case (supra). The net effect is that dishonour on the ground that the payment has been stopped, regardless whether such stoppage is with or without notice to the drawer,

and regardless whether the stoppage of payment is on the ground that the amount lying in the account was not sufficient to meet the requirement of the cheque, would attract the provisions of Section 138.

17. It was contended by learned counsel for the respondent that the respondent-company had offered to issue new cheques to the appellant upon settlement of the accounts and that a substantial payment has been made towards the outstanding amount. We do not think that such an offer would render illegal a prosecution that is otherwise lawful. The offer made by the respondent-company was in any case conditional and subject to the settlement of accounts. So also whether the cheques were issued fraudulently by the authorised signatory for amounts in excess of what was actually payable to the appellant is a matter for examination at the trial. That the cheques were issued under the signature of the persons who were authorised to do so on behalf of the respondent-company being admitted would give rise to a presumption that they were meant to discharge a lawful debt or liability. Allegations of fraud and the like are matters that cannot be investigated by a Court under Section 482 Cr.P.C. and shall have to be left to be determined at the trial after the evidence is adduced by the parties.

18. On behalf of the signatories of the cheques dishonoured it was argued that the dishonour had taken place after they had resigned from their positions and that the failure of the company to honour the commitment implicit in the cheques cannot be construed an act of dishonesty on the part of the signatories of the cheques. We do not think so. Just because the authorised signatories of the cheques have taken a different line of defence than the one taken by by the company does not in our view justify quashing of the proceedings against them. The decisions of this Court in *National Small Industries Corporation Limited v. Harmeet Singh Paintal and Anr.* (2010) 3 SCC 330 and *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla & Anr.* (2005) 8 SCC

89 render the authorised signatory liable to be prosecuted along with the company. In the *National Small Industries Corporation Limited's* case (supra) this Court observed:

"19. xxxx

(c) The answer to Question (c) has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."

19. In the result, we allow these appeals, set aside the judgment and orders passed by the High Court and dismiss the special criminal applications filed by the respondents. The trial Court shall now proceed with the trial of the complaints filed by the appellants expeditiously. We make it clear that nothing said in this judgment shall be taken as an expression of any final opinion on the merits of the case which the trial Court shall be free to examine on its own. No costs.

GYAN SUDHA MISRA, J. 1. I endorse and substantially agree with the views expressed in the judgment and order of learned Brother Justice Thakur. However, I propose to highlight a specific aspect relating to dishonour of cheques which constitute an offence under Section 138 as introduced by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 by adding that in so far as the category of 'stop payment of cheques' is concernedas

to whether they constitute an offence within the meaning of Section 138 of the 'NI Act', due to the return of a cheque by the bank to the drawee/holder of the cheque on the ground of 'stop payment' although has been held to constitute an offence within the meaning of Sections 118 and 138 of the NI Act, and the same is now no longer res integra, the said presumption is a 'rebuttable presumption' under Section 139 of the NI Act itself since the accused issuing the cheque is at liberty to prove to the contrary. This is already reflected under Section 139 of the NI Act when it lays down as follows:-

"139. Presumption in favour of holder.-- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability."

2. We have to bear in mind that the Legislature while incorporating the provisions of Chapter XVII, Sections 138 to 142 inserted in the NI Act (Amendment Act 1988) intends to punish only those who know fully well that they have no amount in the bank and yet issue a cheque in discharge of debt or liability already borrowed/incurred -which amounts to cheating, and not to punish those who refused to discharge the debt for bona fide and sustainable reason. It is in this context that this Hon'ble Court inthe matter of *M.M.T.C. Ltd. and Anr vs. Medchl Chemical and Pharma (P) Ltd. and Anr*[1]. was pleased to hold that cheque dishonour on account of drawer's stop payment instruction constitutes an offence under Section 138 of the NI Act but it is subject to the rebuttable presumption under Section 139 of the NI Act as the same can be rebutted by the drawer even at the first instance. It was held therein that in order to escape liability under Section 139, the accused has to show that dishonour was not due to insufficiency of funds but there was valid cause, including absence of any debt or liability for the stop payment instruction to the bank. The specific

1. (2002) 1 SCC 234.

observations of the Court in this regard may be quoted for ready reference which are as follows:

> *"The authority shows that even when the cheque is dishonoured by reason of stop-payment instructions by virtue of Section 139 the court has to presume that the cheque was received by the holder for the discharge, in whole or in part, of any debt or liability. Of course this is a rebuttable presumption. The accused can thus show that the "stoppayment" instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there were sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop-payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused. Thus a court cannot quash a complaint on this ground."*

Therefore, complaint filed in such a case although might not be quashed at the threshold before trial, heavy onus lies on the court issuing summons in such cases as the trial is summary in nature.

3. In the matter of *Goaplast (P) Ltd. vs. Chico Ursula D'Souza and Anr*[2]. also this Court had held that ordinarily the stop payment instruction is issued to the bank by the account holder when there is no sufficient amount in the account. But, it was also observed therein that the reasons for stopping the payment can be manifold which cannot be overlooked. Hence, in view of Section 139, it has to be presumed that a cheque is issued in discharge of any debt or other liability. But the presumption can be rebutted by adducing evidence and the

2. (2003) 3 SCC 232 = (2004) Crl.L.J. 664.

burden of proof is on the person who wants to rebut the presumption. However, this presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. Therefore, in order to hold that the stop payment instruction to the bank would not constitute an offence, it is essential that there must have been sufficient funds in the accounts in the first place on the date of signing of the cheque, the date of presentation of the cheque, the date on which stop payment instructions were issued to the bank. Hence, in *Goaplast matter* (supra), when the magistrate had disallowed the application in a case of 'stop payment' to the bank without hearing the matter merely on the ground that there was no dispute about the dishonour of the cheque issued by the accused, since the signature was admitted and therefore held that no purpose would be served in examining the bank manager since the dishonour was not in issue, this Court held that examination of the bank manager would have enabled the Court to know on what date stop payment order was sent by the drawer to the bank clearly leading to the obvious inference that stop payment although by itself would be an offence, the same is subject to rebuttal provided there was sufficient funds in the account of the drawer of the cheque.

4. Further, a three judge Bench of this Court in the matter of *Rangappa vs. Sri Mohan*[3] held that Section 139 is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies the strong criminal remedy in relation to the dishonour of the cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. The Court however, further observed that it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the

3. (2010) 11 SCC 441.

bouncing of a cheque is largely in the nature of a civil wrong whose money is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant accused cannot be expected to discharge an unduly high standard of proof". The Court further observed that it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is all preponderance of probabilities.

5. Therefore, if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the accused may not need to adduce the evidence of his/her own. If however, the accused/drawer of a cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, obviously statutory presumption under Section 139 of the NI Act regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant.

6. It is no doubt true that the dishonour of cheques in order to qualify for prosecution under Section 138 of the NI Act precedes a statutory notice where the drawer is called upon by allowing him to avail the opportunity to arrange the payment of the amount covered by the cheque and it is only when the drawer despite the receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount, that the said default would be considered a dishonour constituting an offence, hence punishable. But even in such cases, the question whether or not there was lawfully recoverable debt or liability for discharge whereof the cheque was issued, would be a matter that the trial

court will have to examine having regard to the evidence adduced before it keeping in view the statutory presumption that unless rebutted, the cheque is presumed to have been issued for a valid consideration. In view of this the responsibility of the trial judge while issuing summons to conduct the trial in matters where there has been instruction to stop payment despite sufficiency of funds and whether the same would be a sufficient ground to proceed in the matter, would be extremely heavy.

7. As already noted, the Legislature intends to punish only those who are well aware that they have no amount in the bank and yet issue a cheque in discharge of debt or liability which amounts to cheating and not to punish those who bona fide issues the cheque and in return gets cheated giving rise to disputes emerging from breach of agreement and hence contractual violation. To illustrate this, there may be a situation where the cheque is issued in favour of a supplier who delivers the goods which is found defective by the consignee before the cheque is encashed or a postdated cheque towards full and final payment to a builder after which the apartment owner might notice breach of agreement for several reasons. It is not uncommon that in that event the payment might be stopped bona fide by the drawer of the cheque which becomes the contentious issue relating to breach of contract and hence the question whether that would constitute an offence under the NI Act. There may be yet another example where a cheque is issued in favour of a hospital which undertakes to treat the patient by operating the patient or any other method of treatment and the doctor fails to turn up and operate and in the process the patient expires even before the treatment is administered. Thereafter, if the payment is stopped by the drawer of the cheque, the obvious question would arise as to whether that would amount to an offence under Section 138 of the NI Act by stopping the payment ignoring Section 139 which makes it mandatory by incorporating that the offence under Section 138 of the NI Act is rebuttable. Similarly, there may be

innumerable situations where the drawer of the cheque for bonafide reasons might issue instruction of 'stop payment' to the bank in spite of sufficiency of funds in his account.

8. What is wished to be emphasized is that matters arising out of 'stop payment' instruction to the bank although would constitute an offence under Section 138 of the NI Act since this is no longer res-integra, the same is an offence subject to the provision of Section 139 of the Act and hence, where the accused fails to discharge his burden of rebuttal by proving that the cheque could be held to be a cheque only for discharge of a lawful debt, the offence would be made out. Therefore, the cases arising out of stop payment situation where the drawer of cheques has sufficient funds in his account and yet stops payment for bona fide reasons, the same cannot be put on par with other variety of cases where the cheque has bounced on account of insufficiency of funds or where it exceeds the amount arranged to be paid from that account, since Section 138 cannot be applied in isolation ignoring Section 139 which envisages a right of rebuttal before an offence could be made out under Section 138 of the Act as the Legislature already incorporates the expression "unless the contrary is proved" which means that the presumption of law shall stand and unless it is rebutted or disproved, the holder of a cheque shall be presumed to have received the cheque of the nature referred to in Section 138 of the NI Act, for the discharge of a debt or other liability. Hence, unless the contrary is proved, the presumption shall be made that the holder of a negotiable instrument is holder in due course.

9. Thus although a petition under Section 482 of the Cr.P.C. may not be entertained by the High Court for quashing such proceedings, yet the judicious use of discretion by the trial judge whether to proceed in the matter or not would be enormous in view of Section 139 of the NI Act and if the drawer of the cheque discharges the burden even at the stage of enquiry that he had bona fide reasons to stop the payment and

not make the said payment even within the statutory time of 15 days provided under the NI Act, the trial court might be justified in refusing to issue summons to the drawer of the cheque by holding that ingredients to constitute offence under Section 138 of the NI Act is missing where the account holder has sufficient funds to discharge the debt. Thus the category of 'stop payment cheques' would be a category which is subject to rebuttal and hence would be an offence only if the drawer of the cheque fails to discharge the burden of rebuttal.

10. Thus, dishonour of cheques simpliciter for the reasons stated in Section 138 of the NI Act although is sufficient for commission of offence since the presumption of law on this point is no longer res integra, the category of 'stop payment' instruction to the bank where the account holder has sufficient funds in his account to discharge the debt for which the cheque was issued, the said category of cases would be subject to rebuttal as this question being rebuttable, the accused can show that the stop payment instructions were not issued because of insufficiency or paucity of funds, but stop payment instruction had been issued to the bank for other valid causes including the reason that there was no existing debt or liability in view of bonafide dispute between the drawer and drawee of the cheque. If that be so, then offence under Section 138 although would be made out, the same will attract Section 139 leaving the burden of proof of rebuttal by the drawer of the cheque. Thus, in cases arising out of 'stop payment' situation, Sections 138 and 139 will have to be given a harmonious construction as in that event Section 139 would be rendered nugatory.

11. The instant matter however do not relate to a case of 'stop payment' instruction to the bank as the cheque in question had been returned due to mismatching of the signatures but more than that the petitioner having neither raised nor proved to the contrary as envisaged under Section 139 of the NI Act that the cheques were not for the discharge of a lawful debt nor making the payment within fifteen days of the notice assigning

any reason as to why the cheques had at all been issued if the amount had not been settled, obviously the plea of rebuttal envisaged under Section 139 does not come to his rescue so as to hold that the same would fall within the realm of rebuttable presumption envisaged under Section139 of the Act. I, therefore, concur with the judgment and order of learned Brother Justice Thakur subject to my views on the dishonour of cheques arising out of cases of 'stop payment' instruction to the bank in spite of sufficiency of funds on account of bonafide dispute between the drawer and drawee of the cheque. This is in view of the legal position that presumption in favour of the holder of a cheque under Section 139 of the NI Act has been held by the NI Act as also by this Court to be a rebuttable presumption to be discharged by the accused/drawee of the cheque which may be discharged even at the threshold where the magistrate examines a case at the stage of taking cognizance as to whether a prima facie case has been made out or not against the drawer of the cheque.

R.P. Appeals allowed.

NATIONAL BANK OF OMAN
v.
BARAKARA ABDUL AZIZ & ANR.
(SLP (Crl.) No. 9098/2012)

DECEMBER 3, 2012

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

Code of Criminal Procedure, 1973:

s. 202 (as amended by Amendment Act, 2005) – Duty of Magistrate – To direct inquiry and investigation – Complaint before CJM Ahmednagar – Against the accused who was resident of an area, not falling within the territorial jurisdiction of the CJM – CJM issuing process for offences u/ss. 418 and 420 IPC – High Court quashed the complaint on the ground that CJM passed the order without following the procedure laid down u/s.202 – On appeal, held: It was incumbent upon the CJM to carry out an enquiry or order investigation as contemplated u/s. 202, before issuing process which the CJM had failed – Therefore, order of High Court was correct – However, High Court, instead of quashing the complaint, should have directed the CJM to pass fresh orders following the procedure u/s. 202 – Hence, matter remitted to the Magistrate for passing fresh orders – Penal Code, 1860 – ss. 418 and 420.

s. 202 (as amended by Amendment Act, 2005) – Enquiry under – Scope of – Held: The scope of enquiry under this Section is restricted only to find out the truth or otherwise of the allegations made in the complaint for the purpose of issuing process.

s. 202 (as amended by Amended Act, 2005) – Investigation under – Nature and scope of – Held: Investigation under this provision is different from the

investigation contemplated u/s. 156 Cr.P.C. – It is limited to the ascertainment of truth or falsehood of the allegations made in the complaint.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 9098 of 2012.

From the Judgment & Order dated 03.10.2012 of the High Court of Judicature at Bombay, Bench at Aurangabad in Criminal Application No. 3146 of 2012.

Devashish Bharuka for the Petitioner.

The following Order of the Court was delivered

O R D E R

1. The complainant-National Bank of Oman lodged a private complaint RTC NO.No.260/2007 in the Court of Chief Judicial Magistrate, Ahmednagar against the respondent alleging that he had cheated the bank by swindling 43,15,000/- U.A.E. Dirhams (equivalent to 5.178 Crores Indian Rupees). The gist of the complaint reads as follows:

"In the year 1995, the applicant/accused opened current account with the complainant Bank on a representation that he was holding Indian Passport. The accused slowly gained confidence of the complainant Bank. In February 1996, the accused produced trading licence issued by Abu Dhabi Municipality and Town Planning and represented that he owned firm - M/s Bushra Textiles, situated at Abu Dhabi and engaged in retail and wholesale trading and sale of textiles garments, stationery items, electronics etc. The accused further represented that he was established in business at Abu Dhabi and was well supported by loyal clientele and was in process of expanding his business, which required financial facilities from the Bank. The accused also represented to the Bank that he had more than enough financial stability and viability

to honour the financial commitments and pay back the finances made available to him by the Bank. Based on the said solemn representation, the Company in good faith granted to the accused overdraft facility of 2,50,000/- A.E.D. This facility was enhanced from time to time to the extent of 51 lacs A.E.D. by overdraft loan against trust receipts, local bill limit, credit card etc. till October 2001. The accused, however, committed breach of undertaking and failed to repay the dues of the complainant Bank.

The complainant Bank, therefore, contemplated legal action against the accused in order to obtain detention orders from the competent Court at U.A.E.

The accused thereupon approached the complainant Bank in November 2002 and entered into a restructuring/ settlement agreement with the accused on 12.11.2002 for A.E.D. 43,15,000/- by converting all the outstanding liabilities into a term loan to be repaid in 48 installments.

The accused undertook to pay the said amount as per terms of MOU and also issued post dated cheques for 24 monthly installments and gave assurance and undertaking that said cheques would be honoured and loan would be repaid as per the restructuring agreement between the parties and thereby induced the Bank not to take immediate action and obtain detention order. The complainant relied upon the said representation and did not take action against the accused in November 2002.

The said cheques were dishonoured for want of sufficient funds in the account and in meanwhile the accused surreptitiously and clandestinely absconded to India without discharging his loan liability."

2. The complainant-Bank is not having any branch or any activity in India or nor carrying on any business in India. The Bank, therefore, decided to appoint Mr. N.B. Sapkal, as its

power of attorney holder for the purpose of filing complaint and taking legal steps against the respondent, who is alleged to have duped the Bank and escaped to India. The power of attorney holder is a resident of Ahmednagar and according to the Bank it was convenient for the Bank to file the complaint at Ahmednagar. The respondent being a citizen of India, necessary sanction had to be obtained from the Central Government under the proviso to Section 188 of the Code of Criminal Procedure. Sanction was accordingly sought for from the Government of India and the Government of India, Ministry of Home Affairs, vide letter No.F/83/2007.Jud.Cell dated 26th March, 2010 accorded sanction to enquire and trial of the respondent by a court of competent jurisdiction in India.

