PURNO AGITOK SANGMA
v.
PRANAB MUKHERJEE
(Election Petition No. 1 of 2012)

DECEMBER 5, 2012 AND DECEMBER 11, 2012

[ALTAMAS KABIR, CJI, P. SATHASIVAM, SURINDER SINGH NIJJAR, J. CHELAMESWAR AND RANJAN GOGOI, JJ.]

Constitution of India, 1950:

Art. 58(2) – Qualifications for election as President of India – Expression 'office of profit' – Connotation of – Respondent holding office of Chairman of Council of Indian Statistical Institute, Kolkata – Held (Per majority): In order to be an office of profit, the office must carry pecuniary benefits or must be capable of yielding pecuniary benefits, which is not so in respect of Chairman, ISI – It was not such a post, which was capable of yielding any profit so as to make it, in fact, an office of profit – In any event, by the 2006 amendment to s. 3 of the Parliament (Prevention of Disqualification) Act, 1959, the holder of the post of Chairman, ISI has been excluded from disqualification for contesting the Presidential election– Parliament (Prevention of Disqualification) Act, 1959 – s. 3.

Art. 58(2) – Qualification for election as President of India – 'Office of profit' – Respondent holding the post of Leader of House in Lok Sabha – Held (Per majority): The disqualification contemplated on account of holding the post of Leader of the House was with regard to the provisions of Art.102(1)(a) of the Constitution, besides being the position of the leader of the party in the House, which did not entail the holding of an office of profit under the Government – In any event, since the respondent had tendered his resignation

from the said post prior to filing of his nomination papers, which was duly acted upon by the Speaker of the House, challenge thrown by petitioner to respondent's election as President of India on the said ground loses its relevance – Leaders and Chief Whips of Recognized Parties and Groups in Parliament (Facilities) Act, 1998.

Art. 58 – Presidential election – Held: Supreme Court has repeatedly cautioned that election of the returned candidate should not be lightly interfered with unless circumstances so warrant.

Supreme Court Rules, 1966:

*O. 39, rr. 13 and 20 – Election petition challenging the election of respondent to the post of President of India – Held (Per majority): In the facts and circumstances of the case, the election petition does not deserve a full and regular hearing as contemplated under r. 20 of O. 39 – Thus, the election petition cannot be set down for regular hearing and is dismissed under r. 13 of O. 39 (J. Chelameswar and Ranjan Gogoi, JJ. **dissenting**) – Presidential and Vice Presidentil Elections Act, 1952 – ss. 14 to 20 – Supreme Court Rules, 1966 – O. 39, rr. 13 and 20 – Code of Civil Procedure, 1908 – s. 141 – Constitution of India, 1950 – Art. 71 r/w Seventh Schedule, List I, Entry 72.*

The petitioner, who lost the Presidential election to the respondent, filed the instant election petition under Art. 71 of the Constitution of India, 1950 read with O. 39 of the Supreme Court Rules 1966, challenging the election of the respondent to the post of the President of India on the ground that the respondent, at the time of filing of the nomination papers as a candidate for the Presidential election, held the office of Chairman of the Council of Indian Statistical Institute, Kolkata and was also the Leader of the House in the Lok Sabha; and since both the offices were offices of profit, the respondent

stood disqualified from contesting the Presidential election in view of Art. 58(2) of the Constitution. The challenge was based mainly on the allegation that on the date of filing of nominations, the respondent held "offices of profit", namely (i) Chairman of the Indian Statistical Institute, Kolkata; and (ii) Leader of the House in the Lok Sabha. The stand of the respondent was that he was holding neither of the posts on the date of filing of nominations i.e. 28.6.2012, as he had resigned from both the posts on 20.6.2012.

The election petition was listed for hearing on preliminary point in terms of O. 39, r.13 of the Supreme Court Rules, 1966, as to whether the petition deserved a hearing as contemplated by r.20 of O. 39 of the 1966 Rules.

Dismissing the petition, the Court

HELD: PER ALTAMAS KABIR, CJI (for himself and for P. SATHASIVAM AND S.S. NIJJAR, JJ.)

1.1. Clause (1) of Art. 71 of the Constitution of India, 1950 provides that all doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court whose decision shall be final. Clause (3) of Art. 71 provides that subject to the provisions of the Constitution, Parliament may, by law, regulate any matter, relating to or connected with the election of a President or Vice-President. In addition, the Presidential and Vice-Presidential Elections Act, 1952 (the Act) was enacted with the object of regulating certain matters relating to or connected with elections to the Office of President and Vice-President of India. Part III of the said Act, which contains ss.14 and 14A, as also ss.17 and 18, deals with disputes regarding elections to the posts of President and Vice-President of India. Sections 14 and 14A of the Act

specially vest the jurisdiction to try election petitions thereunder with the Supreme Court in the manner indicated therein. Sections 17 and 18 empower the Supreme Court to either dismiss the election petition or to declare the election of the returned candidate to be void or to declare the election of the returned candidate to be void and the petitioner or any other candidate to have been duly elected. [para 47] [628-E-H; 629-A-B]

1.2. In view of sub-s. (3) of s.14 of the Act, the Supreme Court has framed Rules under Art. 145 of the Constitution. Rule 13 of O. 39 of the Supreme Court Rules, 1966 provides that upon presentation of a petition relating to a challenge to election to the post of the President of India, the same is required to be posted before a Bench of the Court consisting of five Judges for preliminary hearing and to consider whether the petition deserved a regular hearing, as contemplated in r. 20 of O. 39 and, in that context, such Bench may either dismiss the petition or pass appropriate order as it thought fit. [para 48] [629-C-E]

2.1. In order to be an office of profit, the office must carry various pecuniary benefits or must be capable of yielding pecuniary benefits such as providing for official accommodation or even a chauffeur driven car, which is not so in respect of the post of Chairman of the Indian Statistical Institute, which was, in fact, the focus and *raison d'etre* of petitioner's stand. In fact, the said office was also not capable of yielding profit or pecuniary gain. It can also not be said that once a person is appointed as Chairman of the Indian Statistical Institute, the Rules and Bye-laws of the Society did not permit him to resign from the post and that he had to continue in the post against his wishes. There is no contractual obligation that once appointed, the Chairman would have to continue in such post for the full term of office. There is no such compulsion under the Rules and the Bye-laws of the

Society either. In any event, by the 2006 amendment to s. 3 of the Parliament (Prevention of Disqualification) Act, 1959, the holder of the post of Chairman of the Institute has been excluded from disqualification for contesting the Presidential election. [para 55, 58 and 59] [631-D; 632-G-H; 633-A-C]