3. The Chief Judicial Magistrate, Ahmednagar on 25.2.2011 passed the following order on the complaint:

> "Perused complaint and the documents attached thereto. The Central Government has accorded sanction to prosecute the accused. Heard learned counsel appearing for the complainant. There are sufficient materials against the accused. The complainant has made out prima facie case against the accused. Hence process be issued for offences u/s 418 and 420 of I.P.C.
>
> Dt.25.02.2011
>
> Sd/-
> (G.O. Agrawal)
> C.J.M. Ahmednagar

4. The respondent challenged that order by filing Criminal Application No.3146/2012 before the High Court of Judicature, Bombay Bench at Aurangabad. It was contended that the allegations in the complaint do not prima facie constitute any offence or make out a case for issuance of process under Sections 418 and 420 of the I.P.C. Further, it was stated that the respondent-accused was a resident of Dakshin Kannada in the State of Karnataka and the C.J.M. Ahmednagar issued

the process without complying with the mandatory requirement of making an enquiry or directing an investigation for the purpose of deciding whether or not there was sufficient ground for initiating proceedings against the accused as contemplated under Section 202 of the Code of Criminal Procedure. The High Court took the view that prima facie the bare allegation of cheating did not make out a case against the accused for issuance or process under Section 418 of 420 of the I.P.C. Further, it was held that the C.J.M. did not follow the procedure laid down under Section 202 of the Cr.P.C. The High Court held that the Magistrate was obliged to postpone the process against the accused and either enquire the case himself or direct an investigation to be made by a police officer or by such other officer as he thinks fit for the purpose of deciding whether or not there is sufficient grounds for proceeding in a case where the accused is residing beyond the area in which the Magistrate exercises his jurisdiction. The High Court noticed that the accused is a resident of District Dakshin Kannada, Karnataka and hence, the CJM should have followed the procedure laid down in Section 202 Cr.P.C. The High Court, therefore, set aside the order dated 25.2.2011 issuing the process under Sections 418 and 420 of the I.P.C. by the C.J.M. Ahmednagar. Aggrieved by the said order the Bank has come up with this special leave petition.

5. We find no error in the view taken by the High Court that the C.J.M. Ahmednagar had not carried out any enquiry or ordered investigation as contemplated under Section 202 of the Cr.P.C. before issuing the process, considering the fact that the respondent is a resident of District Dakshin Kannada, which does not fall within the jurisdiction of the C.J.M. Ahmednagar. It was, therefore, incumbent upon him to carry out an enquiry or order investigation as contemplated under Section 202 of the Cr.P.C. before issuing the process.

6. The duty of a Magistrate receiving a complaint is set out in Section 202 of the Cr.P.C. and there is an obligation on

the Magistrate to find out if there is any matter which calls for investigation by a criminal court. The scope of enquiry under this Section is restricted only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process has to be issued or not. Investigation under Section 202 of the Cr.P.C. is different from the investigation contemplated in Section 156 as it is only for holding the Magistrate to decide whether or not there is sufficient grounds for him to proceed further. The scope of enquiry under Section 202 of the Cr.P.C. is, therefore, limited to the ascertainment of truth or falsehood of the allegations made in the complaint - (i) on the materials placed by the complainant before the Court (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made our; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have.

Section 202 of the Cr.P.C. was amended by the Cr.P.C. (Amendment Act 2005) and the following words were inserted:

> "and shall, in a case where the accused is residing at a place beyond the area in which he exercises jurisdiction"

7. The notes on clauses for the above-mentioned amendment read as follow:

> "False complaints are filed against persons residing at far off places simply to harass them. In order to see that the innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused."

8. The amendment has come into force w.e.f. 23.6.2006 vide notification No.S.O.923(E) dt. 21.6.2006.

9. We are of the view that the High Court has correctly held that the above-mentioned amendment was not noticed by the C.J.M. Ahmednagar. The C.J.M. had failed to carry out any enquiry or ordered investigation as contemplated under the amended Section 202 of the Cr.P.C. Since it is an admitted fact that the accused is residing outside the jurisdiction of the C.J.M. Ahmednagar, we find no error in the view taken by the High Court. All the same, the High Court instead of quashing the complaint, should have directed the Magistrate to pass fresh orders following the provisions of Section 202 of the Cr.P.C. Hence, we remit the matter to the Magistrate for passing fresh orders uninfluenced by the prima facie conclusion reached by the High Court that the bare allegations of cheating do not make out a case against the accused for issuance of process under Section 418 or 420 of the I.P.C. The C.J.M. will pass fresh orders after complying with the procedure laid down in Section 202 Cr.P.C., within two months from the date of receipt of this order.

10. The special leave petition is, accordingly, disposed of.

K.K.T. SLP disposed of.

STATE OF GUJARAT & ANOTHER
v.
MANOHARSINHJI PRADYUMANSINHJI JADEJA
(Civil Appeal No. 612 of 2002)

DECEMBER 4, 2012

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

Gujarat Agricultural Lands Ceiling Act, 1960:

ss.2(1), 2(3), 2(11), 2(12) and 2(17) read with s.2(6) of Gujarat Act 25 of 1951, s.2(11) of Gujarat Act 26 of 1951 and s.2(a) of Gujarat Act 3 of 1952 – 'Bid land' – Nature of – Held: From the definition of 'agriculture' u/s 2(1), the definition of 'agriculturist' u/s. 2(3) along with the expression 'a person who cultivates land personally' u/s 2(12) and the definition of 'land' u/s. 2(17) of the unamended Act of 1960, it is evident that the legislature intended and did include 'lands' held by 'agriculturist' where grass is raised or used for grazing purposes as part of agricultural land which was in possession of agriculturist – Such lands where grass is grown or used for grazing purpose are always known as 'bid land' and would be subject to the restrictions imposed for the purpose of ascertaining the ceiling limit, unaffected by the coming into force of the 1976 Act as well as the Amendment Act of 1974 and, therefore, determination of holding of such excess agricultural land under the Act of 1960 prior to the coming into force of the Act, 1976 should be operated upon – Saurashtra Land Reforms Act, 1951 (Act 25 of 1951), Saurashtra Barkhali Abolition Act, 1951 (Act 26 of 1951) – Saurashtra Estates Acquisition Act, 1952(Act 3 of 1952) – Gujarat Agricultural Lands Ceiling (Amendment Act), 1972 (Act 2 of 1974) – Urban Land (Ceiling and Regulation) Act, 1976.

Urban Land (Ceiling and Regulation) Act, 1976:

s.2(o) – "Urband land" – Held: Would mean any land situated within the urban agglomeration referred to as such in the Master Plan and would exclude any such land which is mainly used for the purpose of 'agriculture' – The situation has now come where the position has to be made loud and clear to state that the 1976 Act would govern only such of those lands which would fall within its area of operation within urban agglomeration to the specific exclusion of the agricultural lands and consequently the continued application of the un-amended Act of 1960 would remain without any restriction.

In the proceedings under the provisions of the Gujarat Agricultural Lands Ceiling Act, 1960, (the 1960 Act), 587 acres, 35 gunthas of lands belonging to the respondent were declared as surplus. Ultimately, his writ petition was allowed by the single Judge of the High Court holding that his lands were covered by the Urban Land (Ceiling and Regulation) Act, 1976 (the 1976 Act) and not by the 1960 Act. The Letters Patent Appeal filed by the State Government was dismissed by the Division Bench of the High Court.

In the instant appeal filed by the State Government, the case of the appellants-authorities was that the respondent's lands being 'bid lands' were agricultural lands and thereby governed by the provisions of Act of 1960. The stand of the respondent was that the lands were never classified as "agricultural lands"; that they were indisputably "urban lands" governed by the provisions of the 1976 Act and, consequently, the application of the Act of 1960 stood excluded.

The questions for consideration before the Court were:

(i) Whether 'Bid land' would fall within the definition 'land' read along with the definition of 'agriculture' as defined u/ss 2(17) and 2(1) of the Act of 1960?;

(ii) In order to ascertain the nature of description of 'bid land' can the definition of the said expression under the earlier statutes viz. Act No.XXV of 1951, Act No.XXVI of 1951 and Act No.III of 1952 can be imported?

(iii) What is the implication of the Urban Land Ceiling Act, 1976 vis-à-vis the Act of 1960 in respect of 'bid land'?;

(iv) Whether the Amendment Act of 1974 which came into effect from 01.04.1976 and the definition of 'Bid land' under the said Amendment Act of 1974 can be applied for the purpose of deciding the issue involved in this litigation?;

(v) Whether the ratio decidendi of this Court in Nagbhai Najbhai Khackar can be applied to the facts of this case?;

(vi) Whether the orders of the authorities under the Act of 1960 impugned before the High Court were hit by the principles of res judicata?; and

(vii) What is the effect of the repealing of the Urban Land Ceiling Act over the Act of 1960?"

Allowing the appeal, the Court

HELD: 1.1. A careful consideration of the provisions of ss. 2(17), 2(1), 2(3), 2(11) and 2(12) of the Gujarat Agricultural Lands Ceiling Act, 1960, which respectively define the expressions 'land', 'agriculture', 'agriculturist', 'to cultivate' and 'to cultivate personally', gives a clear idea that the lands which are used as well as which are capable of being used for the purpose of agriculture including lands used for raising grass or either full or part of it used for grazing purposes, would come within the ambit of the Act and would be subject to the restrictions

imposed for the purpose of ascertaining the ceiling limit. In view of the explanation part of sub s.(1) of s. 2 which contains as many as Clauses (i) to (vi) the lands used for grazing purposes as well as cutting of grass for rearing of cattle are not the lands to be excluded from the definition of 'agriculture'. The definition of 'land' u/s. 2(17) categorically mentions that the land which is either used or capable of being used for agricultural purposes would fall within the said definition. Therefore, reading the above definitions together, a 'land' where grass is grown or used for grazing purposes, would fall within the inclusive provision of the definition of 'agriculture'. The definition of 'bid land' in Act Nos. XXV of 1951, XXVI of 1951 and Act No. III of 1952 make the position clear that the 'bid land' is nothing but the land used for grazing of cattle and for raising grass for the purpose of rearing of cattle. [Para 29-30 and 35] [543-C-E-F; 543-G-H; 544-A, 547-D-G]

1.2. Under the amended Act of 1960, the definition of agriculture u/s. 2(1) as it existed prior to the said amendment was maintained. In addition, some of those excluded categories, namely, the one mentioned in sub clauses (i), (ii), (iii), (iv) and (v) were also included as falling within the definition of the expression 'agriculture'. Further the nature of exclusion as mentioned in sub-clause (vi) of sub-s.(1) of s.2, namely, such other pursuits as may be described was also mentioned by stating that such of those pursuits which have been prescribed prior to the specified date would continue to stand excluded for that period which was prior in point of time to the specified date as mentioned in the Amendment Act which was notified on 01.04.1976. [Para 36] [547-G-H; 548-A-B]

1.3. It is relevant to mention the date which was specified under the Amendment Act which as per s.2 (27A) meant the date of the coming into force of the amended Act of 1974, namely, 01.04.1976. Therefore, the

conclusion to be drawn would be that as from 01.04.1976 the definition of 'agriculture' under the amended Act was wider in scope which included land used whether or not as an appendage to rice or paddy land for the purpose of rabmanure, dairy farming, poultry farming, breeding of livestock and the cutting of woods and such of those lands which were in the excluded category under the unamended Act cease to have effect of such exclusion on and after 01.04.1976. [Para 36] [548-C-D]

1.4. The expression 'agriculture' u/s 2(1) of the 1960 Act, when examined uninfluenced by the Amendment Act of 1974, specifically defines 'agriculture' to include the land used for raising of grass, crops or garden produce and the use by an agriculturist of the land held by him or part thereof for grazing. The apparent intention of the legislature in including the land used for grazing or for raising grass as per the definition of 'agriculture' under the 1960 Act is quite explicit, inasmuch as, the use of cattle in farming operation was inseparable at the relevant point of time. Therefore, when the Legislature thought it fit to include the land for raising grass and used for grazing, as part of definition of 'agriculture'; there is no need to seek succour from any other definition which was sought to be introduced at any later point of time by way of amendment under the Amendment Act of 1974. [Para 46] [554-D-E, F-H]

1.5. Inasmuch as the invocation of the Amendment Act of 1974 cannot be made having regard to its subsequent emergence, namely, 01.04.1976 i.e. after the coming into force of Act, 1976 as from 17.02.1976, the position that prevailed under the unamended Act of 1960 has to be considered, in order to find out whether the 1960 Act is applicable in respect of the lands held by the respondent for the purpose of its enforcement or otherwise against the respondent. [Para 53] [558-D-E]

1.6. The definition of 'agriculturist' u/s. 2(3) and the expression "to cultivate" as defined u/s. 2(11), as well as, the expression "to cultivate personally" as defined u/s. 2(12) of the Act, considered together, make the position clear that even a person cultivating the lands by one's own labour or by any other member of one's family or under the personal supervision of oneself or any member of ones' family by hired labour or by servants on wages payable in cash or kind would nonetheless fall within the four corners of the expression "agriculturist". Therefore, the expression "agriculturist" used in the definition clause u/s 2(3) or "agriculture" u/s. 2(1) is wide enough to include the respondent who though was once a 'Ruler' and was not tilling the land by himself would still fall within the definition of 'agriculturist' when such agricultural operation, namely, cultivation of land is carried out with the support of any one of his family members by supervising such operation or by engaging any labour to carry out such cultivation. [Para 54] [558-F-H; 559-A-C]

1.7. This Court is, therefore, of the firm view that 'bid land', the nomenclature of which was categorically admitted by the respondent and having regard to its nature and purpose for which it was put to use would squarely fall within the definition of 'agriculture' as defined u/s. 2(1) of the Act of 1960 as it originally stood unaffected by the coming into force of the Act of 1976 as well as the Amendment Act of 1974. In the result, its application to those 'bid lands' held by the respondent cannot be thwarted. [Para 54] [559-D-E]

2.1. The definition of 'bid land' u/s. 2 (6) of the Saurashtra Act No. XXV of 1951 clearly stated that it would refer to the lands used for grazing of cattle and for cutting grass for the use of cattle. The said definition was consistently maintained in the Saurashtra Act No.XXVI of

1951 [s.2(ii)], as well as, Saurashtra Act No.III of 1952 [s.2(a)]. [Para 46] [554-C-D]

2.2. 'Bid land' was one type of land held by Girasdars and Barkhalidars by way of grant and it was in that context the character of 'bid land' was defined for the purpose of ascertaining the total extent of land held by each of the Girasdar and Barkhalidar. The extinguishment of the rights of Girasdars and Barkhalidars as well as the Rulers does not mean that the definition assigned to 'bid land' should be restricted in respect of those specific persons alone and cannot be applied in general for any other purpose. [Para 49 and 52] [556-C-D; 557-D-E]

2.3. The definition of 'bid land' has to be considered *de hors* the ownership or in whose possession such land remains or vests on any particular date. The character of 'bid land' cannot vary simply because it is in the hands of Girasdars and Barkhalidars or with any other person including a former Ruler. Though Saurashtra Acts Nos. III of 1952, XXV of 1951 and XXVI of 1951 pertain to the estates held by Girasdars and Barkhalidars as well as the Rulers of the erstwhile Saurashtra State, the definition of 'bid land' contained in those legislations could however be taken into account for the purpose of understanding the meaning of 'bid land'. Once the 'bid land' can be defined to mean such land used for grazing of cattle or for cutting grass for the use of cattle irrespective of the nature of possession of such lands with whomsoever it may be, a 'bid land' would be a 'bid land' for all practical purposes. There is nothing to show that a 'bid land' is capable of being defined differently or that it was being used for different purpose by different persons. [Para 48 and 52] [555-E-F; 557-G-H; 558-B-C]

3.1. By virtue of s. 1(2) of the Urband Land Ceiling

Act, 1976, the Act was applied to the whole of the State of Gujarat. Under s. 2(a), the appointed day was defined to mean in relation to any State to which the Act applied in the first instance, the date of its introduction in Parliament, which was admittedly 17.02.1976. Under s. 2(n) what is an 'urban agglomeration' has been defined and it is not in dispute that district Rajkot where the lands in question situate falls within the definition of urban agglomeration mentioned in Schedule 1 to the Act. Under s. 2(o) of the 1976 Act, 'urban land' has been defined to mean any land situated within the limits of an urban agglomeration referred to as such in the Master Plan. However, it does not include any such 'land' which is mainly used for the purpose of 'agriculture'. Under s. 2(q) 'vacant land' has been defined to mean land not being mainly used for the purpose of agriculture in an urban agglomeration subject to other exclusions contained in the said sub-clause (q). [Para 39] [549-H; 550-A-C]

3.2. The definition of 'urban land' again makes the position clear that any land situated within the urban agglomeration referred to as such in the Master Plan would exclude any such land which is mainly used for the purpose of 'agriculture'. Under Explanation (A) to s. 2(o) such of those lands which are used for 'raising of grass' stood excluded from the use of 'agriculture'. It is worthwhile to note that the 'land used for grazing' has however not been specifically excluded from the definition of 'agriculture' in Explanation (A). The conspectus consideration of the provisions leads to the conclusion that the apparent purport and intent, therefore, was to exclude lands used for agriculture from the purview of 1976 Act, which would enable the holders of lands of such character used for agriculture to be benefited by protecting their holdings even if such lands are within the urban agglomeration limits and thereby depriving the competent authority from seeking to acquire

those lands as excess lands in the hands of the holder of such lands. [Para 44] [552-G-H; 553-A-C]

3.3. The conspectus consideration of the various provisions of the 1976 Act considered in the light of the object and purport of the 1960 Act which was intended for equal distribution of agricultural lands to the landless poor agriculturists, the application of the said Act will have to be independently made and can be so applied as it stood prior to the coming into force of the 1976 Act as from 17.02.1976. At this juncture it will have to be noted and stated that the subject, namely, the 'land' being an item falling under Entry 18 of List II of Schedule VII to the Constitution, by virtue of the so-called surrender of power of legislation in respect of the said entry namely 'land' by way of Central Legislation, namely, the 1976 Act to be enacted by Parliament pursuant to a State resolution by invoking Art.252 (1) of the Constitution, any subsequent legislation by way of Amendment or otherwise with regard to the said Entry, namely, 'land' will be directly hit by the specific embargo contained in Art.252 (2) of the Constitution. [Para 45] [553-F-H; 554-A-B]

3.4. As regards the Amendment Act, 1974, the date of passing of the Act was irrelevant and what was relevant was the date when the Act was notified, namely, 01.04.1976. Thus, the amendment came into effect only from 01.04.1976 i.e. after the coming into force of the 1976 Act, namely, 17.02.1976. [Para 42] [552-C-D]

3.5. There is no conflict in the stand of the appellant while dealing with the nature of land held by the respondent which was earlier dealt with under the 1960 Act which came to be considered by the authorities under the 1976 Act, pursuant to the return submitted by the respondent on 13.08.1976 u/s. 6(1) of the 1976 Act. Even according to the respondent, the subject land having been classified as 'agricultural land' stood excluded from

the application of the provisions of the 1976 Act though lying within the urban agglomeration area. It was, therefore, axiomatic that *de hors* the implication of the provision of the 1976 Act by virtue of the character of the land held by the respondent, the application of the Act of 1960, as it originally stood prior to 17.2.1976 was imperative. Such a legal consequence existed. Even accepting that being agricultural land lying within the urban agglomeration, the application of the 1976 Act stood excluded, there would not be any scope at all for the respondent to claim on that score that the application of the Act of 1960 should also be excluded. Therefore, taking note of the categorical stand of the respondent himself, having claimed exclusion of such of those lands which were classified as 'agricultural land', which included 'bid land' as well from the application of the provisions of the 1976 Act, the authorities competent under the provisions of such other enactments which would govern such agricultural lands would be free to exercise their powers under these enactments. It can never be said that there would be a vacuum in so far as the application of any statute over the lands held by the respondent that have been classified as 'agricultural land'. [Para 69, 70] [569-C-D, F-H; 570-A-D]