Shibu Soren Vs. Dayanand Sahay & Ors. **2001 (3) SCR 1020 = (2001) 7 SCC 425; and** *Jaya Bachchan Vs. Union of India & Ors.* **2006 (2) Suppl. SCR 110 = (2006) 5 SCC 266;** *M.V. Rajashekaran & Ors. Vs. Vatal Nagaraj & Ors.* **2002 (1) SCR 412 = (2002) 2 SCC 704;** *Ravanna Subanna Vs. G.S. Kaggeerappa* **AIR 1953 SC 653;** *Madhukar G.E. Pankakar Vs. Jaswant Chobbildas Rajani* **1976 (3) SCR 832 = (1977) 1 SCC 70;** *Karbhari Bhimaji Rohamare Vs. Shanker Rao Genuji Kolhe & Ors.* **1975 (2) SCR 753 = (1975) 1 SCC 252;** *Pradyut Bordoloi Vs. Swapan Roy* **2000 (5) Suppl. SCR 525 = (2001) 2 SCC 19;** *Ashok Kumar Bhattacharyya Vs. Ajoy Biswas & Ors.* **1985 (2) SCR 50 = (1985) 1 SCC 151** *Consumer Education & Research Society vs. Union of India & Ors.* **2009 (13) SCR 664 = (2009) 9 SCC 648;** K*anta Kathuria Vs. Manak Chand Surana* **1970 (2) SCR 835 = (1969) 3 SCC 268;** *Indira Nehru Gandhi Vs. Raj Narain* **1976 SCR 347 = 1975 (Supp) SCC 1;** *Union of India & Ors. Vs. Gopal Chandra Mishra & Ors.* **1978 (3) SCR 12 = (1978(2) SCC 301;** *Moti Ram Vs. Param Dev* **1993 (2) SCR 250 = (1993) 2 SCC 725 – referred to.**

2.2. In regard to the office of the Leader of the House, it is quite clear that the respondent had tendered his resignation from membership of the House before he filed his nomination papers for the Presidential election. However, the disqualification contemplated on account of holding the post of Leader of the House was with regard to the provisions of Art.102(1)(a) of the Constitution, besides being the position of the leader of the party in the House, which did not entail the holding

of an office of profit under the Government. In any event, since the respondent had tendered his resignation from the said post prior to filing of his nomination papers, which had been duly acted upon by the Speaker of the House, the challenge thrown by the petitioner to the respondent's election as President of India on the said ground loses its relevance. [para 56] [631-E, G-H; 632-A-B]

2.3. The Constitutional Scheme, as mentioned in the Explanation to Clause (2) of Art. 58 of the Constitution, makes it quite clear that for the purposes of said Article, a person would not be deemed to hold any office of profit, *inter alia,* by reason only that he is a Minister either for the Union or for any State. Art. 102 of the Constitution contains similar provisions wherein in the Explanation to Clause (1) it has been similarly indicated that for the purposes of the said clause, a person would not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister, either for the Union, or for such State. [para 57] [632-C-E]

2.4. The argument that the provisions of Art. 102, as well as Art. 58 of the Constitution could not save a person elected to the office of President from disqualification if he held an office of profit, loses its significance in view of the fact that, as would appear from the materials on record, the respondent was not holding any office of profit either under the Government or otherwise at the time of filing his nomination papers for the Presidential election. [para 57] [632-E-F]

2.5. In the facts and circumstances of the case, the election petition does not deserve a full and regular hearing as contemplated under r. 20 of O. 39 of the Supreme Court Rules, 1966. It can also not be said that s.141 of the Code of Civil Procedure, 1908 is required to

be incorporated into a proceeding taken under O. 39 of the Supreme Court Rules read with Part III of the Presidential and Vice-Presidential Elections Act, 1952, which includes ss.14 to 20 of the said Act and Art. 71 of the Constitution of India. This Court is not inclined, therefore, to set down the election petition for regular hearing and the same is dismissed under r. 13 of O. 39 of the Supreme Court Rules, 1966. [para 60 and 62] [633-E-F, H; 634-A]

Mange Ram Vs. Brij Mohan & Ors. **1983 (3) SCR 525 = (1983) 4 SCC 36 – referred to.**

2.6. This Court has repeatedly cautioned that the election of a candidate who has won in an election should not be lightly interfered with unless circumstances so warrant. [para 61] [633-G]

Charan Lal Sahu Vs. Neelam Sanjeeva Reddy **1978 (3) SCR 1 = (1978) 2 SCC 500**; *Mithilesh Kumar Vs. R. Venkataraman & Ors.* **1988 SCR 525 = (1987) Supp. SCC 692 – cited.**

Per Chelameswar, J.:

It cannot be said that the instant election petition does not deserve a regular hearing. Reasons for such view shall be pronounced shortly. [646-G]

Per Ranjan Gogoi, J. (Dissenting, but partly concurring):

1.1. The short question that has arisen for determination in the election petition, at this stage, is whether the same deserves a regular hearing under r. 20 of O. 39 of the Supreme Court Rules, 1966. [para 2] [634-C]

1.2. Art. 71 of the Constitution provides for matters relating to, or connected with, the election of the

President or the Vice President. In exercise of the power conferred by Art. 71(3) read with Entry 72 of List I of the Seventh Schedule to the Constitution, Parliament has framed the Presidential and Vice-Presidential Election Act, 1952, s.14 (1) whereof provides that no election shall be called in question except by presenting an election petition to the authority specified in sub-s. (2) i.e. the Supreme Court. Section 14(3) provides that every election petition shall be presented in accordance with the provisions contained in Part III of the Act and such Rules as may be made by the Supreme Court under Art. 145 of the Constitution. [para 9-10] [637-C, D-F]

1.3. By virtue of powers conferred by Art. 145 of the Constitution, the Supreme Court has framed the Supreme Court Rules, 1966 (the Rules), r. 34 of O. 39 whereof provides that the procedure on an election petition shall follow, as nearly as may be, the procedure in proceedings before the Supreme Court in the exercise of its original jurisdiction. The said procedure is contained in O. 23 of Part III of the Rules. Order 23, r. 1 contemplates institution of a suit by means of a plaint. After dealing with the requirements of a valid plaint, O.23, r.6 provides that a plaint shall be rejected (a) where it does not disclose a cause of action; and (b) where the suit appears from the statement in the plaint to be barred by any law. [para 11 and 13] [638-B; 639-D-F]

1.4. A preliminary hearing for determination of the question as to whether an election petition deserves a regular hearing under r.20 did not find any place in the Rules till insertion of r.13 in the present form w.e.f. 20.12.1997. Order 23, r. 6 was a part of the Rules alongwith r. 13 as it originally existed. Thus, insertion of r. 13 providing for a preliminary hearing was made despite the existence of the provisions of O. 23, r. 6 and the availability of the power to reject a plaint and dismiss the suit (including an election petition) on the twin grounds

mentioned in r. 6 of O. 23. [para 13 and 15] [639-C-D; 640-C-D]

1.5. Therefore, a preliminary hearing under O.39, r. 13 would require the Court to consider something more than the mere disclosure or otherwise of a cause of action on the pleadings made or the question of maintainability of the election petition in the light of any particular statutory enactment. A further enquiry, which obviously must exclude matters that would fall within the domain of a regular hearing under r. 20, would be called for in the preliminary hearing under r. 13 of O. 39. In the course of such enquiry the Court must be satisfied that though the election petition discloses a clear cause of action and raises triable issue(s), yet, a trial of the issues raised will not be necessary or justified inasmuch as even if the totality of the facts on which the petitioner relies are to be assumed to be proved there will be no occasion to cause any interference with the result of the election. It is only in such a situation that the election petition must not be allowed to cross the hurdle of the preliminary hearing. If such satisfaction cannot be reached, the election petition must be allowed to embark upon the journey of a regular hearing under r. 20 of O. 39 in accordance with the provisions of Part III of the Rules. This is the scope and ambit of the preliminary hearing under O. 39, r.13 of the Rules and it is within these confines that the question raised by the parties, at this stage, have to be answered. [para 15] [640-D-H; 641-A]

2.1. Under the provisions of the Leaders and Chief Whips of Recognized Parties and Groups in Parliament (Facilities) Act, 1998 and the Rules framed thereunder, no remuneration to the Leader of the House or the Leader of the Legislature Party in the House is contemplated beyond the salary and perquisites payable to the holder of such an office if he is a Minister of the Union (in the instant case, the respondent was a Cabinet Minister of

the Union). That apart, either of the offices is not under the Government of India or the Government of any State or under any local or other authority as required under Art. 58 (2) so as to make the holder of any such office incur the disqualification contemplated thereunder. Both the offices in question are offices connected with the Lok Sabha. Any incumbent thereof is either to be elected or nominated by virtue of his membership of the House or his position as a Cabinet Minister, as may be. The election petition insofar as the said offices are concerned, therefore, does not disclose any triable issue for a full length hearing under O. 39, r. 20 of the Rules. [para 16] [641-B-E]

2.2. With regard to the office of the Chairman of the Council of Indian Statistical Institute, Kolkata, the question whether the said office carries any remuneration and/or perquisites or the same is under the control of the Union Government as also the question whether the respondent had resigned from the said office on 20.6.2012, are all questions of fact which are in dispute and, therefore, capable of resolution only on the basis of such evidence as may be adduced by the parties. The Court, therefore, will have to steer away from any of the said issues at the present stage of consideration which is one under O. 39, r.13. Instead, for the present, the Court may proceed on the basis that the office in question is an office of profit which the respondent held on the relevant date. In this regard the specific issue that has to be gone into is whether the office of the Chairman, ISI, Kolkata has been exempted from bringing any disqualification by virtue of the provisions of the Parliament (Prevention of Disqualification) Act 1959, as amended. For an effective examination of the issue, the provisions of Arts. 58, 84 and 102 of the Constitution would require a detailed notice and consideration. [para 17-18] [641-F-H; 642-B-D]

2.3. Article 58(1)(c) requires a Presidential candidate to be qualified for election as a Member of the House of the People. It cannot be said that whosoever is qualified for election as a Member of the House of the People under Art. 84 and does not suffer from any disqualification under Art. 102 becomes automatically eligible for election to the office of the President. Nor can it be said that the provisions of Arts. 58, 84 and 102 of the Constitution envisage a composite and homogenous scheme. The similarities as well as the differences between Art. 58, on the one hand, and Arts. 84 and 102, on the other, are too conspicuous to be ignored or over looked. Insofar as Art. 102 (1)(a) is concerned, though holding an office of profit is a disqualification for election as or being a Member of either House of Parliament, such a disqualification can be obliterated by a law made by Parliament. Under Art. 58(2) though a similar disqualification (by virtue of holding an office of profit) is incurred by a Presidential candidate, no power has been conferred on Parliament to remove such a disqualification. Keeping in view that the words in the Constitution should be read in their ordinary and natural meaning so that a construction which brings out the true legislative intent is achieved, Art. 58 has to be read independently of Arts. 84 and 102 and the purport of the two sets of Constitutional provisions has to be understood to be independent of each other. [para 19-20] [644-F-G; 645-C-H]

Baburao Patel v. Dr. Zakir Hussain **(1968) 2 SCR 133 - relied on**

2.4. Therefore, the Parliament (Prevention of Disqualification) Act, 1959 as amended by the Amendment Act No.31 of 2006 has no application insofar as election to the office of the President is concerned. The disqualification incurred by a Presidential candidate on account of holding of an office of profit is not

removed by the provisions of the said Act which deals with removal of disqualification for being chosen as, or for being a Member of Parliament. If, therefore, it is assumed that the office of Chairman, ISI is an office of profit and the respondent had held the said office on the material date(s), consequences adverse to the respondent, in so far as the result of the election is concerned, are likely to follow. The said facts will, therefore, be required to be proved by the election petitioner. [para 21] [646-B-D]

2.5. Thus, no conclusion that a regular hearing in the instant case will be a redundant exercise or an empty formality can be reached so as to dispense with the same and terminate the election petition at the stage of its preliminary hearing under O. 39, r.13. The election petition, therefore, deserves a regular hearing under O. 39, r. 20 in accordance with what is contained in the different provisions of Part III of the Supreme Court Rules, 1966. [para 21] [646-D-E]

DECEMBER 11, 2012:

Per Chelameswar, J. (Dissenting, but partly concurring):

1.1. It is a long settled principle of law that the elections to various bodies created under the Constitution cannot be questioned except in accordance with the law made by the appropriate legislation. Art. 71 of the Constitution of India declares that all doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court. While the forum for adjudication of disputes pertaining to legislative bodies under the Constitution is required to be determined by the appropriate legislature, the forum for the adjudication of disputes pertaining to the election of the President and the Vice-President is fixed by the Constitution to be this

Court. In exercise of power under Art. 71(3) read with Art. 246(1) and Entry 72 of List I of the Seventh Schedule, Parliament made the Presidential and Vice-Presidential Elections Act, 1952, ('the Elections Act'), s.14 whereof declares that the only mode of questioning the election of either the President or the Vice-President is by presenting an election petition to this Court. Section 14A prescribes that the election of either the President or the Vice-President could be challenged only on the grounds specified in ss.18(1) and 19 of the Act. Further, Art. 145 of the Constitution authorizes this Court to make rules for regulating the practice and procedure of this Court with regard to its jurisdiction, either original or appellate vested in this Court either by the Constitution or law. [para 3,4 and 8] [647-C, E; 648-A-B-E-F; 649-A-B; 651-C; 652-A]

1.2. It cannot be said that the Code of Civil Procedure, 1908 applies to the conduct of the election petition on hand in view of s.141 thereof. The procedure that is required to be followed by this Court while exercising jurisdiction conferred by either the Constitution or Parliament by law could be laid down only by Parliament and until Parliament makes such a law, by the rules made by this Court. CPC is not a law made by Parliament but an "existing law" within the meaning of the expression under Art. 366 (10) and deriving its force from Art. 372 of the Constitution. Further, this Court and the High Courts are not ordinary civil courts within the meaning of such an expression employed in various enactments attracting the bar of jurisdiction created by the statute. Therefore, it cannot be said that by virtue of the operation of s.141 of the Code, this Court is bound by the procedure contained in the Code while exercising its extraordinary jurisdiction under Art. 71 of the Constitution. [para 9 and 11] [652-B-D; 654-D-F]