3.6. Therefore, the legal position that would emerge would be that going by the stand of the respondent, his lands to an extent of 579 acres, 27 Gunthas being 'agricultural land' if stood excluded from the application of the provisions of the 1976 Act, such lands were already governed by the provisions of the Act of 1960 as it originally stood and applied and there can be no demur to it. [Para 70] [570-D-E]

3.7. The Act of 1960 in its un-amended form applied on its own and continued to hold the field and was in operation over the 'agricultural lands' over which the

implication of the 1976 Act had no effect. The said legal position has to be necessarily understood in the said manner and cannot be stated in any other manner. [Para 71] [571-D-E]

Union of India & Ors. Vs. Valluri Basavaiah Chowdhary & Ors. **1979 (3) SCR 802 = (1979) 3 SCC 324 – held inapplicable**

State of Bihar Vs. Sir Kameshwar Singh **1952 SCR 1056 = AIR 1952 SC 252 – referred to**

3.8. This Court holds that the situation has now come where the position has to be made loud and clear to state that the 1976 Act would govern only such of those lands which would fall within its area of operation within urban agglomeration to the specific exclusion of the agricultural lands and consequently the continued application of the un-amended Act of 1960 would remain without any restriction. In *Thumati Venkaiah's* case this Court made it clear that Parliament enacted the Central Act with a view to impose ceiling on vacant land other than the land mainly used for the purpose of agriculture in an urban agglomeration. [Para 74 and 76] [574-C-D; 577-E-F]

Thumati Venkaiah and Others Vs. State of Andhra Pradesh and Others **1980 (3) SCR 1143 = (1980) 4 SCC 295 – relied on**

3.9. In the instant case, since as per the un-amended Act of 1960, 'bid land' held by the respondent fell within the definition of 'agriculture' u/s 2(1) and consequent definition of 'land' in s. 2(17) thereof, the determination of holding of such excess agricultural land under the said Act of 1960 prior to the coming into force of the Act, 1976 should be operated upon. [Para 78] [580-B-C]

4. The Amendment Act of 1974, which was notified

as from 01.04.1976, does not in any way affect the application of 1960 Act as it originally stood. From the definition of 'agriculture' u/s. 2(1), the definition of 'agriculturist' u/s. 2(3) along with the expressions 'a person who cultivates land personally' and the definition of 'land' u/s. 2(17) of the unamended Act of 1960, it is evident that the legislature intended and did include 'lands' held by 'agriculturist' where grass is raised or used for grazing purposes as part of agricultural land which was in the possession of agriculturist. Such lands where grass is grown or used for grazing purpose are always known as 'bid land'. Such 'bid land' was ultimately brought within the definition of 'land' u/s. 2(17) of the Act of 1960. Therefore, even by keeping aside the implication of the wider definition which was introduced by the Amendment Act of 1974 in regard to 'bid lands' and going by the definition of 'agriculture' and 'land' u/ss. 2(1) and 2(17) of the Act of 1960, there is no difficulty in coming to a definite conclusion that such definition contained in the Act as it originally stood did include 'bid lands' which lands were exclusively meant for cutting grass for cattle or used for grazing purposes. Therefore, there was no necessity for this Court to draw any further assistance either from the Objects and Reasons or from the provisions of the Amendment Act of 1974 in order to hold that 'bid lands' were part of agricultural land governed by the provisions of the Act of 1960. [Para 55 and 59] [559-F; 561-E-H; 562-A-B]

Pathumma & Others Vs. State of Kerala & Ors. **1978 (2) SCR 537 = (1978) 2 SCC 1 – referred to**

5. The decision in *Nagbhai Najbhai Khackar* is clear to the pointer that irrespective of the definition of 'bid land' under the Amendment Act 1974, having regard to the definition of 'bid land' under Act III of 1952, such land would fall within the expression of 'agricultural land' as

defined in s. 2(1) of the Act of 1960. The decision in *Nagbhai Najbhai Khackar* **is for the simple proposition as to how a land where grass is raised or used for grazing purposes is to be included under the definition of 'agriculture' and consequently within the definition of 'land' as provided u/ss. 2(1) and 2(17) of the Act of 1960. Therefore, non-consideration of the implication of Act, 1976 in the said decision does not make any difference. [Paras 63 and 66] [564-D-E; 566-G-H; 567-A]**

Nagbhai Najbhai Khackar Vs. State of Gujarat **2010 (11) SCR 414 = (2010) 10 SCC 594 – relied on.**

London Jewellers Limited Vs. Attenborough **(1934) 2 K.B. 206;** *Jacobs Vs. London County Council* **(1950) 1 All E.R. 737;** *Behrens and another Vs. Bertram Mills Circus Ltd*. **(1957) 1 All E.R. 583 – referred to.**

6. The principle of *res judicata* is governed by s. 11 of the Code of Civil Procedure, 1908. Applying the ingredients set out in the said provision, the respondent is bound to show that the issue which was directly and substantially involved between the same parties in the former suit was tried in the subsequent suit, in order to fall within the principles of *res judicata*. Applying the substantive part of s. 11 of C.P.C. it cannot be said that any of the ingredients set out therein are fulfilled in order to apply the principle of *res judicata*. The parties in the Special Civil Application No. 941 of 1980 and SCA No. 15529 of 1999 are entirely different, the fact in issue would disclose that the said cases were based on entirely different set of facts and circumstances. [Para 82] [582-F-H; 583-A]

Palitana Sugar Mills (P) Ltd. and Another Vs. State of Gujarat and Others **- 2004 (5) Suppl. SCR 552 = (2004) 12 SCC 645– referred to**

7. As regards the concept of eclipse in relation to the Act of 1960, as it originally stood as well as after the Amendment Act of 1974 by virtue of the coming into force of the 1976 Act w.e.f. 17.02.1976 and subsequent repeal of the 1976 Act in the year 2000, suffice it to say that once the 1976 Act came to be repealed, whatever constitutional embargo that was existing as against the Act of 1960 as well as the Amendment Act of 1974 ceased to exist and the Act would operate in full force. [Para 83] [583-B-C; 584-D-E]

M.P.V. Sundararamier & Co. vs. The State of Andhra Pradesh & Another **1958 SCR 1422 – referred to**

8. Therefore, this Court holds that the orders of the appellants impugned before the High Court were fully justified. The order of the Single Judge as well as the impugned judgment of the Division Bench are set aside. The judgment dated 08.09.1989 passed by the Gujarat Revenue Tribunal in Revision Application No.TEN.B.R.4/84 confirming the orders of the Deputy Collector and Mamlatdar and A.L.T in so far as bid lands in survey No.111/2 admeasuring 30 acres, 30 Gunthas and survey No.111/3 admeasuring 579 acres, 27 Gunthas stands restored. [Para 78 and 84] [580-C; 584-F-C]

Case Law Reference:

1978 (2) SCR 537	**referred to**	**Para 58**
2010 (11) SCR 414	**relied on**	**Para 60**
(1934) 2 K.B. 206	**referred to**	**Para 63**
(1950) 1 All E.R. 737	**referred to**	**Para 63**
(1957) 1 All E.R. 583	**referred to**	**Para 63**
(2010) 10 SCC 594	**referred to**	**Para 65**
1979 (3) SCR 802	**held inapplicable**	**Para 72**

1952 SCR 1056	**referred to**	**Para 72**
1980 (3) SCR 1143	**relied on**	**Para 75**
2004 (5) Suppl. SCR 552	**referred to**	**Para 80**
1958 SCR 1422	**referred to**	**Para 83**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 612 of 2002.

From the Judgment & Order dated 11.10.2000 and 20.10.2000 of the Division Bench of the High Court of Gujarat at Ahmedabad in Letters Patent Appeal No. 579 of 2000 in Special Civil Application No. 4015 of 1990.

Soli J. Sorabjee, Preetesh Kapoor, Hemantika Wahi, Jesal and Mehernaz Mehta for the Appellants.

Shekhar Naphade, Huzefa A. Ahmedi, Anip Sacthey, Mohit Paul, Shagun Matta, Shubhangi Tuli for the Respondent.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. The State of Gujarat and the Mamlatdar & Agriculture are the appellants. The appellants are aggrieved by the judgment of the Single Judge of the High Court of Gujarat at Ahmedabad dated 11.10.2000 and the final order of the Division Bench dated 20.10.2000 passed in Letters Patent Appeal No.597/2000 in Special Civil Application No.4015 of 1990. By the said impugned judgment and the final order, the Letters Patent Appeal preferred by the appellants came to be dismissed confirming the judgment of the learned Single Judge passed in Special Civil Application No.4015 of 1990 dated 06.05.1999.

2. The second appellant herein initiated proceedings under the provisions of The Gujarat Agricultural Lands Ceiling Act, 1960 (hereinafter called as 'the Act of 1960') and after hearing the interested party, passed an order dated 24.08.1982 in

Ceiling Case No.2 of 1976 holding that the land to an extent of 587 acres 35 Gunthas was in excess of ceiling limit and the respondent was entitled to retain only balance land i.e. 51 acres.

3. The respondent preferred an appeal under Section 35 of the 1960 Act to the Deputy Collector, Rajkot. The Deputy Collector dismissed the appeal by an order dated 10.11.1983. The respondent preferred a revision under Section 38 of the Act of 1960 which was registered as TEN.B.R.4/84 before the Gujarat Revenue Tribunal. The Gujarat Revenue Tribunal by its judgment dated 08.09.1989 partly allowed the revision and directed that Randarda lands admeasuring 40 acres to be included in the total holding, that Bhomeshwar Temple admeasuring 12 acres 34 Gunthas to be excluded from the holding of the respondent and remanded the matter back to the second appellant for taking evidence regarding the age of the members of the family.

4. Aggrieved by the order of the Gujarat Revenue Tribunal, the respondent preferred the writ petition in Special Civil Application No.401a 5 of 1990. Before the learned Single Judge, the respondent took the stand that his lands were covered by the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter called the 'Act, 1976') and was not governed by the Act of 1960. In fact, the said stand of the respondent was raised for the first time in the writ petition. The stand of the respondent was accepted by the learned Single Judge and by the judgment and order dated 06.05.1999 passed in Special Civil Application No.4015 of 1990, the judgment and order of the Gujarat Revenue Tribunal dated 08.09.1989 in Revision Application No.TEN.B.R.4/84 was set aside and the Rule was made absolute.

5. The appellants preferred Letters Patent Appeal No.597/ 2000 and by the order impugned in this civil appeal, the said LPA having been dismissed, the appellants have come forward with this appeal.

6. We heard Mr. Soli J. Sorabjee, learned senior counsel for the appellants and Mr. Shekhar Naphade, learned senior counsel for the respondent. Mr. Soli J. Sorabjee, learned senior counsel for the appellants in the first instance traced the existence of the Act of 1960 as it originally stood which was enforced on 15.06.1961 and, thereafter, the initiative taken by the Gujarat State Legislative Assembly by passing a resolution on 14.08.1972 under Article 252 (1) of the Constitution of India authorizing the Parliament to legislate with respect to 'imposition of ceiling on the holding of urban immovable property'. Learned senior counsel also referred to the amendment passed by the State Legislature to the definition of 'land' in the Act of 1960 by way of 'removal of doubts' to the expression 'Bid lands' also to be included in the definition of 'land' on 23.02.1974 which amendment was notified on 01.04.1976 under the Gujarat Agricultural Lands Ceiling (Amendment) Act, 1972. Learned senior counsel also brought to our notice the coming into force of the Act, 1976 on and from 17.02.1976.

7. While elaborating his submissions on the various provisions contained in the different enactments, in the foremost, the learned senior counsel referred to the expressions 'agriculture' under Section 2(1) and 'land' under Section 2(17) of the un-amended, Act of 1960. Learned counsel also referred to Section 6 which sought to fix the ceiling on holding of such agricultural land. In that context, learned senior counsel brought to our notice the Statement of Objects and Reasons for bringing out the Gujarat Agricultural Lands Ceiling (Amendment) Act, 1972 (being Gujarat Act No.2 of 1974) (hereinafter called the Amendment Act, 1974) wherein, inter alia, it sought to remove doubts relating to 'Bid lands' of former Princes, as well as, Girasdars and Barkhalidars in the Saurashtra area which were duly covered under the definition of 'land' and submitted that it was only with a view to remove doubts that the Amendment Act was brought out and that it was not by virtue of the said amendment alone 'Bid lands' fell within the definition of 'land'.

8. In other words, according to learned senior counsel, even as per the definition of 'land' under Section 2(17) read along with the definition of "agriculture" under Section 2(1) of the un-amended Act of 1960, 'Bid lands' were duly covered within the said expression of 'land' and the Amendment Act, 1974 only sought to remove any doubt in the mind of anyone as regards the character of the 'Bid lands'.

9. The learned senior counsel then referred to Section 2(q), namely, the definition of 'vacant land' and Section 2(o), the definition of 'urban land' under the provisions of the Act, 1976 to contend that even going by the said definitions, such land within the urban agglomeration which fall within the definition of 'agricultural land' stood excluded for the purpose of application of the Act, 1976.

10. Learned senior counsel also brought to our notice the definition of 'Bid land' under Section 2(a) of the Saurashtra Estates Acquisition Act, 1952 (hereinafter called as the "Saurashtra Act No. III of 1952") as well as the definition of the very same expression, namely, 'Bid land' under the Saurashtra Land Reforms Act, 1951 (hereinafter called as the "Saurashtra Act No.XXV of 1951) as well as Saurashtra Barkhali Abolition Act (hereinafter called as the "Saurashtra Act No.XXVI of 1951) and contended that even long prior to the Amendment Act 1974 'Bid land' has been defined to mean a land used by Girasdars or Barkhalidars for grazing cattle or for cutting grass, for the use of cattle, meaning thereby that such lands were nonetheless 'agricultural lands'. In the light of the above statutory provisions relating to the 'Bid land' learned counsel submitted that de hors the Amendment Act 1974 which came to be notified on 01.04.1976 'Bid land' fell within the definition of 'land' under the Act of 1960 and consequently there was no scope for the respondent to fall back upon the Act, 1976 in order to challenge the order passed by the second appellant which ultimately came to be confirmed by the Gujarat Revenue Tribunal which was set aside by the judgment of the Division Bench in the order impugned in this appeal.

11. The learned senior counsel further contended that this very issue was considered by this Court in a recent decision in *Nagbhai Najbhai Khackar Vs. State of Gujarat* reported in (2010) 10 SCC 594 which has taken the view that the definition of 'land' under Section 2(17) read along with Section 2(1) of the Act of 1960 'Bid land' would fall within the definition of 'agriculture' and consequently governed by the definition Section 2(17) which define the expression 'land' and, therefore, the ceiling limit prescribed under Section 6 of Act of 1960 would be applicable to the 'Bid lands' of the respondent. The learned senior counsel also relied upon the decision of the Privy Council in *London Jewellers Limited Vs. Attenborough* - (1934) 2 K.B. 206; the House of Lords decision in Jacobs Vs. London County Council - (1950) 1 All E.R. 737; and the Queens Bench decision in *Behrens and another Vs. Bertram Mills Circus Ltd.* - (1957) 1 All E.R. 583 for the proposition that wherein a decision more than one reason is assigned to support the ultimate conclusion, both the reasons will have binding effect and that one cannot be excluded under any pretext. The learned senior counsel also relied upon *Smt. Somawanti and others Vs. State of Punjab and others* - AIR 1963 SC 151 wherein it was held that the binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided. The learned senior counsel, therefore, contended that in the recent judgment of this Court in *Nagbhai Najbhai Khackar* (supra) when the ultimate decision was reached based on two grounds, both the grounds, would be the ratio of the decision and, therefore, the said decision will be complete answer to the question involved in this appeal.

12. In the alternate learned senior counsel submitted that the argument of the respondent which weighed with the learned Single Judge as well as the Division Bench of the High Court in the impugned judgment based on the Act, 1976 vis-à-vis the Act of 1960 read along with Amendment Act 1974 was not

sustainable. According to learned senior counsel, in the first place, there could not be any repugnancy as between the Act of 1960 and the Act, 1976, inasmuch as the amendment of the definition of 'land' in the Act of 1960 was amended as early as on 23.02.1974, namely, long prior to the coming into force of the Act, 1976. According to learned senior counsel the relevant date is the date when the Amendment Act came to be passed in the Assembly on 23.02.1974 and the subsequent notification dated 01.04.1976 bringing into effect the Amendment Act 1974 was not the relevant date. In other words, according to him, when once the amending legislation was passed in the Assembly in the year 1974 the subsequent notification though was made in the year 1976 for bringing into force the amendments, the relevant date would be the date when the Act was passed and not the date when it was notified. The learned counsel then contended that in any case the resolution dated 14.08.1972 was passed under Article 252(1) of the Constitution relating to the legislation with respect to ceiling on 'urban immovable property' and it had nothing to do with the 'agricultural land'. The learned counsel, therefore, contended that the conclusion of the learned Single Judge, as well as, that of the Division Bench in having non-suited the appellants on the specific ground that by virtue of the provisions of the Act, 1976 the appellants' action in proceeding against the respondent under the Act of 1960 was null and void was unsustainable in law. Learned senior counsel contended that once the Act, 1976 stood repealed, as a corollary, the Act of 1960 with all the Amendments carried to it would automatically get revived and it will not become a dead letter as contended on behalf of the respondent. Learned senior counsel referred to the decision of this Court in *M.P.V. Sundararamier & Co. Vs. The State of Andhra Pradesh & another* - 1958 SCR 1422 in support of the said submission. Learned senior counsel also relied upon *Thumati Venkaiah and others Vs. State of Andhra Pradesh and others* - (1980) 4 SCC 295 for the said proposition. The learned counsel, therefore, contended that, in the light of the recent decision of this Court in *Nagbhai Najbhai Khackar*

(supra), which squarely covers the case on hand, the order impugned is liable to be set aside.