1.3. This Court, in exercise of its authority under Art. 145, has made rules regulating the procedure of this Court, both in its original and appellate jurisdiction called the Supreme Court Rules, 1966 ['the Rules']. Insofar as the election petitions under the Elections Act are concerned, the procedure is prescribed under O. 39 which occurs in Part VII of the Rules. Rule 34 thereof stipulates that while adjudicating an election petition under the Elections Act, this Court is required to follow (as nearly as may be) the procedure contained in Orders 22 to 34 of Part III of the Rules regulating the proceedings before this Court in exercise of its original jurisdiction. Such a stipulation is expressly made subject to other provisions of O.39 or any special order or direction by this Court. The stipulation that this Court is obliged to follow the procedure applicable to the proceedings under the original jurisdiction of this Court (Part III of the Rules) is made subject to the other provisions of O. 39. Thus, if the procedure contained in Part III is inconsistent with any provisions contained in Part VII (O. 39), this Court is not obliged to follow the procedure contained in Part III. Apart from that, in view of r. 34 of O. 39, it is always open to this Court in a given case not to follow the procedure contained under O. 39. [para 12] [655-A-F]

1.5. Rules 13 to 15 of O. 39 prescribe the procedure to be followed by this Court on the receipt of an election petition under the Act. A plain reading of r.13 of O. 39 indicates that on the due presentation of an election petition under the Act to this Court: [1] the same shall be posted before a bench of five Judges for a preliminary hearing and orders; [2] such a hearing and orders are regarding the service of the petition and advertisement thereof. Rules 14 and 15 respectively stipulate that the notice of the presentation of the election petition under the Act is required to be served on the various persons specified under r.14. An election petition under the Act is

required to be listed for a preliminary hearing contemplated under r.13. Rule 13 further stipulates [3] upon such a preliminary hearing, if the Court comes to the conclusion that the petition does not deserve a regular hearing, contemplated under r.20, the Court may either dismiss the election petition or pass any appropriate orders as it deems fit. [para 13-14] [655-G; 656-A-B-C-D]

1.6. Therefore, O. 39, r. 13 prescribes a procedure contrary to the stipulation contained under O. 24, r.1 which mandates that after due institution of an original suit before this Court, "summons shall be issued". It is worthwhile noticing that while O. 24 requires summons to be issued, O. 39, r.14 contemplates that only a notice of the presentation of an election petition is to be issued. The distinction between summons and notice is very subtle but real. [para 15] [657-E-F]

2.1. Order 39. r. 13 vests a discretion in the bench of five Judges before whom the election petition under the Act is posted for preliminary hearing to record a conclusion whether the petition deserves a notice under r.14 or publication under r.15 and a regular hearing under r.20 or any other appropriate order such as (perhaps) directing some formal defects in the petition to be cured etc. However, the discretion of the bench to record a finding that the election petition does not deserve a regular hearing and, therefore, is required to be dismissed must be exercised on rational grounds known to law for clear and cogent reasons to be recorded. [para 16-17] [657-G-H; 658-A-B-C]

2.2. It is not possible to give an exhaustive list of the circumstances in which this Court can render the finding that an election petition does not require a regular hearing but for the purpose of the case is hand it can be said that if the allegations made in the election petition

even if assumed to be true do not constitute one or some of the grounds on which an election under the Act can be challenged, it would be certainly one of the grounds enabling this Court to reach a conclusion that the election petition does not deserve a regular hearing. In the instant case, the only ground on which the election of the respondent is challenged is that he was not eligible to contest the election to the office of President of India. Such a ground is certainly one of the grounds on which election of the respondent as the President of India could be challenged, as s.18(1)(c) of the Elections Act stipulates that if this Court is of the opinion that the nomination of the successful candidate has been wrongly accepted, this Court shall declare the election to be void. [para 21,23 and 27] [659-C, G; 660-A-B; 661-C]

3.1. The respondent does not dispute the fact that he was the Chairman of the Indian Statistical Institute, Kolkata and also the leader of the political party called Indian National Congress in the Lok Sabha. However, the respondent took a categoric stand that he had resigned from both the offices before the crucial date i.e. on the date of scrutiny of the nomination papers (2.7.2012) – a stand which is seriously disputed by the election petitioner by an elaborate pleading in the petition that the respondent did not, in fact, cease to hold the offices by the crucial date. The respondent also took a categoric stand that apart from his having had relinquished the two offices by the crucial date, neither of the abovementioned offices is an office the holding of which would make him ineligible to contest the election in question. [para 29-30] [661-F-H; 662-A]

3.2. The issue that is required to be examined for the purpose of the order on the preliminary hearing under r. 13 of O.39 of the Rules is whether the holding of either of the two offices – if really held on the crucial date – would render the respondent ineligible to contest the election in

question? Further, the question would be, whether the two offices are offices of profit. The question – whether the respondent did in fact hold those offices on the crucial date is a question of fact which cannot be the subject matter of enquiry at this stage. [para 31-32] [662-B-D]

3.3. Article 58 provides that holding of an office of profit either under the Government of India or the Government of any State or any local or other authority subject to the control of any of the said Governments *inter alia* **would render the holder of such office of profit ineligible for election as President. The respondent's defence is that neither of the offices held by him are offices of profit falling under Art. 58 (2) which would render him ineligible to contest the election in question. [para 34-36] [662-E; 663-B-D]**

3.4. Any person seeking to contest an election either to the office of the President of India or for the membership of anyone of the legislative bodies under the Constitution must satisfy certain eligibility criteria stipulated by the Constitution. Any person who is eligible to become and not disqualified for becoming a member of Parliament would not automatically be eligible to contest the election to the office of the President of India. There is a difference in the eligibility criteria applicable to the election of the membership of Parliament and the election to the office of the President of India. Claues (2) of Art. 58 disqualifies persons holding office of profit not only specified under Art. 102 (1) (a) but also under any local or any other authority which is subject to the control of either of the two governments. Further, while an office of profit, the holding of which renders a person disqualified for being chosen as a member of Parliament, can be declared by the Parliament not to be an office of profit holding of which would disqualify the holder from

becoming a member of Parliament. Such an authority is not expressly conferred on the Parliament in the context of the candidates at an election to the office of the President of India.Thus, the Constitution prescribes more stringent qualifications for election to the office of President of India and the disqualification stipulated under Art. 58(2) is incapable of being exempted by a law made by Parliament. [para 38, 40-43] [665-A-B; 667-C-D; F-G; 668-A-B-F]

Baburao Patel and others v. Dr. Zakir Hussain and others **1968 SCR 133 = AIR 1968 SC 904 – relied on**

3.5. The declaration made by Parliament in the Disqualification Act, 1959 would not provide immunity for a candidate seeking election to the office of the President of India if such a candidate happens to hold an office of profit contemplated under Art. 58(2). Even otherwise, the legal nature of Indian Statistical Institute and of the office of its Chairman is required to be examined. The office of the Chairman of the Institute is not an office created by any statute but is an office created by the bye-laws of the Society. The Chairman is required to be elected by a Council created under the regulations of the Society. Therefore, it is certainly not an office (profit or no profit) either under the Central or State Government. [para 46-47 and 54] [671-D-E, G; 673-C-D]

B.S. Minhas v. Indian Statistical Institute and others **1984 (1) SCR 395 = (1983) 4 SCC 582; and** *M.V. Rajashekaran and others v. Vatal Nagaraj and others* **2002 (1) SCR 412 = (2002) 2 SCC 704 - referred to.**