13. As against the above submission, Mr. Naphade, learned senior counsel prefaced his submission by contending that the stand of the appellants that 'Bid lands' were agriculture lands under the Act was not correct. Learned senior counsel pointed out that the appellant initiated proceedings against the respondent both under the Act of 1960, as well as, the Act, 1976 and that in fact they were also keen to proceed under the Act, 1976. While referring to the submission of learned senior counsel for the appellant Mr. Naphade contended that the argument based on Article 252 of the Constitution and its effect was almost given up by the appellant. The learned senior counsel after referring to the unamended Act of 1960 and the definition of 'agriculture', 'agriculturist' and 'to cultivate personally' and the definition of 'agricultural land' and 'Bid Land' of Girasdar under the Saurashtra Act No.XXV of 1951 contended that the various definitions under the Act of 1960 were more concerned with the 'agriculturists' and their close proximity to the land held by them, while under the Saurashtra Reforms Act the stress was more on the lands held by the grantees as tenure holders in some form or the other. In that context, learned senior counsel submitted that the definition between the 'Bid land' and the 'agriculture land' was clearly known to the Legislature as could be seen from the definition so drawn in the provisions contained under the Act of 1960, as well as, the Saurashtra Land Reforms Act. According to learned senior counsel, the reference to the description of 'Bid lands' under Saurashtra Act No.XXV of 1951 and the 'Act XXVI of 1951 disclose that the Legislature was conscious of the fact that the Act of 1960 did not include 'Bid lands' in the definition of 'land'.

14. While referring to the amendment which was brought out to the definition of 'land' in the Act of 1960, in particular Sections 4, 5 and 10 of the Amendment Act by which amendment was brought into Sections 2(1) and 2(17) and

introduction of Section 2(27A) in the principal Act the learned counsel contended that the intention of the Legislature to bring into effect certain consequences pursuant to the amendment after the specified date, namely, 01.04.1976 was clearly spelt out. According to learned counsel, it was not merely by way of removal of doubt that the Amendment Act of 1974 was brought in but a significant purport was intended in bringing out such amendments to take effect on and after 01.04.1976 which has been specifically mentioned in Section 2 (27A) which came to be introduced by Amendment Act of 1974.

15. The learned senior counsel then contended that even assuming that the Amendment Act of 1974 would apply to the case on hand, since the respondent did not fall under the definition of 'Ruler' as stipulated in Section 2(17)(ii)(d) of the Amended Act, the Act of 1960 cannot be applied to the case of the respondent. Learned senior counsel by referring to Article 366 of the Constitution pointed out that under sub-clause 22 of Article 366 a 'Ruler' has been defined to mean the Prince, Chief or other person who at any time before the commencement of the Constitution (26th Amendment) Act, 1971 was recognized by the President as the 'Ruler' of an Indian State or any person who at any time before such commencement was recognized by the President as the successor of such 'Ruler' and a person thus fulfill the above criteria alone would come within the definition of 'Ruler'. The learned senior counsel contended that the respondent was never recognized in accordance with such constitutional provision and, therefore, the said Section 2(17)(ii)(d) of the Amended Act can have no application to the case of the respondent. It was further contended that the respondent would neither fall under the category of Girasdar or Barkhalidar or in the category of 'Ruler' and, therefore, even if the Amended Act of 1974 is applied, the respondent stood excluded from the coverage of the Act.

16. The learned senior counsel, therefore, contended that the argument that 'Bid lands' were already governed by the

definition of 'agriculture' (i.e.) long prior to the coming into force of the 1974 Act, namely, from 01.04.1976 cannot be accepted. A fortiori, learned senior counsel contended that when the statute is clear in its ambit and scope and there being no ambiguity, there was no necessity to rely upon or refer to the Objects and Reasons to understand the purport of the enactment and relied upon the Constitution Bench decision of this Court reported in *Pathumma & Others Vs. State of Kerala & Ors.* reported in (1978) 2 SCC 1. The learned senior counsel, therefore, contended that whatever argument now raised based on the expression 'Bid lands' on behalf of the appellant may hold good only after 01.04.1976 and that the heavy reliance placed upon *Nagbhai Najbhai Khackar* (supra) cannot also come to the aid of the appellant since the various principles set out in the said decision were solely based on the Amendment Act, 1974 as has been specifically spelt out in various paragraphs of the said decision. The learned senior counsel pointed out that the said decision, does not, apply to the facts of this case, inasmuch as, there was no reference to the implication of the Act, 1976 which came into effect as early as on 17.02.1976 vis-à-vis the Act of 1960 and the said Act being an Act of Parliament, the appellant was bound by the provisions contained therein which would negate the entire submission made on behalf of the appellant.

17. According to learned senior counsel when the application of Act, 1976 was not the subject matter of consideration while deciding the scope of the amendment Act of 1974 in the judgment reported in *Nagbhai Najbhai Khackar* (supra), reliance placed upon the said decision on behalf of the appellant is of no relevance.

18. The next submission of Mr. Naphade was that the Act, 1976 and the Act of 1960 were operating in their respective fields, though relatable to holding of lands. Learned counsel after making reference to Section 1(2), 2 (A), 2 (C), 2(N) and the Schedule to the Act, 1976 pointed out that Rajkot where

the disputed land situate, fell within the urban agglomeration area, that the land in question is admittedly a land referred to in the Master Plan as has been stipulated under Section 2(o) of the Act, 1976 and, therefore, there is a world of difference for considering the land classified as 'agricultural land' under both the enactments. According to learned senior counsel, having regard to the Explanations A, B & C of Section 2(q) of the Act, 1976 a conscious departure has been made with reference to the description of 'agricultural land' inasmuch as under the said Act it must be shown that the land was being 'used' for agricultural purposes in contradistinction to the Act of 1960 where a land simpliciter falling under the definition of 'agriculture' would alone be the relevant factor. Mr. Naphade in his submissions contended that having regard to the emergence of Act, 1976 on and from 17.02.1976 and by virtue of the Constitutional mandate, the Act of 1960 ceased to have any effect on any 'agricultural land' in the State of Gujarat. In other words, according to learned senior counsel, since admittedly the lands belonged to the respondent were lying within the urban agglomeration specified under the Schedule to the Act, 1976 the application of Act of 1960 ceased to have any effect on the said land and, therefore, the appellant had no authority to invoke the provisions of the Act of 1960 for the purpose of acquisition.

19. Learned senior counsel contended that the 1974 Amendment to the Act of 1960 was a 'still born child' inasmuch as it came into effect only from 01.04.1976 whereas the Act, 1976 was brought into force on 17.02.1976 itself and was holding the field. The learned counsel stressed the point that the date of passing of the Act was not the relevant date and what was relevant was the date of implementation of the Act which legal principle was well settled as per the decision reported in *In the matter of the Hindu Women's Rights to Property* Act, 1937 - AIR 1941 F.C. 72.

20. While meeting the argument of Shri Soli Sorabjee, the

contention of Mr. Naphade on Article 252 was that having regard to the invocation of the said Article by the State of Gujarat, there was a virtual surrender of its power to legislate and thereby it was denuded of bringing out any legislation afresh or by way of amendment on the subject governed by this legislation brought out pursuant to invocation of Article 252 of the Constitution. In that context, learned senior counsel brought to our notice Section 103 of the 1935 Act which was the comparative provision to Article 252 of the Constitution and pointed out that under Section 103 of the 1935 Act while the States could approach the Federal Government for bringing out a legislation, having regard to the specific provisions contained in the said Section, the power to deal with such legislation for any future contingency was retained by the State Government, while on the contrary the framers of our Constitution even after a specific point raised in the Constituent Assembly proceedings for retention of such a power by the State Government, Article 252 (2) ultimately came to be framed making it clear that once the power of the legislative competence of the State was surrendered to the Parliament, thereafter any future legislation on the subject could only be dealt with by the Parliament and the state was completely denuded of such power. In support of the said submission, learned senior counsel relied upon *M/s R.M.D.C. (Mysore) Private Ltd.* (supra) and *State of U.P. Vs. Nand Kumar Aggarwal and others* - (1997) 11 SCC 754.

21. Learned senior counsel after referring to the orders of the Mamlatdar dated 24.08.1982, the Deputy Collector dated 10.11.1983 and the Gujarat Revenue Tribunal dated 08.09.1989 as compared to the return filed by the respondent under Section 6 of the Act, 1976 dated 13.08.1976, the order of the competent authority dated 25.05.1983 and the order of the Tribunal under the Act, 1976 dated 18.09.1991 contended that even according to the appellants themselves as stated in their reply affidavit no agricultural operation was carried out in survey No.111/2-30 and thereby virtually admitting the position that the lands in

question can never be held to be 'agricultural lands'. The learned counsel contended that the appellants were blowing hot and cold, that for the purpose of coverage under the Act, 1976 they wanted to contend that the lands were not agricultural land, while when it came to the question of coverage under the Act of 1960, they contended that the very same lands as 'Bid lands' would fall within the definition of 'agriculture'. The learned counsel, therefore, submitted that the impugned judgment of the High Court was well justified and does not call for interference.

22. Lastly, it was contended by the learned senior counsel for the respondent that the case of the appellant is also hit by the principle of res judicata. The learned senior counsel by referring to an order passed by the Deputy Collector, Bhavnagar relating to Bhavnagar 'Bid lands' in his order dated 09.11.1979 specifically held that the Act of 1960 was not applicable to the said lands and that only Act, 1976 would apply. It was pointed out that when the issue went before the High Court of Gujarat in Special Civil Application No.941 of 1980 a joint affidavit of two Deputy Collectors dated 06.10.1980 came to be filed with reference to Bhavnagar 'Bid lands' wherein it was reiterated on behalf of the Government that only Act, 1976 would apply to 'Bid land' in urban agglomeration of Bhavnagar and that the Act of 1960 was not applicable. Learned senior counsel also referred to an affidavit dated 16.02.2000 filed by the Deputy Secretary, Revenue Department, Government of Gujarat in relation to Bhavnagar 'Bid lands' before the High Court of Gujarat in Civil Application No.15529/1999 in S.C.A. No, 10108/1994 wherein a clear stand was taken by the State Government that possession of Bhavnagar 'Bid land' not having been acquired and taken under the Act, 1976 when the Act was in force, after its repeal, there was no scope to take possession of those lands.

23. The learned senior counsel also referred to the decision of this Court in *Palitana Sugar Mills (P) Ltd. and another Vs. State of Gujarat and others* - (2004) 12 SCC 645

and contended that in a contempt petition filed at the instance of a purchaser of Bhavnagar 'Bid lands' this Court after tracing the history of the earlier litigation wherein it was concluded that Bhavnagar 'Bid lands' were controlled by the provisions of the Act, 1976 and not by the Act of 1960 and consequently the matter having been finally decided by the Courts and reached its finality the authorities cannot reopen the same. The learned senior counsel, therefore, contended that since the decision on the applicability of the Act of 1960 vis-à-vis the Act, 1976 in relation to 'Bid lands' of the 'Ruler' of erstwhile Bhavnagar State having been examined and ultimately concluded that in respect of such lands only the Act, 1976 would apply, in the case on hand as the lands in question were lying within the 'urban agglomeration' area, the said conclusion which reached its finality in this Court would operate as res judicata. The learned senior counsel contended that though this contention was raised before the High Court, the Division Bench after referring to the contention felt it unnecessary to decide the issue since the stand of the appellant was rejected on other grounds.

24. While meeting the last of the submission of learned senior counsel for the respondent, Mr. Soli J. Sorabji contended that the principle of res judicata can have no application to the case on hand since none of the earlier proceedings relating to Bhavnagar 'Bid lands' had anything to do with the lands of the respondent with reference to which alone we are concerned and, therefore, on that score itself the said contention should be rejected. According to learned senior counsel, the application of the principle of res judicata, as set out in Section 11 of CPC, was not fulfilled and, therefore, the said submission made on behalf of the respondent cannot be considered. The learned senior counsel pointed out to the specific facts which were referred to in the joint affidavits of two Deputy Collectors filed in S.C.A. No.941/1980 wherein it was specifically averred to the effect that since a long time to the knowledge of the land holder, the land in question were demonstrated or meant for residential purpose in the master plan which was prepared

since August 1976, that the land in question fell within the definition of 'urban land' under Section 2(o) of the Act, 1976 and, therefore, the overriding effect of Section 42 of the Act, 1976 excluded the application of the Act of 1960. The learned senior counsel contended that in the light of the above peculiar facts relating to Bhavnagar 'Bid lands' which ceased to be a 'Bid land' and was classified as residential plot in the Master Plan at the relevant point of time, the stand of the authorities as regards the exclusive application of Act, 1976 continued to be maintained even after the said Act came to be repealed. The learned senior counsel contended that it will be preposterous if a decision reached in regard to a case which was governed by its own special facts to apply the principle of res judicata to a different case where the fact situations are entirely different and in which case in no prior proceedings it was admitted by the authorities concerned that Act, 1976 alone would apply to the exclusion of the Act of 1960.

25. Having heard the eloquent submissions of Shri Soli J. Sorabjee, learned senior counsel for the appellant and the enlightening submissions of Shri Naphade, learned senior counsel for the respondent, we find that while the simple case of the appellant, namely, the State of Gujarat is that the respondents' lands being 'Bid lands' are agricultural lands and thereby governed by the provisions of Act of 1960, the whole endeavour of the respondent was that the lands were never classified as "agricultural lands", that they were indisputably "urban lands" governed by the provisions of the Act, 1976 and consequently the application of the Act of 1960 stood excluded. The enlightening submissions of the respective counsel oblige us to set out various legal principles highlighted before us in order to appreciate the respective submissions and thereby arrive at a just conclusion.

26. In the forefront, we want to make a detailed reference to certain relevant provisions of the Act of 1960 prior to its amendment and after its amendment, Saurashtra Act No.III of

1952, Saurashtra Act No.XXV of 1951, Saurashtra Act No. XXVI of 1951, Section 103 of The Government of India Act, 1935 and Article 252 of the Constitution. The relevant provisions under the unamended Act of 1960 are Section 2(1), Section 2(3), Section 2(11), Section 2 (12), Section 2(17) and Section 6. Under the amended Act of 1960, the relevant provisions are Section 2(1) (a) (b), (c), Section 2(17) (i) (ii) (a), (b), (c), (d) and Section (27A). Under Saurashtra Act No.III of 1952, the relevant provisions are Section 2(a), (b), (e), (f), Section 4 and Section 5(1), (2). Under Saurashtra Act XXV of 1951, the relevant provision are Sections 2(6), 2 (15) and 2(18). Under the Saurashtra Act No.XXVI of 1951, the relevant provision is Section 2 (ii).

27. For easy reference, the above provisions are extracted hereunder:

The Gujarat Agricultural Lands Ceiling Act, 1960

Section 2. Definitions- In this Act, unless the context requires otherwise-

(1) "agriculture" includes horticulture, the raising of crops, grass or garden produce, the use by an agriculturist of the land held by him or part thereof for grazing but does not include-

(i) the use of any land, whether or not an appenage to rice or paddy land, for the purpose of rab-mannure;

(ii) the cutting of wood, only;

(iii) dairy farming;

(iv) poultry farming;

(v) breeding of live-stock; and

(vi) such other pursuits as may be prescribed.

Explanation - If any question arises as to whether any land or part thereof is used for any of the pursuits specified in any of the sub-clauses (i) to (vi), such question shall be decided by the Tribunal;

(3) "agriculturist" means a person who cultivates land personally"

(11) "to cultivate" with its grammatical variations and cognate expressions means to till or husband the land for the purpose of raising or improving agricultural produce, whether by manual labour or by means of cattle or machinery or to carry on any agricultural operation thereon;

Explanation- A person who enters into a contract only to cut grass or to gather the fruits or other produce of trees, on any land, shall not on that account only, be deemed to cultivate such land;

(12) "to cultivate personally" means to cultivate land on one's own account-

(i) by one's own labour, or

(ii) by the labour of any member of one's family, or

(iii) under the personal supervision of oneself or any member of one's family by hired labour or by servants on wages payable in cash or kind but not in crop share;

Explanation-I.-A widow or a minor or a person who is subject to any physical or mental disability, or a serving member of the armed forces shall be deemed to cultivate land personally, if such land is cultivated by her or his servants or hired labour;

Explanation II.- In the case of a joint family, land shall be deemed to be cultivated personally, if it is so cultivated by any member of such family;

(17) "land" means land which is used or capable of being used for agricultural purposes and includes the sites of farm buildings appurtenant to such land;

Section 6. Ceiling on holding land - (1) Notwithstanding anything contained in any law for the time being in force or in any agreement usage or decree or order of a Court, with effect from the appointed day no person shall, subject to the provisions of sub-sections (2) and (3) be entitled to hold whether as owner or tenant or partly as owner and partly as tenant land in excess of the ceiling area.

(2) Where an individual, who holds land, is a member of a family, not being a joint family and land is also separately held by such individual's spouse or minor children, then the land held by the individual and the said members of the individual's family shall be grouped together for the purposes of this Act and the provisions of this Act shall apply to the total land so grouped together as if such land had been held by one person.

(3) Where on the appointed day a person holds exempted land along with other land then-

(i) if the area of exempted land is equal to or more than the ceiling area he shall not be entitled to hold other land; and

(ii) if the area of exempted land is less than the ceiling area, he shall not be entitled to hold other land in excess of the area by which the exempted land is less than the ceiling area.

(4) Land which under the foregoing provisions of this section a person is not entitled to hold shall be deemed to be surplus land held by such person.

The Gujarat Agricultural Lands Ceiling Act 1960 (After the amendment)

2. In this Act, unless the context requires otherwise-

(1) "agriculture" includes-

(a) horticulture,

(b) the raising of crops, grass or garden produce,

(c) the use by an agriculturist of the land held by him or part thereof for grazing

17. "land" means-

(i) in relation to any period prior to the specified date, land which is used or capable of being used for agricultural purpose and includes the sites of farm buildings appurtenant to such land;

(ii) In relation to any other period, land which is used or capable of being used for agricultural purposes, and includes-

(a) the sites of farm buildings appurtenant to such land;

(b) the lands on which grass grows naturally;

(c) the bid lands held by the Girasdars or Barkhalidars under the Saurashtra Land Reforms Act, 1951, the Saurashtra Barkhali Abolition Act, 1951 or the Saurashtra Estates Acquisition Act, 1952, as the case may be;

(d) such bid lands as are held by a person who, before the commencement of the Constitution (Twenty-Sixth Amendment) Act, 1971 was a Ruler of an Indian State comprised in the Saurashtra area of the State of Gujarat, as his private property in

pursuance of the covenant entered into by the Ruler of such State:

(27A) "specified date" means the date of coming into force of the Amending Act of 1972.