3.6. Besides, the inclusion of various offices in the Schedule of the Disqualification Act only reflects the understanding of the Parliament that those offices are offices of profit contemplated under Art. 102(1)(a). But such an understanding is neither conclusive nor binding

on this Court while interpreting the Constitution. Such inclusion appears to be an exercise – '*ex majure cautela*'. **Interpretation of the Constitution and the laws is "emphatically the province and duty" of the judiciary. Therefore, the meaning of the expressions "office of profit" and "office of profit under the State Government/ Central Government" are required to be examined. [para 62-63] [676-D-F; 677-A-B]**

Shivamurthy Swami Inamdar v. Agadi Sanganna Andanappa **(1971) 3 SCC 870;** *Ravanna Subanna v. G.S. Kaggerappa*, **AIR 1954 SC 653;** *Shibu Soren v. Dayanand Sahay and others* **2001 (3) SCR 1020 = (2001) 7 SCC 425 - referred to.**

3.7. The office of the Chairman of the Indian Statistical Institute, Kolkata, which is an authority for the purpose of Art. 58(2), is an office of profit as explained by this Court in various judgments. Assuming that the tests relevant for determining whether an office of profit contemplated under Art. 58(2) are the same as the test laid down by this Court in the context of Art. 102(1)(a), the answer to the said question depends upon the terms and conditions subject to which the respondent held that office. Whether the amounts if any paid to him in that capacity are compensatory in nature or amounts capable of conferring pecuniary gain are questions of fact which ought to be decided only after ascertaining all the relevant facts which are obviously in the exclusive knowledge either of the respondent or the Institute. The respondent in his short counter made a statement that he did not derive pecuniary gain by holding the said office. The veracity of such statement has not been subjected to any further scrutiny. After an appropriate enquiry into such conflicting statements of facts if it is to be concluded that the said office is an office of profit, inevitably the question whether the respondent had tendered his resignation by the crucial date is required to be ascertained – once again

an enquiry into a question of fact. [para 69-70] [679-C-F; 680-A-C]

3.8. The petitioner if permitted to inspect or seek discovery of records of the Indian Statistical Institute might or might not secure information to demonstrate truth or otherwise of the respondent's affidavit. The issue is not whether the petitioner would eventually be able to establish his case or not. The issue is whether the petitioner is entitled to a rational procedure of law to establish his case. The Constitution creates only one forum for the adjudication of such disputes. All other avenues are closed. By holding that the election petition does not deserve a regular hearing contemplated under r.20 would not be consistent with the requirement that justice must not only be done but it must also appear to have been done. [para 70-71] [680-D-F]

3.9. If adjudication of the election petition requires securing of information which is exclusively available with the respondent and the Indian Statistical Institute and which may be relevant, the petitioner cannot be told that he would not be able to secure such information on the ground that letter of the law does not provide for such opportunity. The CPC does not apply to the election petition. The rules framed by this Court under Art. 145 are silent in this regard. But the very fact that this Court is authorised to frame rules regulating the procedure applicable to trial of the election petitions implies that this Court has powers to pass appropriate orders to secure such information. [para 73] [681-C-E]

3.10. Similarly, accepting the statement of the respondent that he did not derive any pecuniary benefit by virtue of his having had been Chairman of the Indian Statistical Institute without permitting the petitioner to test the correctness of that statement by cross-examining the respondent or confronting the respondent with such

documents which the petitioner might discover if such a discovery is permitted would be a denial of equality of the law to the petitioner guaranteed under Art. 14 of the Constitution. Such facility is afforded to every litigant pursuing litigation in a court of civil judicature in this country. Therefore, it cannot be said that the election petition does not deserve a regular hearing. [para 74] [681-G-H; 682-A]

Case Law Reference:

Per Altamas Kabir, CJI

2001 (3) SCR 1020	**referred to**	**para 16**
2006 (2) Suppl. SCR 110	**referred to**	**para 17**
2002 (1) SCR 412	**referred to**	**para 18**
1978 (3) SCR 1	**cited**	**para 22**
1988 SCR 525	**cited**	**para 24**
1983 (3) SCR 525	**referred to**	**para 28**
AIR 1953 SC 653	**referred to**	**para 28**
1976 (3) SCR 832	**referred to**	**para 29**
1978 (3) SCR 12	**referred to**	**para 30**
1993 (2) SCR 250	**referred to**	**para 31**
2009 (13) SCR 664	**referred to**	**para 37**
1970 (2) SCR 835	**referred to**	**para 38**
1976 SCR 347	**referred to**	**para 38**
1975 (2) SCR 753	**referred to**	**para 39**

Per Ranjan Gogoi, J

(1968) 2 SCR 133	**relied on**	**para 20**

Per J. Chelameswar, J

1968 SCR 133	**relied on**	**para 44**
1984 (1) SCR 395	**relied on**	**para 49**
2002 (1) SCR 412	**relied on**	**para 55**
(1971) 3 SCC 870	**referred to**	**para 64**
AIR 1954 SC 653	**referred to**	**para 64**
2001 (3) SCR 1020	**referred to**	**para 65**

CIVIL ORIGINAL JURISDICTION : Under Article 71 of the Constitution of India.

Election Petition No. 1 of 2012.

Goolam E. Vahanvati, A.G., Ram Jethmalani, Satya Pal Jain, Harish N. Salve, Pravin H. Parekh, S.S. Shamshery, Dheeraj Jain, P.V. Yogeswaran, Lata Krishnamurthi, P.R. Mala, Subhashish R. Soren, Pranav Diesh, Karan Kalia, Ashish Dixit, V.M. Vishnu, Bharat Sood, Bhakti Vardhan Singh, Devadatt Kamat, Rohit Sharma, Anoopam N. Prasad, Nizam Pasha, Anandh Kannan, Sameer Parekh, E.R. Kumar, Sonali Basu Parekh, Rajat Nair, Vishal Prasad, Utsav Trivedi, Abhishek Vinod Deshmukh (for Parekh & Co.) Meenakshi Arora for the appearing parties.

The Judgments & Order of the Court was delivered by

ALTAMAS KABIR, CJI. 1. The Petitioner herein was a candidate in the Presidential elections held on 19th July, 2012, the results whereof were declared on 22nd July, 2012. The Petitioner and the Respondent were the only two duly nominated candidates. The Respondent received votes of the value of 7,13,763 and was declared elected to the Office of the President of India. On the other hand, the Petitioner received votes of the value of 3,15,987.

2. The Petitioner has challenged the election of the Respondent as President of India on the ground that he was not eligible to contest the Presidential election in view of the provisions of Article 58 of the Constitution of India, which is extracted hereinbelow :-

> **"58. Qualifications for election as President.-** (1) No person shall be eligible for election as President unless he -
>
> (a) is a citizen of India,
>
> (b) has completed the age of thirty-five years, and
>
> (c) is qualified for election as a member of the House of the People.
>
> (2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.
>
> ***Explanation.-***For the purposes of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice President of the Union or the Governor of any State or is a Minister either for the Union or for any State."