Under Saurashtra Act No.III of 1952 the relevant provisions are Section 2(a), (b), (e), (f), Section 4 and Section 5(1), (2):

"2. In this Act, unless there is anything repugnant to the subject or context-

(a) "Bid land" means such land as on the 17th April, 1951 was specifically reserved and was being used by a Girasdar or Barkhalidar for grazing cattle or for cutting grass:

(b) "cultivable waste" means cultivable land which has remained uncultivated for a period of three years or more before the 17th April, 1951

(c) xxx xxx xxx

(d) xxx xxx xxx

(e) "land" means land of any description whatsoever and includes benefits arising out of land and things attached to the earth, or permanently fastened to anything attached to the earth.

(f) words and expressions used but not defined, in this Act, and defined in the Saurashtra Land Reforms Act, 1951 and the Saurashtra Barkhali Abolition Act, 1951 shall have the meanings assigned to them in those Acts.

3. xxx xxx xxx

4. When a notification is issued by the Government in respect of an estate or any part thereof under section 3,

then, with effect from the date specified in the notification, the following consequences shall, in respect of that estate or part thereof, ensue, namely:-

(a) (i) all public roads, lanes, paths, bridges, ditches, dikes and fences on, or beside the same, the bed of the sea and/or harbours, creeks below high water mark, and of rivers streams, nalas, lakes, public wells and tanks, all bunds and palas, standing and flowing water and gauchars;

(ii) all cultivable and uncultivable waste lands (excluding land used for building or other non agricultural purposes),

(iii) all bid lands,

(iv) all unbuilt village site lands and village site lands on which dwelling houses of artisans and landless labourers are situated, and

(v) all schools, Dharmashalas, village choras, public temples and such other public buildings or structures as may be specified in the notification together with the sites on which such buildings and structures stand,

Which are comprised in the estates so notified shall, except in so far as any rights of any person other than the Girasdar or the Barkhalidar may be established in and over the same, and except as may otherwise be provided by any law, for the time being in force, vest in, and shall be deemed to be, with all rights in or over the same or appertaining thereto, the property of the State of Gujarat and all rights held by a Girasdar or a Barkahalidar in such property shall be deemed to have been extinguished and it shall be lawful for the Collector, subject to the general or

special orders of the Collector, to dispose of them as he deems fit, subject always to the rights of way and of other rights of the public or of individuals legally subsisting.

(b) A Girasdar or a Barkhalidar shall, subject to the provisions of this Act, be deemed to be an occupant in respect of all other land held by him.

5. (1) Notwithstanding anything contained in section 3, or section 4 -

(a) no bid land which is also uncultivable waste, wadas and kodias shall vest in, and be the property of the State of Gujarat

(b) no bid land comprised in the estate of a Girasdar who is considered to be of B and C class for the purpose of making rehabilitation grant under the Saurashtra Land Reforms Act 1951, or of a Barkhalidar, the total area of agricultural land comprised in whose estate does not exceed eight hundred acres, shall vest in and be the property of the State of Gujarat] and

(c) no bid land which is also cultivable waste or no village site land shall be acquired unless it is in excess of the requirements of the Girasdar or Barkhalidar in accordance with the rules to be made in this behalf; and

(d) in the case of Girasdari Majmu villages, one fourth of the total area of bid land in the village shall not be acquired.

(2) If any bid land or village site, land is not acquired under the provisions of sub-section (1) and such bid land or village site land is use by the Girasdar or Barkhalidar for a different purpose, it shall be liable to be acquired under the provision of section 4."

Under Saurashtra Act No.XXV of 1951, the relevant provisions are Sections 2 (6), 2(15) and 2(18). They are as follows:

"2. In this Act, unless there is anything repugnant in the subject or context:-

(6) "bid land" means such land as has been used by the Girasdar for grazing his cattle or for cutting grass for the use of his cattle.

(15) "Girasdar" means any talukdar, bhagdar, bhayat, cadet or mulgirasia and includes any person whom the Government may, by notification in the Official Gazette, declare to be a Girasdar for the purposes of this Act.

(18) "land" means any agricultural land, bid land or cultivable waste"

Under Saurashtra Act No.XXVI of 1951 the relevant provision is Section 2(ii).

2. In this Act, unless there is anything repugnant to the subject or context-

(i) xxx xxx xxx

(ii) "bid land" means such land as has been used by Barkhalidar for grazing his cattle or for cutting grass for the use of his cattle;"

28. In order to appreciate the contentions raised before us, we wish to make a specific reference to the Preamble as well as the object of the Act of 1960. The Preamble shows that the Act was contemplated and was brought into effect since it was felt expedient in public interest to make a uniform provision for the whole of the State of Gujarat and in particular in respect of restrictions upon holding agricultural land in excess of certain limits. The expediency so noted was for securing the

distribution of agricultural land to subserve the common good for the purpose of allotment of some lands to persons who are in need of land for agriculture and also to appreciate for other consequential and incidental matters. As far as the object of the Act was concerned, it is stated therein that the said enactment came to be enacted only for the purpose of fixing the ceiling area and not with any intention directly to interfere with the rights and liabilities of landlords and tenants.

29. Keeping the above perspective of the law makers in mind, when we examine Section 2(17) which defines the expression 'land' it means the land which is used or capable of being used for agricultural purposes including the sites of farm, building appurtenant to such land. Section 6 of the 1960 act imposes restriction in the holding of the land which has been defined under Section 2(17) of the Act which is in excess of the ceiling area. The ceiling area has been set out under Section 2(5) of the Act. The definition of 'land' in its cognates and expression is specific in its tenor and mentions about its usage as well as its capability of usage for agricultural purposes. The expression "agriculture" has been defined under section 2(1) of the act which inter alia includes horticulture, raising of crops, grass or garden produce and the use by an agriculturist of the land held by him either in full or part for grazing purposes. The definition of "agriculturist" under Section 2(3) read along with Section 2(11) and 2(12) which define the expression 'to cultivate' and 'to cultivate personally' make the position clear that it would include a person who indulges in the avocation of agriculture by way of cultivation of the land either by himself or through other persons again under the supervision of his own men.

30. A careful consideration of the above provisions under the Act of 1960 gives a clear idea that lands which are used as well as which are capable of being used for the purpose of agriculture including lands used for raising grass or either full or part of it used for grazing purposes would come within the

ambit of the Act, which in turn would be subject to the restrictions imposed for the purpose of ascertaining the ceiling limit. Consequently, the excess or surplus land in the holding of a person who is an agriculturist is to be ascertained in order to initiate and ultimately acquire such surplus land. Such acquisition as expressed in the Preamble to the Act would be for the purpose of equal distribution of land to other landless persons.

31. Keeping the above statutory provisions in mind, when we consider the respective submissions, the following broad legal principles are required to be dealt with by us.

(i) Whether 'Bid Land' would fall within the definition 'Land' read along with the definition of 'Agriculture' as defined under Sections 2(17) and 2(1) of the Act of 1960 ?

(ii) In order to ascertain the nature of description of 'Bid Land' can the definition of the said expression under the earlier statutes viz. Act No.XXV of 1951, Act No.XXVI of 1951 and Act No.III of 1952 can be imported ?

(iii) What is the implication of the Urban Land Ceiling Act, 1976 vis-à-vis the Act of 1960 in respect of 'Bid Land' ?

(iv) Whether the Amendment Act of 1974 which came into effect from 01.04.1976 and the definition of 'Bid Land' under the said Amendment Act of 1974 can be applied for the purpose of deciding the issue involved in this litigation ?

(v) Whether the ratio decidendi of this Court in Nagbhai Najbhai Khackar (supra) can be applied to the facts of this case ?

(vi) Whether the orders of the authorities under the

Act of 1960 impugned before the High Court were hit by the principles of Res Judicata ?

(vii) What is the effect of the repealing of the Urban Land Ceiling Act over the Act of 1960 ?

32. Though the definition of 'land' and 'agriculture' read together would include a 'land' used for raising grass or used for grazing purposes, the question for our consideration is whether 'Bid lands' can be brought within the scope of the said expression, namely, the definition of 'land' read along with the definition of 'agriculture' under the Act of 1960 as has been so construed by the authorities constituted under the provisions of Act of 1960 up to the level of Gujarat Revenue Tribunal. On behalf of the appellant it was contended that the subsequent amendment brought out under the 1974 amending Act which came to be notified on 01.04.1976 was only by way of clarification about 'Bid lands' in consonance with the definition of 'agriculture'. According to the respondent even such a clarification sought to be made under the amending Act 1974 by way of removal of doubts only revealed that as on the date when Act, 1976 which came into effect from 17.02.1976 'Bid lands' were not part of agricultural lands as defined under Section 2(1) read along with 2(17) of the 1960 Act.

33. Mr. Soli Sorabjee, learned senior counsel, to support the submission made on behalf of the appellant, would draw succor to the definition of the very same expression 'Bid land' under Act No.XXV of 1951 as well as Act No.XXVI of 1951 and Act No.III of 1952. Under Act XXV of 1951 in Section 2(6) definition of 'Bid land' has been defined to mean such land raised by Girasdar for grazing his cattle or for cutting grass for the use of his cattle. Under Section 2(18) of Act No.XXV of 1951, the definition of 'land' under said Act included 'Bid land'. The purport of the said enactment was to end Girasdar system and while doing so regulate the relationship between the Girasdars and their tenants and to enable the latter to become occupants of the 'land' held by them as tenants and

simultaneously to provide for the amount of compensation payable to Girasdars for the extinguishment of their rights. Whatever be the purport of the enactment, the definition of 'land' as defined under Section 2(18) and 'Bid land' as defined under Section 2(6) discloses that 'Bid land' would be a land which was treated on par with agricultural land and such land is none other than the land which is used for grazing by cattle as well as for cutting grass for the use of cattle.

34. With that when we come to the nature of description of 'Bid land' in the Act No.III of 1952, under Section 2(a) 'Bid land' has been defined to mean such land as on 17.04.1951 specifically reserved for being used by a Girasdar or Barkhalidar for grazing cattle or for cutting grass. Under Section 4 the manner of vesting of such of those lands described therein vested in the State and thereby assuming the character of the property of the State of Gujarat and consequently all rights held by Girasdars or Barkhalidars in such property deemed to have been extinguished. For our limited purpose, it will be sufficient to confine our consideration to the definition under Section 2 (a) of Act No.III of 1952 which defines 'Bid land'. As stated earlier 'Bid land' is a land used for grazing by cattle or for cutting grass in the tenure lands held by Girasdar or Barkhalidar. When we refer to Saurashtra Abolition Act 1951 i.e. Act XXVI of 1951 the definition under section 2 (ii) which defines 'Bid land' to mean such land as has been used by Barkhalidars for grazing his cattle or for cutting grass for the use of his cattle. The purport of the said enactment was for improvement of the land revenue administration and agrarian reforms which necessitated abolition of Barkhalidars tenure prevailing in certain parts of Saurashtra. Under Section 6(1) of Act XXVI of 1951, the right of allotment of land under the said act in favour of Barkhalidar is stipulated. The manner in which the application for allotment is to be made is also provided therein. Under sub-section (2) of Section 6 while making an application for allotment the details to be furnished by Barkhalidar has been set out wherein under clause (c) (iii) of sub clause (2) of Section 6 it is stipulated

that full particulars of a Barkhalidar's estate containing the area of agriculture also, 'Bid land' and 'cultivable waste' in his estate should be furnished. Apparently in order to fulfill the said obligation by a Barkhalidar, the definition of 'Bid land' has been set out in Section 2(ii) of Act No.XXVI of 1951.

35. Keeping the above statutory prescription relating to the description of 'Bid land' in the above enactments which were all prior to coming into force of Act, 1976 namely, 17.02.1976 the nature of 'Bid land' has been succinctly described to mean a land which was used for grazing of cattle or for cutting grass for the use of rearing of cattle. To recapitulate the definition of 'agriculture' under Section 2(1), as well as, the definition of 'land' under Section 2(17) of the unamended Act of 1960, the expression 'agriculture' included inter alia, the land used for raising of grass, as well as, the land held by the agriculturist for grazing purpose. When we consider the explanation part of sub section (1) of Section 2 which contains as many as Clauses (i) to (vi) the lands used for grazing purposes as well as cutting of grass for rearing of cattle are not the lands to be excluded from the definition of 'agriculture'. The definition of 'land' under Section 2(17) categorically mentions that the land which is either used or capable of being used for agriculture purposes would fall within the said definition. Therefore reading the above definitions together a 'land' where grass is grown or used for grazing purposes fall within the inclusive provision of the definition of 'agriculture'. The definition of 'Bid land' in the earlier enactments namely Act Nos.XXV of 1951, XXVI of 1951 and Act No.III of 1952 make the position clear that the 'Bid land' is nothing but the land used for grazing of cattle and for raising grass for the purpose of rearing of cattle.

36. Under the amended Act of 1960 the definition of agriculture under Section 2(1) as it existed prior to the said amendment was maintained. In addition, some of those excluded categories, namely, the one mentioned in sub clauses (i), (ii), (iii), (iv) and (v) were also included as falling within the

definition of the expression 'agriculture'. Further the nature of exclusion as mentioned in sub-clause (vi) of clause 1 of Section 2, namely, such other pursuits as may be described was also mentioned by stating that such of those pursuits which have been prescribed prior to the specified date would continue to stand excluded for that period which was prior in point of time to the specified date as mentioned in the Amendment Act which was notified on 01.04.1976. Here and now it is relevant to mention the date which was specified under the Amendment Act which as per Section 2 (27A) meant the date of the coming into force of the amended act of 1972, namely, 01.04.1976. Therefore, the conclusion to be drawn would be that while as from 01.04.1976 the definition of 'agriculture' under the amended Act was wider in scope which included land used whether or not as an appendage to rice or paddy land for the purpose of rabmanure, dairy farming, poultry farming, breeding of livestock and the cutting of woods and such of those lands which were in the excluded category under the unamended Act cease to have effect of such exclusion on and after 01.04.1976.

37. Having regard to the reference to the specified date, namely, the date of notification (i.e.) 01.04.1976, the expanded definition of 'land' under Section 2(17) was brought to our notice wherein specific reference to the 'Bid lands' held by Girasdars and Barkhalidars under Act Nos.XXV of 1951, XXVI of 1951 and III of 1952 and also such 'Bid lands' held by a person prior to the commencement of the Constitution 26th Amendment Act 1971 as a 'ruler' of an Indian State comprised in the Saurashtra Area of State of Gujarat. The endeavour of learned counsel for the respondent while drawing our attention to the new Section 2(17), in particular, the reference to 'Bid lands' in clause (c) and (d) of Section 2 (17) (ii) was to stress upon the point that a clear distinction was drawn as regards the land falling within the said definition held by a person prior to the specified date and after the specified date. Under Section 2(17) (i) after the amendment the provision relating to the definition of 'land' was sought to be distinguished as was existing prior to the specified date

while under Section 2(17)(ii) a wider scope of such definition of 'land' was introduced. Having regard to such distinction shown in respect of a 'land' one prior to the specified date and the one in relation to any other period, learned counsel contended that the specific reference to 'Bid lands' held by Girasdar and Barkhalidar under sub clause (c) and (d) in Section 2 (17) (ii) makes a world of difference, as the scope of inclusion of the 'Bid lands' within the ambit of the expression 'land' under Section 2(17) was introduced on and after 01.04.1976 namely the specified date which was not the position prior to the said date.

38. The submission of leaned counsel was two fold, namely, that the specific reference to 'Bid lands' under Section 2(17) sub clause (ii) (c) and (d) came to be introduced for the first time on and after 01.04.1976 and hence the said situation requires a different consideration in the light of the Central enactment namely the Act, 1976 which had already come into force from 17.02.1976 by the State Legislature surrendering its legislative competence to the Union Government by invoking Article 252 (1) of the Constitution. The further submission is that in the light of the field being occupied by the Central Act, having regard to the restriction contained in Article 252 (2) of the Constitution there could not have been any competence for State Government to bring about an amendment effective from 01.04.1976 in relation to the Act and the subject with reference to which the State Government has surrendered its legislative power that bringing any amendment was exclusively within the competence of the Parliament and thereby the State amendment had no effect and was void as from its inception.

39. Before considering the said submission it is necessary to also refer to the provisions contained in the Act, 1976 for an effective consideration and to reach a just conclusion. Under the Act, 1976 by virtue of Section 1(2) of the Act, the Act was applied to the whole of the State of Gujarat. Under Section 2(a) the appointed day was defined to mean in relation to any State

to which the Act applied in the first instance the date of introduction of the Act, 1976 in the Parliament which was admittedly 17.02.1976. Under Section 2(n) what is an 'urban agglomeration' has been defined and it is not in dispute that district Rajkot where the lands in question situate falls within the definition of urban agglomeration mentioned in Schedule 1 of the Act. Under Section 2(o) 'Urban Land' has been defined to mean any land situated within the limits of an urban agglomeration referred to as such in the Master Plan. However, it does not include any such 'land' which is mainly used for the purpose of 'agriculture'. Under Section 2 (q) 'vacant land' has been defined to mean land not being mainly used for the purpose of agriculture in an urban agglomeration subject to other exclusions contained in the said sub-clause (q). The expression 'agriculture' has been specifically defined under the Explanation (A) to Section 2(o) by which it is stated that agriculture would include 'Horticulture' but would not include 'raising of grass', 'dairy farming', 'poultry farming', 'breeding of livestock' and such cultivation or growing of such plant as may be prescribed. Under Explanation (B) it is mentioned that lands are not being used mainly for the purpose of 'agriculture' if such land has not entered in the revenue or land records before the appointed day as for the purpose of 'agriculture'. Under Explanation (C) it is further stipulated that notwithstanding anything contained in Explanation (B) 'land' shall not be deemed mainly used for the purpose of agriculture if the land has been specified in the Master Plan for the purpose other than agriculture. Section 6 of the Act, 1976 prescribes the ceiling limit of vacant land which a person can hold in an urban agglomeration of the Act, 1976. If a person holds vacant land in excess of the ceiling limit at the commencement of the Act, he should file the statement before the competent authority of all vacant land to enable the State Government to acquire such vacant land in excess of ceiling limit under the Act.