3. According to the Petitioner, at the time of filing the nomination papers as a candidate for the Presidential elections, the Respondent held the Office of Chairman of the Council of Indian Statistical Institute, Calcutta, hereinafter referred to as the "Institute", which, according to him, was an office of profit. It appears that at the time of scrutiny of the nomination papers on 2nd July, 2012, an objection to that effect had been raised before the Returning Officer by the Petitioner's authorized representative, who urged that the nomination

papers of the Respondent were liable to be rejected. In response to the said submission, the representative of the Respondent sought two days' time to file a reply to the objections raised by the Petitioner. Thereafter, on 3rd July, 2012, a written reply was submitted on behalf of the Respondent to the objections raised by the Petitioner before the Returning Officer, along with a copy of a resignation letter dated 20th June, 2012, whereby the Respondent claimed to have resigned from the Chairmanship of the Institute. A reply was also filed on behalf of the Respondent to the objections raised by Shri Charan Lal Sahu. The matter was, thereafter, considered by the Returning Officer at the time of scrutiny of the nomination papers on 3rd July, 2012, when the Petitioner's representative even questioned the genuineness of the resignation letter submitted by the Respondent to the President of the Council of the Institute, Prof. M.G.K. Menon.

4. Having considered the submissions made on behalf of the parties, the Returning Officer, by his order dated 3rd July, 2012, rejected the Petitioner's objections as well as the objections raised by Shri Charan Lal Sahu, and accepted the Respondent's nomination papers. Accordingly, on 3rd July, 2012, the Petitioner and the Respondent were declared to be the only two duly nominated candidates for the Presidential election.

5. Immediately after the rejection of the Petitioner's objection to the Respondent's candidature for the Presidential elections, on 9th July, 2012, a petition was submitted to the Election Commission of India, under Article 324 of the Constitution, praying for directions to the Returning Officer to re-scrutinize the nomination papers of the Respondent and to decide the matter afresh after hearing the Petitioner. The Election Commission rejected the said petition as not being maintainable before the Election Commission, since all disputes relating to Presidential elections could be inquired into and decided only by this Court. Thereafter, as indicated

hereinabove, the Presidential elections were conducted on 19th July, 2012, and the Respondent was declared elected to the Office of the President of India on 22nd July, 2012.

6. Aggrieved by the decision of the Returning Officer in accepting the nomination papers of the Respondent as being valid, the Petitioner has questioned the election of the Respondent as the President of India under Article 71 of the Constitution read with Order XXXIX of the Supreme Court Rules, 1966, and, in particular, Rule 13 thereof. The said Rule, which is relevant for a decision in this petition, reads as follows :-

> "13. Upon presentation of a petition the same shall be posted before a bench of the Court consisting of five Judges for preliminary hearing and orders for service of the petition and advertisement thereof as the Court may think proper and also appoint a time for hearing of the petition. **Upon preliminary hearing, the Court, if satisfied, that the petition does not deserve regular hearing as contemplated in Rule 20 of this Order may dismiss the petition or pass any appropriate order as the Court may deem fit**."
>
> **[Emphasis supplied]**

7. In keeping with the provisions of Rule 13 of Order XXXIX of the Supreme Court Rules, 1966, which deals with Election Petitions under Part III of the Presidential and Vice-Presidential Elections Act, 1952, the Election Petition filed by the Petitioner was listed for hearing on the preliminary point as to whether the petition deserved a hearing, as contemplated by Rule 20 of Order XXXIX, which provides as follows :

> "20. Every petition calling in question an election shall be posted before and be heard and disposed of by a Bench of the Court consisting of not less than five Judges."

8. Mr. Ram Jethmalani, learned Senior Advocate,

appearing for the Petitioner, submitted that the Respondent's election as President of India, was liable to be declared as void mainly on the ground that by holding the post of Chairman of the Indian Statistical Institute, Calcutta, on the date of scrutiny of the nomination papers, the Respondent held an office of profit, which disqualified him from contesting the Presidential election.

9. Mr. Jethmalani urged that apart from holding the office of the Chairman of the aforesaid Institute, the Respondent was also the Leader of the House in the Lok Sabha which had been declared as an office of profit. Urging that since the Respondent was holding both the aforesaid offices, which were offices of profit, on the date of filing of the nomination papers, the Respondent stood disqualified from contesting the Presidential election in view of Article 58(2) of the Constitution.

10. Mr. Jethmalani submitted that Article 71 of the Constitution provides that all doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court whose decision is to be final. Mr. Jethmalani submitted that there were sufficient doubts to the Respondent's assertion that on the date of filing of his nomination papers, he had resigned both from the office of Chairman of the Indian Statistical Institute, Calcutta, and as the Leader of the House in the Lok Sabha, on 20th June, 2012. Mr. Jethmalani urged that the doubt which had been raised could only be dispelled by a full-fledged inquiry which required evidence to be taken and cross-examination of the witnesses whom the Respondent might choose to examine. Accordingly, Mr. Jethmalani submitted that the instant petition would have to be tried in the same manner as a suit, which attracted the provisions of Section 141 of the Code of Civil Procedure, which reads as follows:

> "**141. Miscellaneous Proceedings.** - The procedure provided in this Code in regard to suit shall be followed,

as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

Explanation – In this Section the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution."

In addition, learned counsel also referred to Rule 34 of Order XXXIX of the Supreme Court Rules, 1966, which provides as follows :-

"**Order XXXIX, Rule 34**

Subject to the provisions of this Order or any special order or direction of the Court, the procedure of an Election Petition shall follow as nearly as may be the procedure in proceedings before the Court in exercise of its Original Jurisdiction."

11. Mr. Jethmalani pointed out that in the Original Jurisdiction of the Supreme Court, provided for in Order XXII of the Supreme Court Rules, 1966, the entire procedure for institution and trial of a suit has been set out, providing for all the different stages in respect of a suit governed by the Code of Civil Procedure. Mr. Jethmalani submitted that the making of the procedure for trial of Election Petitions akin to that of the Original Jurisdiction of the Supreme Court, was a clear indication that the matter must be tried as a suit, if under Rule 13 of Order XXXIX, the Court consisting of 5 Judges was satisfied at a preliminary inquiry that the matter deserved a regular hearing, as contemplated in Rule 20 of the said Order.

12. For the sake of comparison, Mr. Jethmalani referred to Section 87 of the Representation of the People Act, 1951, laying down the procedure for the trial of Election Petitions and providing that every Election Petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure to the trial of

suits. Mr. Jethmalani urged that in matters relating to election disputes it was the intention of the Legislature to have the same tried as regular suits following the procedure enunciated in Section 141 C.P.C.

13. Mr. Jethmalani then drew our attention to Article 102 of the Constitution and, in particular, Clause 1(1)(a) thereof, which, inter alia, provides as follows :-

"**102**. (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament –

(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

(b)…….

(c)…….

(d)…….

(e)…….

Explanation*: For the purposes of this clause a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State."*

14. Mr. Jethmalani submitted that language similar to the above, had been incorporated in Article 58(2) of the Constitution, which also provides that a person shall not be eligible for election as President, if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority, subject to the control of any of the said Governments. Mr. Jethmalani submitted that as in Explanation to Article 102, the Explanation to Clause (2) of Article 58 also indicates that a person shall not be deemed to

hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor of any State or is a Minister either for the Union or for any State. Mr. Jethmalani urged that Article 102 cannot save a person elected to the Office of President from disqualification, if he holds an office of profit.