40. In the light of the above provisions contained in the Act, 1976 Mr. Naphade learned senior counsel contended that

Amendment Act of 1974 would be a 'still born child' having regard to the existence of the Act, 1976 as from 17.02.1976. The learned counsel also sought to repel the contention of the appellants that the date of passing of the Act alone would be relevant and not the date of notification. For that purpose, learned counsel relied upon **In the matter of the Hindu Women's Rights to Property Act, 1937** (supra). In the said decision the Federal Court considered the question referred to by His Excellency the Governor General under Section 213 of the Constitution Act. The first question is relevant for our purpose which reads as under:-

> "(1) Does either the Hindu Women's Rights to Property Act, 1937 (Central Act, 18 of 1937) which was passed by the Legislative Assembly on 4th February, 1937, and by the Council of State on 6th April 1937, and which received the Governor-General's assent on 14th April 1937, or the Hindu Women's rights to Property (Amendment) Act, 1938 (Central Act, 11 of 1938) which was passed in all its stages after 1st April 1937, operate to regulate (a)succession to agricultural land? (b) devolution by survivorship of property other than agricultural land?
>
> (underlining is ours)

41. At page 75 the Federal Court has answered the said question in the following words:-

> ".....It is not to be supposed that a legislative body will waste its time by discussing a bill which, even if it receives the Governor-General's assent, would obviously be beyond the competence of the Legislature to enact, but if it chooses to do so, that is its own affair, and the only function of a Court is to pronounce upon the bill after it has become an Act. In the opinion of this Court, therefore, it is immaterial that the powers of the Legislature changed during the passage of the bill from the Legislative Assembly to the Council of State. The only date with which the Court is concerned is 14th April 1937, the date on which the Governor-General's assent was given; and the question whether the Act was or was not within the competence of the Legislature must be determined with reference to that date and to none other."
>
> (underlining is ours)

42. By relying upon the said decision, learned counsel contended that the date of passing of the Act was irrelevant and what was relevant is the date when the Act was notified, namely, 01.04.1976. We find force in the said submission and without diluting much on the said contention we proceed to consider the other contentions raised on the footing that the amendment came into effect only from 01.04.1976 i.e. after the coming into force of the Act, 1976, namely, 17.02.1976. We have kept ourselves abreast of the various provisions of the unamended Act of 1960, the definition of 'Bid land' under Act XXV of 1951, XXVI of 1951 and III of 1952 and keeping aside whatever amendment sought to be introduced by the Amendment act of 1974 with effect from 01.04.1976 we proceed to examine whether the contention of the respondent can be countenanced.

43. In this context, we are also obliged to note the definition of 'vacant land' under the Act, 1976 as defined under Section 2(q) and also the definition of 'Urban Land' under Section 2(o). Since the respondent strongly relied upon the operation of the Act, 1976 as from 17.02.1976 in order to contend that the Amendment Act of 1974 will be of no consequence being a still born child after the coming into force of the Act, 1976 it will be appropriate to examine the said contention in the first instance.

44. Under the Act, 1976 while defining 'vacant land', the said definition specifically excludes a 'land' used for the purpose of 'agriculture'. The definition of 'Urban Land' again makes the position clear that any land situated within the urban agglomeration referred to as such in the Master Plan would exclude any such land which is mainly used for the purpose of

'agriculture'. Under the Explanation A to Section 2(o) such of those lands which are used for 'raising of grass' stood excluded from the use of 'agriculture'. It is worthwhile to note that the 'land used for grazing' has however not been specifically excluded from the definition of 'agriculture' in the said Explanation 'A'. The conspectus consideration of the above provisions leads us to conclude that the apparent purport and intent, therefore, was to exclude lands used for agriculture from the purview of Act, 1976 which would enable the holders of lands of such character used for agriculture to be benefited by protecting their holdings even if such lands are within the urban agglomeration limits and thereby depriving the competent authority from seeking to acquire those lands as excess lands in the hands of the holder of such lands.

45. That being the position, by the implication of the Act, 1976 in respect of the land used for agriculture within the urban agglomeration, the question for consideration is whether such exclusion from acquisition having regard to the character of the land as used for agriculture would entitle the owner of such land to contend that such exclusion would deprive the competent authorities under the 1960 Act to restrict their powers to be exercised under the said Act and from resorting to acquisition by applying the provisions contained in the said Act. We are of the considered opinion that the conspectus consideration of the various provisions of the Act, 1976 considered again in the light of the object and purport of the 1960 Act which was intended for equal distribution of agricultural lands to the landless poor agriculturists, the application of the said Act will have to be independently made and can be so applied as it stood prior to the coming into force of the Act, 1976 as from 17.02.1976. At this juncture it will have to be noted and stated that the subject namely, the 'land' being an item falling under Entry 18 of List II of Schedule VII of the Constitution, by virtue of the so-called surrender of power of legislation in respect of the said entry namely 'land' by way of Central Legislation namely Act, 1976 to be enacted by the Parliament pursuant to a State resolution

by invoking Article 252 (1) of the Constitution, there would be every justification in the submission on behalf of the respondent that any subsequent legislation by way of Amendment or otherwise with regard to the said Entry, namely, 'land' will be directly hit by the specific embargo contained in Article 252 (2) of the Constitution.

46. Once we steer clear of the said legal position and proceed to examine the contention raised, as was highlighted by us in the initial part of our judgment the concept of 'Bid land' was not a new phenomenon to the 1960 Act. The definition of 'Bid land' under Section 2 (6) of the Saurashtra Act, 1951 clearly stated that it would refer to the lands used for grazing of cattle and for cutting grass for the use of cattle. The said definition was consistently maintained in the Saurashtra Act No.XXVI of 1951, as well as, Saurashtra Act No.III of 1952. When we examine the definition of the expression 'agriculture' under Section 2(1) of the 1960 Act uninfluenced by the Amendment Act of 1974, it specifically define 'agriculture' to include the land used for raising of grass, crops or garden produce, the use by an agriculturist of the land held by him or part thereof for grazing. Grazing as per the dictionary meaning "graze land suitable for pasture". The word "pasture" means the land covered with grass etc. suitable for grazing animals especially cattle or sheep or herbage for animals or for animals to graze. Therefore, the land meant for grazing has got its own intrinsic link with the cattle for its pasturing. The apparent intention of the legislature in including the land used for grazing or for raising grass as per the definition of 'agriculture' under the 1960 Act is quite explicit, inasmuch as, the use of cattle in farming operation was inseparable at the relevant point of time. Therefore, when the Legislature thought it fit to include the land for raising grass and used for grazing as part of definition of 'agriculture' there is no need to seek succour from any other definition which was sought to be introduced at any later point of time by way of amendment under the Amendment Act of 1974.

47. While rebutting the submission of the appellant in placing reliance upon the definition of 'Bid land' under the provisions of Saurashtra Act Nos.XXV of 1951, XXVI of 1951 and III of 1952, Mr. Naphade learned senior counsel for the respondent contended that the definition of 'Bid land' in these enactments was with particular reference to the land held and used by Girasdars and Barkhalidars and that there was no reference to the lands held by any Ruler of an erstwhile State. It was the further submission of learned senior counsel that those legislations were specifically dealing with the tenure holdings of Girasdars and Barkhalidars and that the purport of those legislations were to denude those large scale tenure holders of the lands held by them with a view to entrust such lands with the cultivating tenants themselves and, therefore import of the definition of 'Bid land' in those legislations will not be appropriate while considering the implication of the provisions contained in the 1960 Act.

48. Though, we appreciate the ingenious submissions put forth before us on behalf of the respondent, we are not in a position to accept such an argument for more than one reason. The said submission cannot be accepted for the simple reason that what we are concerned with is the definition of 'Bid land' de hors the ownership or in whose possession such land remain or vest on any particular date. In other words, the character of 'Bid land' cannot vary simply because it is in the hands of Girasdars and Barkhalidars or with any other person including a former Ruler of a State. The reference to the definition of 'Bid land' under those enactments can be definitely considered in order to find out as to what is the nature and character of a 'land' and not as to who was holding it.

49. The Saurashtra Act No.XXV of 1951 was introduced for the improvement of land revenue administration and for ultimately putting an end to the Girasdari system. The purport of the legislation was to regulate the relationship of Girasdars and their tenants in order to enable the latter to become

occupants of the lands held by them and to provide for the payment of compensation to the Girasdars for the extinguishment of their rights. Again Saurashtra Act No.XXVI of 1951 was brought in to provide for certain measures for the abolition of Barkhalidar tenure for Saurashtra and also for the improvement of the land revenue administration. In other words, the said legislation was for the improvement of land revenue administration and for agrarian reforms which necessitated abolition of Barkhalidar tenure prevailing in certain parts of Saurashtra. In order to ascertain the extent of lands held by the Girasdars and Barkhalidars the definition of 'agricultural land', 'agriculture' and 'Bid Land' was specified in the respective statutes. Such definition was required in order to ascertain the extent of lands held by Girasdars and Barkhalidars. 'Bid land' was one type of land held by such tenure holder by way of grant and it was in that context the character of 'Bid Land' was defined for the purpose of ascertaining the total extent of land held by each of the Girasdar and Barkhalidar. Under Section 3 and 4 of Saurashtra Act No. III of 1952 which Act was introduced to provide for acquisition of certain estates of Girasdars and Barkhalidars 'Bid Land' was defined under Section 2(a) of the Act.

50. Section 3 of the Act empowered the Government to issue notification from time to time in the Official Gazette and declare that with effect from such date that may be specified in the notification, all rights, title and interest of Girasdars or Barkhalidars in respect of any estate or part of an estate comprised in the notification would cease and vest in the State of Gujarat. As a sequel to such vesting, all the incidents of the tenure attached to any land comprised in such estate or part thereof would be deemed to have been extinguished. What are all the consequences that would follow pursuant to issuance of notification, has been set out in Section 4. However, under Section 5(1) which is a non-obstante clause which makes it clear that notwithstanding anything contained in Section 3 or Section 4 'Bid Land' were exempted from such acquisition.

51. It is true that though under the Saurashtra Act XXV of 1951, Saurashtra Act XXVI of 1951 and Saurashtra Act III of 1952, the purport of the enactments were to extinguish all rights held by Girasdars and Barkhalidars as well as the Rulers of the State in the State of Gujarat in respect of their estates which among other kinds of lands included 'Bid Land' also.

52. Here again, it will have to be stated that this Act was also enacted to provide certain measures for the abolition of the Barkhalidars tenure in Saurashtra. Therefore, while the submissions of the learned senior counsel for the respondent that the above enactments were brought into effect with particular reference to the holding of certain estates by Girasdars and Barkhalidars as well as erstwhile Rulers of State, such restricted application of the Act cannot be held to mean that the definition of 'Bid land' should also be read out in a restricted fashion. As stated by us earlier, the operation of extinguishment of the rights of such specific persons viz., Girasdars and Barkhalidars as well as the Rulers does not mean that the definition assigned to 'Bid land' should be restricted in respect of those specific persons alone and cannot be applied in general for any other purpose. After all, the attempt of the appellants in relying upon the definition of 'Bid land' in those enactments was to understand the nature and use for which the 'Bid land' is put to. It cannot be said that merely because those enactments were brought out for the purpose of extinguishment of the rights of certain class of persons viz. Girasdars and Barkhalidars, the definition of 'Bid land' contained in those Legislations should under no circumstances be considered by any other authority functioning under other enactments. We are convinced that though Saurashtra Act Nos.III of 1952, XXV of 1951 and XXVI of 1951 pertain to the estates held by Girasdars and Barkhalidars as well as the Rulers of the erstwhile Saurashtra State, the definition of 'Bid land' contained in those legislations could however be taken into account for the purpose of understanding the meaning of 'Bid land'. Therefore, the arguments of the learned senior

counsel for the respondent in seeking to restrict the meaning of 'Bid land' in the Saurashtra Act Nos.XXV of 1951, Act XXVI of 1951 and Act III of 1952 exclusively to those specified persons viz., Girasdars, Barkhalidars and the Rulers cannot be accepted. In other words once the 'Bid land' can be defined to mean such land used for grazing of cattle or for cutting grass for the use of cattle irrespective of the nature of possession of such lands with whomsoever it may be, a 'Bid land' would be a 'Bid land' for all practical purposes. It is also to be noted that nothing was brought to our notice that a 'Bid land' is capable of being defined differently or that it was being used for different purpose by different persons.

53. We shall deal with the object of the Amendment Act 1974, namely, for removal of doubts a little later. For the present, inasmuch as, we have to a very large extent accepted the submission of learned counsel for the respondent that the invocation of the Amendment Act of 1974 cannot be made having regard to its subsequent emergence, namely, 01.04.1976 i.e. after the coming into force of Act, 1976 as from 17.02.1976, we confine our consideration to the position that prevailed under the unamended Act of 1960. After all our endeavour is only to find out whether the 1960 Act is applicable in respect of the lands held by the respondent for the purpose of its enforcement or otherwise against the respondent.

54. One other submission of the learned senior counsel for the respondent was that the respondent was once a Ruler cannot be held to be an 'agriculturalist', inasmuch as, the definition of 'agriculturist' under Section 2(3) means a person who cultivate the land personally. We were not impressed by the said submission, inasmuch as, the definition of an 'agriculturist' is not merely confined to Section 2(3) alone. The said definition has to be necessarily considered along with the definition "to cultivate" as defined under Section 2(11), as well as, the expression "to cultivate personally" as defined under Section 2(12) of the Act. Those expressions considered

together make the position clear that even a person cultivating the lands by ones own labour or by any other member of one's family or under the personal supervision of oneself or any member of ones' family by hired labour or by servants on wages payable in cash or kind would nonetheless fall within the four corners of the expression "agriculturist". Therefore, the expression "agriculturist" used in the definition Clause 2(3) or "agriculture" under Section 2(1) is wide enough to include the respondent who though was once a 'Ruler' and was not tilling the land by himself would still fall within the definition of 'agriculturist' when such agricultural operation namely cultivation of land is carried out with the support of any one of his family members by supervising such operation or by engaging any labour to carry out such cultivation. We are therefore of the firm view that the 'Bid land', the nomenclature of which was categorically admitted by the respondent and having regard to its nature and purpose for which it was put to use would squarely fall within the definition of 'agriculture' as defined under Section 2(1) of the Act of 1960 as it originally stood unaffected by the coming into force of the Act, 1976 as well as the Amendment of 1974. In the result, its application to those 'Bid lands' held by the respondent cannot be thwarted.

55. We shall now deal with the question whether the amendment Act of 1974 which was notified as from 01.04.1976 does in any way affect the application of 1960 Act as it originally stood having regard to the enforcement of the Amendment Act by drawing a clear distinction as between the position which was existing prior to the specified date namely 01.04.1976 and after the said date.

56. According to learned senior counsel for the respondent the definition of 'land' under Section 2(17) after the amendment, namely, after 01.04.1976 seeks to differentiate between the nature of land which would be governed by the provisions of the 1960 Act i.e. one prior to the specified date and thereafter. Under sub-clause (i) of Section 2(17) of the 1960 Act while

defining the 'land' it is specifically mentioned that the same would mean "in relation to any period prior to the specified date, 'land' which is used or capable of being used for agricultural purpose and includes the sites of farm buildings appurtenant to such "land". For that purpose when we refer to the definition of 'agriculture' under Section 2(1) of the Amended Act a wider definition was brought in by including in the said definition clauses (d) to (h) which, inter alia, covered the use of any land, whether or not an appanage to rice or paddy land for the purpose of rabmanure, dairy farming, poultry farming, breeding of live-stock, and the cutting of wood which class of lands were specifically excluded from the definition of 'agriculture' prior to the amendment. The proviso to the said sub-clause (1) of Section 2 also specifies that such inclusion in the definition of 'agriculture' was not applicable in relation to any period prior to the specified date, namely, 01.04.1976. That apart, under Section 2(17)(ii) in regard to the period subsequent to the specified date, namely, 01.04.1976 the definition of 'land' would include the lands on which grass grown on its own, the 'Bid land' held by Girasdars and Barkhalidars under the Saurashtra Act Nos.XXV of 1951, XXVI of 1951 and III of 1952 as well as such 'Bid lands' which were held by a person who before the commencement of the Constitution was a 'Ruler' of an Indian State comprised in the Saurashtra area of the State of Gujarat. The contention, therefore, was that but for such inclusion of 'Bid lands' in the amended definition of Section 2(17)(ii) there was no scope to proceed against such 'Bid lands' held by Girasdars and Barkhalidars as well as the 'Rulers' of erstwhile State.

57. In this context learned senior counsel for the respondent placed reliance upon the decision of this Court in *State of Karnataka Vs. Union of India & another* - (1978) 2 SCR 1 and contended that when the language is clear and unambiguous one need not have to delve into the Objects and Reasons in order to find out its implication. The said contention

was by way of rebuttal to the submission of learned senior counsel for the appellants that the Objects and Reasons of the 1974 Act disclose that the same was brought into effect only with a view to remove certain doubts as regards 'Bid lands' and, therefore, the amendment was not contemplated to include 'Bid lands' for the first time in addition to the other type of lands described under the unamended Act of 1960.

58. There can be no quarrel about the proposition of law as propounded by the learned senior counsel for the respondent and as has been stated by the Constitution Bench of this Court in paragraphs 38 and 39 of *Pathumma* (supra). In paragraph 39 this Court did say:

> "39.….We are, however, unable to agree with this argument because in view of the clear and unambiguous provisions of the Act, it is not necessary for us to delve into the statement of objects and reasons of the Act….."

59. We too are not inclined to go by the argument based on the objects and reasons in relation to a 'Bid land'. We have considered the definition of 'agriculture' under Section 2(1), the definition of 'agriculturist' under Section 2(3) along with the expressions 'a person who cultivates land personally' and the definition of 'land' under Section 2(17) of the unamended Act. Having examined the nature of description of those expressions contained therein, we are convinced that the legislature intended and did include 'lands' held by 'agriculturist' where grass is raised or used for grazing purposes as part of agricultural land which was in the possession of agriculturist. Such lands where grass is grown or used for grazing purpose are always known as 'Bid land'. Such 'Bid land' was ultimately brought within the definition of 'land' under Section 2(17) of the Act of 1960. Therefore, even by keeping aside the implication of the wider definition which was introduced by the Amendment Act of 1974 in regard to 'Bid lands' and going by the definition of 'agriculture' and 'land' under Section 2(1) and 2(17) of the

Act of 1960, we have no difficulty in taking a definite conclusion that such definition contained in the Act as it originally stood did include 'Bid lands' which lands were exclusively meant for cutting grass for cattle or used for grazing purposes. Therefore, there was no necessity for this Court to draw any further assistance either from the Objects and Reasons or from the provisions of the Amended Act of 1974 in order to hold that 'Bid lands' were part of agricultural land governed by the provisions of the Act of 1960.

60. In that respect when reliance was placed upon the recent decision of this Court in *Nagbhai Najbhai Khackar* (supra) on behalf of the appellant, we find that the said decision fully support the stand of the appellant. Of course, in the said decision the question posed for consideration was "whether Bid lands were required to be taken into consideration for the purpose of land ceiling under the 1960 Act as amended by the Act of 1974 which came into force on 01.04.1976". This Court while examining the said question posed for its consideration however dealt with a specific submission made on behalf of the appellant herein which has been set out in paragraph 11:

> **"11.** It was further submitted that the lands in question are in fact "agricultural" lands. They survived acquisition under the earlier three Acts only because they were "bid lands" which by definition under those Acts were lands "being used" by Girasdars/Barkhalidars for grazing cattle. That, under the Ceiling Act, Section 2(1) defines the use of land for the purposes of grazing cattle as agricultural purpose and thus, according to the learned counsel, by their very definition "bid lands" are capable of being used for agricultural purpose, namely, grazing cattle."

61. In paragraphs 20 and 21 it has been held as under:

> **"20.** There is one more reason for not accepting the argument of the appellants. The subject lands survived acquisition under the 1952 Act only because they were "bid

lands" which by definition under those Acts were treated as lands being used by the girasdars for grazing cattle (see Section 2(a) of the 1952 Act). Now, under the present Ceiling Act, Section 2(1) defines the use of land for the purpose of grazing cattle as an agricultural purpose. Thus, "bid lands" fall under Section 2(1) of the Ceiling Act. This is one more reason for coming to the conclusion that the Ceiling Act as amended applies to "bid lands". (underline ours)

21. It is also important to note that under Section 5(1) of the 1952 Act all lands saved from acquisition had to be "bid lands" which by definition under Section 2(a) of the 1952 Act were the lands being used by a Girasdar or a Barkhalidar for grazing cattle or for cutting grass. If the lands in question were put to any other use, they were liable to acquisition under Section 5(2). Because the subject lands were used for grazing cattle, they got saved under the 1952 Act and, therefore, it is now not open to the appellants to contend that the subject lands are not capable of being used for agricultural purpose."

62. In fact our conclusion on this aspect in the earlier part of our judgment is in tune with what has been propounded by this Court in the said paragraph. The learned senior counsel for the respondent contended that the said decision cannot be applied to the facts of this case. The submission of the learned counsel was twofold. According to him, the said decision came to be rendered in the light of the definition of 'Bid land' which came to be introduced for the first time after the coming into force of the Amendment Act of 1974 and, therefore, whatever decided in the said decision was exclusively in the context of the Amendment Act of 1974 which cannot be applied to the case on hand. The second submission of the learned senior counsel was that in the said decision the implication of the Act, 1976 was not considered and, therefore, whatever said in the said decision was applicable only to the facts involved in that

case and can have no universal application. To buttress the former argument, Mr. Soli J. Sorabjee, the learned counsel for the appellants contended that though the question posted for consideration in the said decision was in the context of the definition of 'Bid land' as described in the Amendment Act 1974, this Court while holding that 'Bid land' would fall within the definition of 'agricultural land' under the Act of 1960 also examined the issue as to what is a 'Bid land' under the 1952 Act independent of the definition of 'Bid land' introduced in the Amendment Act 1974. The learned senior counsel by drawing our attention to paragraph 20 of the said decision contended that the said independent consideration of what is a 'Bid land' was an added reason to hold that the said kind of land would also fall within the definition of 'agricultural land' as defined in Section 2(1) of the Act of 1960.

63. Having considered the respective submissions, we find force in the submission of the learned senior counsel for the appellants. A close reading of paragraph 20 is clear to the pointer that irrespective of the definition of 'Bid land' under the Amendment Act 1974, having regard to the definition of 'Bid land' under Act III of 1952, such land would fall within the definition of 'Agricultural Land' as defined in Section 2(1) of the Act of 1960. This Court in fact made it very clear in its perception while stating the said position by holding that it was an added reason for holding that the Land Ceiling Act, as amended, applied to 'Bid land'. One more reason which this Court mentioned was that the land in question survived acquisition under the 1952 Act only because they were 'Bid lands' which, by virtue of its character was being used by Girasdars for grazing by cattle and thereby stood excluded from acquisition. Therefore, when this Court examined the character of the 'Bid land' which was used for grazing purpose as one falling within the definition of 'agriculture land' even without the implication of the Amendment Act of 1974, the reliance placed upon the said decision merits acceptance. The said submission of the learned senior counsel for the appellants is supported

by the decisions in *London Jewellers* (supra), *Jacobs* (supra), *Behrens* (supra) and *Smt.Somawanti* (supra). In the decision in *London Jewellers* (supra), it has been held as under:

> *".....I cannot help feeling that if we were unhampered by authority there is much to be said for this proposition which commended itself to Swift J. and which commended itself to me in Folkes v. King, but that view is not open to us in view of the decision of the Court of Appeal in Folkes v King. In that case two reasons were given by all the members of the Court of Appeal for their decision and we are not entitled to pick out the first reason as the ratio decidendi and neglect the second, or to pick out the second reason as the ratio decidendi and neglect the first; we must take both as forming the ground of the judgment."*
>
> (Emphasis added)

64. The ratio of the said decision was followed in *Jacobs* (supra). In the decision in *Behrens* (supra), it has been held as under:

> *".....This question depends, I think, on the language used by Cozens-Hardy, M.R. It is well established that, if a judge gives two reasons for his decision, both are binding. It is not permissible to pick out one as being supposedly the better reason and ignore the other one; nor does it matter for this purpose which comes first and which comes second. The practice of making judicial observations obiter is also well established. A judge may often give additional reasons for his decision without wishing to make them part of the ratio decidendi; he may not be sufficiently convinced of their cogency as to want them to have the full authority of precedent, and yet may wish to state them so that those who later may have the duty of investigating the same point will start with some guidance. This is a matter which the judge himself is alone capable of deciding and any judge who comes after him must ascertain which course has been adopted from the language used and not by consulting his own preference."*
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> (Emphasis added)

65. The proposition of law has thus been so lucidly expressed in the above decisions, it will have to be held that the additional reasons adduced in our decision in *Nagbhai Najbhai Khackar* (supra) directly covers the issue raised before us. One more reason, which weighed with this Court for holding that 'Bid land" falls within the definition of 'Agriculture Land' as defined under Section 2(1) of the Act of 1960 is binding and thus there is no scope to exclude the said decision from its application. Therefore, we reiterate that merely because the question posed for consideration related to the character of 'Bid lands' after the 1974 amendment what has been held in paragraphs 20 and 21 mutantis mutandis is in tune with what has now been held by us based on the definition of 'agriculture' as well as 'land' under Sections 2(1) and 2(17) of the un-amended Act of 1960 itself.

66. As far as the next submission is concerned, the argument raised was that the said decision never dealt with the issue which has been presently raised in this appeal, namely, the implication of the Act, 1976 which came into force on 17.02.1976 while the Amendment Act of 1974 was brought into force subsequently i.e. on and after 01.04.1976 and, therefore, the said decision can have no application to the facts of this case. In so far as the said contention is concerned, the same is liable to be rejected inasmuch as the said decision is for the simple proposition as to how a land where grass is raised or used for grazing purposes is to be included under the definition of 'agriculture' and consequently within the definition of 'land' as provided under Sections 2(1) and 2(17) of the Act of 1960.

Therefore, non-consideration of the implication of Act, 1976 in the said decision does not in any way deter us from relying upon the ratio laid down in the said decision to support our conclusion.

67. The next submission of learned counsel for the respondent related to the supervening effect of the Act, 1976 in the State of Gujarat on and after 17.02.1976 which according to learned senior counsel has made the Act of 1974 a 'still born child' and also the submission that after the coming into force of the Act, 1976 there was no authority in the respondent to invoke the 1960 Act in order to acquire the lands of the respondent. As we have refrained from relying upon the Amended Act of 1974 while approving the action of the appellant in seeking to proceed against the respondent for acquiring the surplus lands of the respondent under the Act of 1960, we do not find any dire necessity to deal with the said contention in extenso. The formidable submission raised on behalf of the respondent related to the supremacy of the Act, 1976 over the 1960 Act. The learned counsel pointed out that the respondent filed its return under the provisions of the Act, 1976 on 13.08.1976, that the said return was considered by the competent authority by passing its Order dated 21.05.1983 which was thereafter considered by the Tribunal in its order dated 08.09.1989 and that the appellant/State while dealing with the respondent and the Act, 1976 themselves have mentioned in the reply affidavit in paragraph 4.1 that the lands in Survey No.111/2-3 situated in Madhopur village was reserved for site and service project meaning thereby that they were not agricultural lands. The learned counsel would, therefore, contend that while on the one hand when it came to the question of determining the surplus lands under the provisions of the Act, 1976 the appellant would contend that the lands held by the respondent were not classified as agricultural land and thereby not entitled for exclusion under the said Act, when it came to the question of applicability of 1960 Act they contend that such lands are to be treated as agricultural lands.

68. We do not find any such contradiction in the stand of the appellant even in the reply affidavit. At page 5 of the reply affidavit while referring to the lands in Survey No.111/2-3 of Madhopur village it is specifically mentioned that those lands are 'Bid lands' and are located within the industrial development industrial area. What was contended was that admittedly no agricultural operation was being carried out in respect of Survey No.111/2-3 along with Survey Nos.91/3 and 129. In this respect it will also be necessary to refer to the stand of the respondent himself in his appeal filed under Section 33 of the Act, 1976. In paragraphs 9 and 10 the appellant claimed the character of the land in the following manner:

> *"9. Land admeasuring 30 acres and 30 Gunthas i.e. 1,24,412 sq. mts., of survey No.111/2 of village Madhopur is a vidi land of the Appellant and that has been brought under the recreational zone of RUDA. That should not have been included in the holding of the Appellant. Here also the application under section 20 is pending with the Government for exemption.*
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> *10. Survey No.111/3 of village Madhopur admeasuring 579 acres 27 Gunthas is falling in agricultural zone of RUDA. A certificate has been produced before the Competent Authority and this should not be included in the holding of the Appellant. The Competent Authority has shown Appellant's flat in Bombay admeasuring 223 sq. mts. From the records the Bombay flat was shown as 575.06 sq. mts., being built up property it should not be declared as surplus. Of course the flat is situated in Bombay it should be calculated as 1725.18 sq. mts."*
>
> *(underlining is ours)*

69. In paragraph 9 respondent has referred to the land admeasuring 30 acres and 30 Gunthas i.e. 1,24,412 sq. mts. in survey No.111/2 of village Madhopur as vidi land which was

brought under the recreational zone of RUDA and, therefore, those lands should not have been included in the holding of the appellant. As far as the land admeasuring 579 acres 27 Gunthas in the very same village Madhopur in survey No.111/3 is concerned, it was specifically claimed that those lands fell in the 'AGRICULTURAL ZONE' of RUDA and, therefore, it should not have been brought within the category of excess lands held by the respondent. In fact, the above submission made on behalf of the appellant far from supporting the stand of the respondent fully supports the stand of the appellant. We, therefore, do not find any conflict in the stand of the appellant while dealing with the nature of land held by the respondent which was earlier dealt with under the Act of 1960 which came to be considered by the authorities under the Act, 1976 pursuant to the return submitted by the respondent on 13.08.1976 under Section 6(1) of the Act, 1976.

70. When we consider the submission of the learned senior counsel for the respondent pertaining to the implication of the Act, 1976 vis-à-vis Act of 1960, the submission was again two fold. In the first place, it was contended that as the entire lands were lying within the urban agglomeration of the scheduled area viz., Rajkot, the Act, 1976 would alone govern the subject land and thereby exclude the application of the Act of 1960. Though in the first blush, the argument appears to be appealing, on a deeper scrutiny, it will have to be held that the said submission cannot be accepted. Even according to the respondent, the subject land having been classified as 'agricultural land' stood excluded from the application of the provisions of the Act, 1976 though lying within the urban agglomeration area. It was, therefore, axiomatic that de hors the implication of the provision of the Act, 1976 by virtue of the character of the Land held by the respondent, the application of the Act of 1960, as it originally stood prior to 17.2.1976 was imperative. Such a legal consequence existed. Even accepting the arguments of the learned senior counsel for the respondent, that being agricultural land lying within the urban agglomeration,

the application of the Act, 1976 stood excluded, we fail to see as to how there would be any scope at all for the respondent to contend on that score the application of the Act of 1960 should also be excluded. Therefore, taking note of the categorical stand of the respondent himself, having claimed exclusion of such of those lands which were classified as 'agricultural land', which included 'Bid land' as well, to be excluded from the application of the provisions of the Act, 1976 and thereby the authorities competent under the provisions of such other enactments which would govern such agricultural lands would be free to exercise their powers under these enactments. The respondent cannot be heard to contend that there would be a vacuum in so far as the application of any Statute over the lands held by the respondent that have been classified as 'agricultural land'. Such a proposition, expounded on behalf of the appellants can never be countenanced. Therefore, the legal position that would emerge would be that going by the stand of the respondent, his lands to an extent of 579 acres 27 Gunthas being 'agricultural land' if stood excluded from the application of the provisions of the Act, 1976 such lands were already governed by the provisions of the Act of 1960 as it originally stood and applied and there can be no demur to it.

71. On this aspect, the next submission of the learned senior counsel for the respondent was that since the Act, 1976 having been passed by the Parliament, at the instance of the appellant State which came into effect from 17.02.1976, no other law on the said subject viz, 'land' would operate in the field. The sum and substance of the submission was that having regard to the emergence of the Act, 1976 on and from 17.02.1976, the application of the Act of 1960 would automatically cease to operate. To some extent, we appreciate the submission in so far as it related to the implementation of the Act of 1974 by which the amendment was introduced to the Act of 1960. In that respect, we consider the invocation of Article 252 of the Constitution wherein Sub-clause (2)

specifically stipulated that in future, amendments could be carried out only by the Parliament and not by the State. Here we are concerned with the Act of 1960 in its un-amended form which was holding the field insofar as it related to the agricultural lands. We do find some logic to accede to the contention of the learned senior counsel in regard to the application of 1974 Act after the emergence of the Act, 1976 but same is not the position in relation to the un-amended Act of 1960. In the first place, such an argument does not find support by the specific embargo contained in Article 252(2) of the Constitution. Going by the specific stipulation contained in Article 252 (2) of the Constitution, such an extended meaning cannot be imported into the said provision in order to nullify the effect and operation of the un-amended Act of 1960 in so far as it related to 'agricultural lands' in the appellant State. We, therefore, hold that the Act of 1960 in its un-amended form applied on its own and continue to hold the field and was in operation over the 'agricultural lands' over which the implication of the Act, 1976 had no effect. The said legal position has to be necessarily understood in the said manner and cannot be stated in any other manner, much less in the manner contended on behalf of the respondent. Thus the said contention made on behalf of the respondent, therefore, stands rejected.

72. In support of the said submission, reliance was placed upon a decision of this Court in *Union of India & Ors. Vs. Valluri Basavaiah Chowdhary & Ors.* reported in (1979) 3 SCC 324. Having bestowed our serious consideration in the reliance placed upon the said decision, we find that the said decision has no application to the legal issues involved in the case on hand. That was a case where in regard to the passing of the Act, 1976 itself, based on the resolution passed by the Andhra Pradesh Legislative Assembly on 08.04.1972. The challenge was made to the vires of the Act in the High Court of Andhra Pradesh. The ground raised was that the Parliament lacked legislative competence. Such lack of competence was raised on two grounds. In the first place, it was contended that the

Governor of Andhra Pradesh did not participate in the process of authorization in the passing of the Act by the Parliament and the second ground was that the resolution of the State Legislature gave authorization to the imposition of ceiling on the basis of the valuation of the immovable property i.e. for ceiling on ownership on immovable property and not on the area of land. It was contended that the ultimate act in imposing ceiling on the area of the land was not in conformity with the real intendment of the resolution of the State and therefore it lacked competence. On the first ground viz., due to the non participation of the Governor of Andhra Pradesh, the Parliament lacked competence found favour with the High Court of Andhra Pradesh which struck down the Act on that ground itself. While dealing with the said ground, this Court dealt with the scope of Article 252 (1) & (2) of the Constitution and by relying upon the earlier decision of this Court in *State of Bihar Vs. Sir Kameshwar Singh* reported in AIR 1952 SC 252, ruled that in the passing of the resolution of the State Legislature, the Governor nowhere comes in the picture.

73. As far as the second contention was concerned, it was held as under in *Valluri Basavaiah Chowdhary* (supra) at paragraphs 28, 31 and 32.

> ***"28.*** *We are afraid, the contention cannot be accepted. It is not disputed that the subject-matter of Entry 18, List II of the Seventh Schedule, i.e. 'land' covers 'land and building' and would, therefore, necessarily include 'vacant land'. The expression 'urban immovable property' may mean 'land and buildings', or 'buildings' or 'land'. It would take in lands of every description, i.e., agricultural land, urban land or any other kind and it necessarily includes vacant land.*
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> * * *
>
> ***31.*** *It is but axiomatic that once the legislatures of two or more States, by a resolution in terms of Article 252(1),*

abdicate or surrender the area, i.e., their power of legislation on a State subject, the Parliament is competent to make a law relating to the subject. It would indeed be contrary to the terms of Article 252 (1) to read the resolution passed by the State legislature subject to any restriction. The resolution, contemplated under Article 252(1) is not hedged in with conditions. In making such a law, the Parliament was not bound to exhaust the whole field of legislation. It could make a law, like the present Act, with respect to ceiling on vacant land in an urban agglomeration, as a first step towards the eventual imposition of ceiling on immovable property of every other description.