15. Mr. Jethmalani submitted that from the annexures to the affidavit filed on behalf of the Respondent it was highly doubtful as to whether the Respondent had actually resigned from the post of Chairman of the Institute on 20th June, 2012, or even from the Membership of the Congress Party, including the Working Committee, and from the office of the Leader of the Congress Party in Lok Sabha on the same date, as contended by him. Mr. Jethmalani submitted that from the copy of the letter addressed to Professor M.G.K. Menon, President of the Institute, it could not be ascertained as to whether the endorsement made by Professor Menon amounted to acceptance of the Respondent's resignation or receipt of the letter itself. Learned counsel urged that this was another case of "doubt" within the meaning of Article 71 of the Constitution of India which required the Election Petition to be tried as a suit for which a detailed hearing was required to be undertaken by taking evidence and allowing for cross-examination of witnesses.

16. It was also submitted that the expression "office of profit" has not been conclusively explained till today under the Presidential and Vice-Presidential Elections Act, 1952, nor any other pre-independence statute, and the same required to be resolved by this Court. In this regard, Mr. Jethmalani referred to the decision of a three-Judge Bench of this Court in the case of *Shibu Soren Vs. Dayanand Sahay & Ors.* [(2001) 7 SCC 425], in which the aforesaid expression came to be considered and in interpreting the provision of Articles 102(1)(a) and 191(1)(a), this Court held that such interpretation should be realistic having regard to the object of the said Articles. It was observed that the expression "profit" connotes an idea of some pecuniary gain other than "compensation". Neither the quantum

of amount paid, nor the label under which the payment is made, may always be material to determine whether the office is one of profit. This Court went on further to observe that mere use of the word "honorarium" cannot take the payment out of the concept of profit, if there is some pecuniary gain for the recipient. It was held in the said case that payment of an honorarium, in addition to daily allowances in the nature of compensatory allowances, rent-free accommodation and chauffeur driven car at State expense, were in the nature of remuneration and is a source of pecuniary gain and, hence, constituted profit. Mr. Jethmalani urged that it was on the basis of such observation that the Election Petition in the said case was allowed.

17. Mr. Jethmalani also referred to the decision of this Court in the case of *Jaya Bachchan Vs. Union of India & Ors.* [(2006) 5 SCC 266], wherein also the phrase "office of profit" fell for interpretation within the meaning of Article 102 and other provisions of the Constitution with regard to use of the expression "honorarium" and its effect regarding the financial status of the holder of office or interest of the holder in profiting from the office. It was observed that what was relevant was whether the office was capable of yielding a profit or pecuniary gain, other than reimbursement of out-of-pocket/actual expenses, and not whether the person actually received monetary gain or did not withdraw the emoluments to which he was entitled. The three-Judge Bench, which heard the matter, held that an office of profit is an office which is capable of yielding profits of pecuniary gain and that holding an office under the Central or State Government, to which some pay, salary, emolument, remuneration or non-compensatory allowance is attached, is "holding an office of profit". However, the question whether a person holds an office of profit has to be interpreted in a realistic manner and the nature of the payment must be considered as a matter of substance rather than of form. Their Lordships further observed that for deciding the question as to whether one is holding an office of profit or not, what is relevant

is whether the office is capable of yielding a profit or pecuniary gain and not whether the person actually obtained any monetary gain therefrom.

18. In the same connection, reference was also made to the decision of this Court in *M.V. Rajashekaran & Ors. Vs. Vatal Nagaraj & Ors.* [(2002) 2 SCC 704], where also the expression "office of profit" fell for consideration.

19. Mr. Jethmalani urged that having regard to the above, the Election Petition deserved a regular hearing, as contemplated in Rule 20 of Order XXXIX of the Supreme Court Rules, 1966.

20. Appearing for the Respondent, Mr. Harish Salve, learned Senior Advocate, submitted that election to the office of the President of India is regulated under the provisions of the Presidential and Vice-Presidential Act, 1952, hereinafter referred to as the "1952 Act", and, in particular Part III thereof, which deals with disputes regarding elections. Mr. Salve pointed out that Sections 14 and 14A of the Act specifically vest the jurisdiction to try Election Petitions under the 1952 Act with the Supreme Court, in the manner prescribed in the said sections. Accordingly, the challenge to a Presidential election would have to be in compliance with the provisions of Order XXXIX of the Supreme Court Rules, 1966, which deals with Election Petitions under Part III of the 1952 Act. Rule 13 of Order XXXIX of the Supreme Court Rules, therefore, becomes applicable and it enjoins that upon presentation of an Election Petition, the same has to be posted before a Bench of the Court consisting of five Judges, for preliminary hearing to satisfy itself that the petition deserves a regular hearing, as contemplated in Rule 20. For the sake of reference, Sections 14 and 14A of the 1952 Act, are extracted hereinbelow :-

> "**14.** (1) No election shall be called in question except by presenting an Election Petition to the authority specified in sub-section (2).

> (2) The authority having jurisdiction to try an Election Petition shall be the Supreme Court.
>
> (3) Every Election Petition shall be presented to such authority in accordance with the provisions of this Part and of the rules made by the Supreme Court under article 145.
>
> **14A.** (1) An Election Petition calling in question an election may be presented on one or more of the grounds specified in sub-section (1) of section 18 and section 19, to the Supreme Court by any candidate at such election, or—
>
> (a) in the case of Presidential election, by twenty or more electors joined together as petitioners ;
>
> (b) in the case of Vice-Presidential election, by ten or more electors joined together as petitioners.
>
> (2) Any such petition may be presented at any time after the date of publication of the declaration containing the name of the returned candidate at the election under section 12, but not later than thirty days from the date of such publication."

21. Mr. Salve submitted that the nomination papers of the respective candidates had been scrutinized by the Returning Officer in accordance with the provisions of Section 5A of the 1952 Act. Referring to Sub-Section (3) of Section 5E, Mr. Salve submitted that after completing all the formalities indicated in Sub-Section (3), the Returning Officer had accepted the nomination papers of the Respondent as valid, which, thereafter, gave the Respondent the right to contest the election. Mr. Salve submitted that Section 14 of the 1952 Act was enacted under Clause (3) of Article 71 of the Constitution which provides that subject to the provisions of the Constitution,

Parliament may by law regulate any matter relating to or connected with the election of a President or Vice-President.

22. Mr. Salve submitted that the election of the President and Vice-President has been treated on a different level in comparison with the election of Members of Parliament and other State Legislatures. While Article 102 deals with election of Members to the House, Article 58 deals with the election of the President and the Vice-President of India, which has to be dealt with strictly in accordance with the law laid down in this regard. In support of his aforesaid contention, Mr. Salve referred to a Seven-Judge Bench decision of this Court in the case of *Charan Lal Sahu Vs. Neelam Sanjeeva Reddy* [(1978) 2 SCC 500], where the alleged conflict between Article 71(1) of the Constitution with Article 58 thereof was considered by this Court and it was held that Article 58 only provides for the qualification regarding the eligibility of a candidate to contest the Presidential elections and had nothing to do with the nomination of a candidate which required 10 proposers and 10 seconders. The provisions of Sections 5B and 5C of the 1952 Act were also considered and held not to be in conflict with Article 14 of the Constitution. Article 71(3) of the Constitution was also seen to be a law by which Parliament could regulate matters connected with the Presidential elections, including those relating to election disputes arising out of such an election. Relying on its own earlier judgments, the Hon'ble Judges of the Bench held that there was no force in the attack to either Article 71(3) of the Constitution or the provisions of Sections 5B or 5C of the 1952 Act.