32. *There is no need to dilate on the question any further in this judgment, as it can be better dealt with separately. It is sufficient for purposes of these appeals to say that when Parliament was invested with the power to legislate on the subject, i.e. 'ceiling on immovable property', it was competent for the Parliament to enact the impugned Act i.e., a law relating to 'ceiling on urban land'."*

74. Whatever stated in Paragraph 28 can only be understood to mean that when the State Legislature authorizes the Parliament to pass a legislation in respect of the subject matter of Entry 18, List II of the Seventh Schedule, i.e. 'land' it would cover 'land and building' and would necessarily include 'vacant land' and would take in land of every description including 'agriculture land' or any other kind of land. It also went on to hold that the resolution passed by the State Legislature cannot be said to impose any restriction as it would be contrary to the terms of Article 252 (1) of the Constitution. It was further held that the Parliament was empowered to enact the law pursuant to the surrender of the State to enact a law with said subject by formulating its own prescription as to the nature of urban land in different stages. Beyond that, we do not find any other statement of law propounded in the said decision.

Applying the said legal principle, it can only be held that the Act, 1976 in having imposed a restriction by way of ceiling on urban land within the urban agglomeration by excluding agricultural land it was a valid piece of legislation. In this respect, the contention of Mr. Soli J. Sorabji that the State Legislature only intended in its authorization to bring about a legislation only on 'urban immovable land' and not on any agriculture land is quite appealing. We can also state that in paragraph 32 of the said decision, this Court consciously decided not to dilate on the question any further in that judgment as it can be better dealt with separately at a later point of time. We now hold that the situation has now come where the position has to be made loud and clear to state that the Act, 1976 would govern only such of those lands which would fall within its area of operation within urban agglomeration to the specific exclusion of the agriculture lands and consequently the continued application of the un-amended Act of 1960 remain without any restriction.

75. On the other hand Mr. Soli J. Sorabjee, the learned senior counsel for the appellants placed reliance upon a Constitutional Bench decision of this Court in *Thumati Venkaiah* (supra). Almost an identical situation was dealt with by this Court in the said decision. That case also arose from the State of Andhra Pradesh. To briefly refer to the facts, in the State of Andhra Pradesh a ceiling of agricultural holdings was sought to be imposed by enacting an Act called The Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act (Act 1 of 1973 (hereinafter referred to as the 'Andhra Pradesh Act'). It was enacted by the Andhra Pradesh Legislature on 01.01.1973. The Act was challenged before the High Court of Andhra Pradesh. However a Full Bench of the High Court negatived the challenge by its judgment dated 11.04.1973. The Act was however brought into force on and from 01.01.1975. The amendments were brought to the said Act by Amendment Act of 1977 with retrospective effect from 01.01.1975. After the amendments, again the Act was challenged on the main ground that by reason of enactment of the Act, 1976, the Andhra

Pradesh Act has become void and inactive. It can be validly mentioned that the subsequent contention of the respondent herein was the focal point in the said decision. Dealing with the said contention, the Constitutional Bench has held as under in paragraph 5:

> *"5. Now, as we have already pointed out above, the Andhra Pradesh Legislature had, at the time when the Andhra Pradesh Act was enacted, no power to legislate with respect to ceiling on urban immovable property. That power stood transferred to Parliament and as a first step towards the eventual imposition of ceiling on immovable property of every other description, Parliament enacted the Central Act with a view to imposing ceiling on vacant land, other than land mainly used for the purpose of agriculture, in an urban agglomeration. The argument of the landholders was that the Andhra Pradesh Act sought to impose ceiling on land in the whole of Andhra Pradesh including land situate in urban agglomerations and since the concept of urban agglomeration defined in Section 2(n) of the Central Act was an expansive concept and any area with an existing or future population of more than one lakh could be notified to be an urban agglomeration, the whole of the Andhra Pradesh Act was ultra vires and void as being outside the legislative competence of the Andhra Pradesh Legislature. This argument, plausible though it may seem, is in our opinion, unsustainable. It is no doubt true that if the Andhra Pradesh Act seeks to impose ceiling on land falling within an urban agglomeration, it would be outside the area of its legislative competence, since it cannot provide for imposition of ceiling on urban immovable property. But the only urban agglomerations in the State of Andhra Pradesh recognized in the Central Act were those referred to in Section 2(n)(A)(i) and there can be no doubt that, so far as these urban agglomerations are concerned, it was not within the*

> *legislative competence of the Andhra Pradesh Legislature to provide for imposition of ceiling on land situate within these urban agglomerations. It is, however, difficult to see how the Andhra Pradesh Act could be said to be outside the legislative competence of the Andhra Pradesh Legislature insofar as land situate in the other areas of the State of Andhra Pradesh is concerned. We agree that any other area in the State of Andhra Pradesh with a population of more than one lakh could be notified as an urban agglomeration under Section 2(n)(A)(ii) of the Central Act, but until it is so notified it would not be an urban agglomeration and the Andhra Pradesh Legislature would have legislative competence to provide for imposition of ceiling on land situate within such area. No sooner such area is notified to be an urban agglomeration, the Central Act would apply in relation to land situate within such area, but until that happens, the Andhra Pradesh Act would continue to be applicable to determine the ceiling on holding of land in such area. It may be noted that the Andhra Pradesh Act came into force on January 1, 1975 and it was with reference to this date that the surplus holding of land in excess of the ceiling area was required to be determined and if there was any surplus, it was to be surrendered to the State Government. It is therefore clear that in an area other than that comprised in the urban agglomerations referred to in Section 2(n)(A)(i), land held by a person in excess of the ceiling area would be liable to be determined as on January 1, 1975 under the Andhra Pradesh Act and only land within the ceiling area would be allowed to remain with him. It is only in respect of land remaining with a person, whether an individual or a family unit, after the operation of the Andhra Pradesh Act, that the Central Act would apply, if and when the area in question is notified to be an urban agglomeration under Section 2(n)(a)(ii) of the Central Act. We fail to see how it can at all be contended that merely because an area may possibly in*

the future be notified as an urban agglomeration under Section 2(n)(A)(ii) of the Central Act, the Andhra Pradesh Legislature would cease to have competence to legislate with respect to ceiling on land situate in such area, even though it was not an urban agglomeration at the date of enactment of the Andhra Pradesh Act. Undoubtedly, when an area is notified as an urban agglomeration under Section 2(n)(A)(ii), the Central Act would apply to land situate in such area and the Andhra Pradesh Act would cease to have application, but by that time the Andhra Pradesh Act would have already operated to determine the ceiling on holding of land falling within the definition in Section 3(j) and situate within such area. It is, therefore, not possible to uphold the contention of the landholders that the Andhra Pradesh Act is ultra vires and void as being outside the legislative competence of the Andhra Pradesh Legislature."

(Emphasis added)

76. In the first blush, it appears as though the said decision support the contention of the respondent. But in paragraph 5, we have highlighted certain relevant conclusions which fully support the stand of the appellants. This Court made it clear thereunder that the Parliament enacted the Central Act with a view to impose ceiling on vacant land other than the land mainly used for the purpose of agriculture in an urban agglomeration. The arguments of the land holders that the concept of urban agglomeration defined in Section 2(n) was an expansive concept and any area which was already notified as urban agglomeration, as well as, which can be notified in future based on the increase in population as urban agglomeration and, therefore, the Andhra Pradesh Act was ultra vires lacking legislative competence was held to be unsustainable. It was also held that the Andhra Pradesh Act seeks to impose ceiling on land falling within the urban agglomeration, it would be outside the area of its legislative competence as it cannot

provide for imposition of ceiling on urban immovable property after the emergence of Act, 1976. It was thus made clear that after the coming into force of the Act, 1976 by virtue of Article 252 (1) and (2) of the Constitution, there would have been no scope for the State Legislature to bring about a legislation for imposing a ceiling on an urban immovable property which falls within the urban agglomeration. It was also made clear that other areas which were not declared as urban agglomeration came to be subsequently declared as urban agglomeration and notified as such, the Central Act would automatically apply and in relation to such notified area also, the State Legislature would be incompetent to make any legislation by way of imposition of ceiling on and after such declaration is made. While referring to such a situation, this Court made it clear that the Andhra Pradesh Act continue to be applicable for determining the ceiling of holding of lands in such area, prior to any such subsequent notification under the Act, 1976. It was further made clear that since the Andhra Pradesh Act came into force on and from 01.01.1975, the surplus holding of land in excess of the ceiling area were required to be determined with reference to that date and if there was any surplus, it was to be surrendered to the State Government. It was further reinforced by stating that in an area other than that comprised in the urban agglomeration, the land held by a person in excess of the ceiling area would be liable to be determined as on 01.01.1975 under the Andhra Pradesh Act and the land within the ceiling area alone would be allowed to remain with him.

77. The crucial words in the said paragraph can be mentioned again in order to appreciate and understand the legal position noted. They are:

"It may be noted that the Andhra Pradesh Act came into force on January 1, 1975 and it was with reference to this date that the surplus holding of land in excess of the ceiling area was required to be determined and if there was any surplus, it was required to be determined and if there was any surplus, it was to be surrendered to the

State Government. It is, therefore, clear that in an area other than that comprised with Urban Agglomeration referred to in Section 2(n)(A) (i), land held by a person in excess of the ceiling area would be liable to be determined as on January 1, 1975 under the Andhra Pradesh Act and only Land within the ceiling area would be allowed to remain with him. It is only in respect of Land remaining with a person, whether an individual or a family unit, after the operation of the Andhra Pradesh Act, that the Central Act would apply…."

"Undoubtedly, when an area is notified as an urban agglomeration under Section 2(n)(A)(ii), the Central Act would apply to land situate in such area and the Andhra Pradesh Act would cease to have application, but by that time the Andhra Pradesh Act would have already operated to determine the ceiling on holding of land falling within the definition in Section 3(j) and situate within such area. It is therefore not possible to uphold the contention of the landholders that the Andhra Pradesh Act is ultra vires and void as being outside the legislative competence of the Andhra Pradesh Legislature."

(Emphasis added)

A close and careful reading of the said statement of law declared by this Court makes it clear that if as on the date when the Andhra Pradesh Act was already in force i.e. as on 01.01.1975, the determination of surplus land as per the provisions of the said Act should have been determined and only thereafter the implication of the Act, 1976 could be applied. The specific statements *"It is only in respect of land remaining with a person, whether an individual or a family unit, after the operation of the Andhra Pradesh Act, that the Central Act would apply….." "…..but by that time the Andhra Pradesh Act would have already operated to determine the ceiling on holding of land falling within the definition in Section 3(j) and situate within such area….."* makes the above position clear without any ambiguity.

78. Afortiori if the said ratio decided by the Constitution Bench of this Court is applied, there would be no difficulty in holding that as held by us earlier, since as per the un-amended Act of 1960, 'Bid land' held by the respondent fell within the definition of 'agriculture' under Section 2(1) and consequent definition of 'land' as defined in Section 2(17) of the Act of 1960, the determination of holding of such excess agriculture land under the said Act of 1960 prior to the coming into force of the Act, 1976 should be operated upon. Having regard to the said legal position, we hold that the action of the appellants in having passed the orders impugned before the High Court were fully justified and interfering with the same by the learned Single Judge and the Division Bench of the High Court by the impugned order in this Civil Appeal are liable to be set aside.

79. The impugned judgment of the Division Bench of the High Court proceeded mainly on the footing that the Amended Act of 1974 cannot form the basis for proceeding against the respondent for the purpose of acquisition under the 1960 Act in the light of the field being occupied by the Act, 1976 which came into force prior to the coming into force of the 1974 Act, namely, on 17.02.1976 and the Amendment Act of 1974 which came to be notified only on 01.04.1976. The said conclusion was based on the implication of Article 252(2) of the Constitution wherein once at the instance of the State Government even in relation to any entry in List II an enactment came to be made by the Parliament, any subsequent amendment relating to the said subject can only be made by the Parliament and not by the State. The Division Bench referred to the claim of the appellant that even by ignoring the Amendment Act 1974 which came into effect from 01.04.1976 having regard to the existence of the Act, 1976 as from 17.02.1976, the ceiling with regard to the agricultural land has to be determined as it was existing prior to 17.02.1976, namely, as agricultural land and the same being not part of urban agglomeration the 1960 Act would apply. We find that the said argument was simply brushed aside. The submission

was not dealt with in the proper perspective.

80. It was lastly contended by the learned senior counsel for the respondent that the case of the appellants was hit by the principle of res judicata. In support of the said submission, reliance was placed upon the joint affidavit filed by two Deputy Collector dated 06.10.1980, filed in a different case viz., in Special Civil Application No.941 of 1980 before the High Court of Gujarat where on behalf of the State of Gujarat, it was contended that in respect of 'Bid land' only Act, 1976 would apply where such 'Bid land' lie within the agglomeration of Bhavnagar and that Act of 1960 was not applicable. Reliance was also placed upon another affidavit dated 16.02.2000, filed by the Deputy Secretary, Revenue Department, Government of Gujarat in relation to Bhavnagar 'Bid lands' before the High Court of Gujarat in S.C.A.No.15529 of 1999, wherein a stand was taken by the State Government that possession of Bhavnagar 'Bid land' not having been acquired and taken under the Act, 1976 prior to its repeal, there was no scope to take possession of those lands. Reliance was placed upon the decision of this Court in *Palitana Sugar Mills (P) Ltd. and another Vs. State of Gujarat and others* (supra)wherein, it was concluded by this Court that Bhavnagar 'Bid lands' were controlled by the provisions of Act, 1976 and not by the Act of 1960. By referring to those affidavits and the decision of this Court, the contention was that the stand taken by the appellant in regard to the Bhavnagar 'Bid lands' would apply in all force to the 'Bid lands' belonging to the respondent though they were situated in Rajkot.

81. In reply to the said submission Mr. Soli J. Sorabjee, learned senior counsel for the appellants contended that the principle of res judicata cannot be applied as the parties were different and the subject lands were different and the respondent had nothing to do with the issue raised in the decision relied upon by the learned senior counsel for the respondent. It was also submitted that since the ingredients to support the principle of res judicata as set out under Section

11 of the Code of Civil Procedure not having been fulfilled, the submission of the learned senior counsel for the respondent cannot be considered. The learned senior counsel for the appellants brought to our notice the facts set out in the joint affidavits of the two Deputy Collectors in S.C.A. No.941 of 1980, wherein it was specifically averred to the effect that since long time, to the knowledge of the land holders, the land in question was demonstrated as meant for residential purpose in the Master Plan which was prepared since August, 1976 and that the land in question fell within the definition of 'urban land' under Section 2(o) of the Act, 1976 and therefore the overriding effect of Section 42 of the Act, 1976 excluded the application of the Act of 1960.

82. When we refer to the facts mentioned in the joint affidavit of the two Deputy Collector in S.C.A.No.941 of 1980, we find that the submissions of the learned senior counsel for the appellants were clearly set out therein. The lands which were originally classified as 'Bid lands' came to be specifically classified as land meant for residential purpose in the Master Plan prepared in the year August, 1976 and thereby came within the definition of 'urban land' under Section 2(o) of the Act, 1976. Whatever decision rendered based on those facts cannot be equated to the facts involved in the case on hand, in order to apply the principle of res judicata and thereby non-suit the appellants. The principle of res judicata is governed by Section 11 of the Code of Civil Procedure. Applying the ingredients set out in the said provision, the respondent is bound to show that the issue which was directly and substantially involved between the same parties in the former suit and was tried in the subsequent suit, in order to fall within the principles of res judicata. Applying the substantive part of Section 11 of C.P.C. we fail to see how any of the ingredients set out therein are fulfilled in order to apply the principle of res judicata. The parties are entirely different, the fact in issue as pointed out by the learned senior counsel for the appellants would disclose that they were based on entirely different set of facts and

circumstances and therefore we do not find any substance in the said submission raised on behalf of the respondent. The said submission, therefore, stands rejected.

83. When we come to the submission relating to the concept of eclipse in relation to the Act of 1960, as it originally stood as well as after the Amendment Act of 1974 by virtue of the coming into force of the Act, 1976 w.e.f. 17.02.1976, we wish to only touch upon the position that occurred due to the subsequent repeal of the Act, 1976 in the year 2000. We are conscious of the fact that we are not solely concerned with the said issue of eclipse of the Act of 1960 and its revival after the repeal of the Act, 1976. However, since the said issue was argued by the respective counsel and reliance was placed upon a Constitution Bench decision of this Court on this issue in *M.P.V. Sundararamier* (supra) we are obliged to deal with the said submission. In the said decision among other contentions a contention was raised on behalf of the petitioner therein which was as under:

> "Section 22 having been unconstitutional when it was enacted and, therefore, void, no proceedings could be taken thereunder on the basis of the Validation Act as the effect of unconstitutionality of the law was to efface it out of the statute book."

Dealing with the said contention, the Constitution Bench has held at page 1469 and 1474-75 as under:

> ".....If a law is on a field not within the domain of the legislature, it is absolutely null and void, and a subsequent cession of that field to the legislature will not have the effect of breathing life into what was a still-born piece of legislation and a fresh legislation on the subject would be requisite. But if the law is in respect of a matter assigned to the legislature but its provisions disregard constitutional prohibitions, though the law would be unenforceable by reason of those prohibitions, when once they are removed, the law will become effective without re-enactment.

> The result of the authorities may thus be summed up: Where an enactment is unconstitutional in part but valid as to the rest, assuming of course that the two portions are severable, it cannot be held to have been wiped out of the statute book as it admittedly must remain there for the purpose of enforcement of the valid portion thereof, and being on the statute book, even that portion which is unenforceable on the ground that it is unconstitutional will operate proprio vigore when the Constitutional bar is removed, and there is no need for a fresh legislation to give effect thereto. On this view, the contention of the petitioners with reference to the Explanation in s.22 of the Madras Act must fail…."
>
> (emphasis added)

In the light of the said proposition of law laid down by the Constitution Bench decision of this Court, it will have to be held that once the Act, 1976 came to be repealed whatever constitutional embargo that was existing as against the Act of 1960 as well as the Amendment Act of 1974 ceased to exist and the Act would operate in full force. In the light of the said settled legal position, we need not dilate much on this issue and we leave it at that.

84. Having regard to our above conclusions, the judgment impugned in this appeal is liable to be set aside. The appeal, therefore, stands allowed. The order of the learned Single Judge as well as the impugned judgment of the Division Bench are set aside. The judgment dated 08.09.1989 passed by the Gujarat Revenue Tribunal in Revision Application No.TEN.B.R.4/84 confirming the orders of the Deputy Collector and Mamlatdar and A.L.T in so far as Bid lands in survey No.111/2 admeasuring 30 acres 30 Gunthas and survey No.111/3 admeasuring 579 acres 27 Gunthas stands restored. In the facts and circumstances of the case where we have dealt with pure questions of law there will be no order as to costs.

R.P. Appeal allowed.