23. The Petitioner, C.L. Sahu, had also challenged the election of Shri Giani Zail Singh as President of India and such challenge was repelled by this Court upon holding that the Petitioner had no locus standi to file the same.

24. Mr. Salve lastly referred to the decision of this Court in *Mithilesh Kumar Vs. R. Venkataraman & Ors.* [(1987) Supp. SCC 692], wherein, on a similar question being raised,

a five-Judge Bench of this Court reiterated its earlier views in the challenge made to the election of Shri Neelam Sanjeeva Reddy and Shri Giani Zail Singh as former Presidents of India.

25. Mr. Salve then urged that since the provisions of Order XXXIX of the Supreme Court Rules framed under Article 145 of the Constitution had been so framed in accordance with Section 14 of the 1952 Act, the provisions of Section 141 of the Code of Civil Procedure could not be imported into deciding a dispute relating to a challenge to the election of the President.

26. Mr. Salve submitted that Rule 13 of Order XXXIX of the Supreme Court Rules, 1966, stood substituted on 9th December, 1997, and the substituted provision came into effect on 20th December, 1997. In the Original Rule which came to be substituted, there was no provision for a preliminary hearing to be conducted to establish as to whether the Election Petition deserved a regular hearing. However, in view of repeated and frivolous challenges to the elections of almost all of the Presidents elected, the need for such an amendment came to be felt so as to initially evaluate as to whether such an Election Petition, challenging the Presidential election, deserved a regular hearing.

27. Mr. Salve then submitted that the post of Chairman of the Indian Statistical Institute, Calcutta, was not an office of profit as the post was honorary and there was no salary or any other benefit attached to the said post. Learned counsel submitted that even if one were to accept the interpretation sought to be given by Mr. Ram Jethmalani that the office itself may not provide for any direct benefit but that there could be indirect benefits which made it an office of profit, the said post neither provides for any honorarium nor was capable of yielding any profit which could make it an office of profit. Mr. Salve submitted that the law enunciated in the decisions cited by Mr. Ram Jethmalani in the case of *Shibu Soren* (supra) and *Jaya Bachchan* (supra) was good law and, in fact, the post which the Respondent was holding as Chairman of the Institute was

not an office of profit, which would disqualify him from being eligible to contest as a candidate for the office of President of India.

28. As to the holding of the post of Leader of the House, Mr. Salve submitted that the holder of such a post is normally a Cabinet Minister of the Government and is certainly not an appointee of the Government of India so as to bring him within the bar of Clause (2) of Article 58 of the Constitution of India. In support of his contention that the provisions of Section 141 CPC would not apply in the facts of this case, Mr. Salve referred to the decision of this Court in *Mange Ram Vs. Brij Mohan & Ors.* [(1983) 4 SCC 36], wherein the Code of Civil Procedure and the High Court Rules regarding trial of an Election Petition, were considered, and it was held that where necessary, the provisions of the Civil Procedure Code could be applied, but only when the High Court Rules were not sufficiently effective for the purpose of the production of witnesses or otherwise during the course of trial of the petition. Mr. Salve also referred to a three-Judge Bench decision of this Court in *Ravanna Subanna Vs. G.S. Kaggeerappa* [AIR 1953 SC 653], which was a case from Mysore relating to the election of a Councilor under the Mysore Town Municipal Act, 1951. Of the two questions raised, one of the points was with regard to the question as to whether the Appellant therein could be said to be holding an office of profit under the Government thereby attracting the provisions relating to disqualification. On a plain meaning of the expression "office of profit", Their Lordships, inter alia, observed that the word "profit" connotes the idea of pecuniary gain and if there really was a gain, its quantum or amount would not be material, but the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the office really carries any profit. Their Lordships went on further to observe as follows :

> "From the facts stated above, it can reasonably be inferred that the fee of Rs.6 which the non-official Chairman is entitled to draw for each sitting of the Committee, he attends, is not meant to be a payment by way of remuneration or profit, but it is gain to him as a consolidated fee for the out-of-pocket expenses which he has to incur for attending the meetings of the Committee. We do not think that it was the intention of the Government which created these Taluk Development Committees which were to be manned exclusively by non-officials, that the office of the Chairman or of the Members should carry any profit or remuneration."

Mr. Salve urged that in the instant case as well, the post of Chairman of the Indian Statistical Institute, Calcutta, did not yield any profit to the holder of the post, which was entirely meant to be an honour bestowed on the holder thereof. Mr. Salve also referred to the decision of this Court in the case of *Shibu Soren* (supra) which had already been referred to by Mr. Ram Jethmalani, and pointed out that Article 102(1)(a) of the Constitution of India deals with disqualification from being chosen as a Member of the two Houses or from being a Member of either House of Parliament and did not affect the post of President of India.

29. The last decision referred to by Mr. Salve in the above context was that of this Court in *Madhukar G.E. Pankakar Vs. Jaswant Chobbildas Rajani* [(1977) 1 SCC 70], where also the expression "office of profit" came to be considered. In paragraph 31 of the said decision, reference was made to the earlier decision of this Court in *Ravanna Suvanna's* case (supra) and the ratio of the said decision was tested in relation to Insurance Medical Practitioners. It was held that the petitioner did derive profit, but the question was whether he held an office under the Government. Since mere incumbency in office is no disqualification, even if some sitting fee or insignificant honorarium is paid, it was ultimately held that the ban on candidature or electoral disqualification, must have a substantial link with the end, may be the possible misuse of

position as Insurance Medical Practitioner in doing his duties as Municipal President.

30. On the other question with regard to the acceptance of the Respondent's resignation from the post of Chairman of the Institute held by the Respondent, Mr. Salve submitted that the alleged discrepancy in the signatures of the Respondent in his letter of resignation addressed to the President of the Institute with his other signatures, was no ground to suspect that the said document was forged, particularly when it was accepted by the Respondent that the same was his signature and that he used both signatures when signing letters and documents. In this regard, Mr. Salve referred to the Constitution Bench decision of this Court in *Union of India & Ors. Vs. Gopal Chandra Mishra & Ors.*[(1978(2) SCC 301], wherein the question as to when a resignation takes place or is to take effect, has been considered in some detail. While considering the various aspects of resignation, either with immediate effect or from a future date, one of the propositions which emerged from the ultimate conclusions arrived at by this Court was that in view of the provisions of Article 217(1)(a) and similar provisions in regard to constitutional functionaries like the President, Vice-President, Speaker, etc. the resignation once submitted and communicated to the appropriate authority becomes complete and irrevocable and acts ex proprio vigore. The only difference is when resignation is submitted with the intention of resigning from a future date, in such case it was held that before the appointed date such resignation could be rescinded.

31. The next case referred to by Mr. Salve in this regard is the decision rendered by this Court in *Moti Ram Vs. Param Dev* [(1993) 2 SCC 725], where a similar question arose with regard to resignation from the office of the Chairman of the Himachal Pradesh Khadi and Village Industries Board, with a request to accept the resignation with effect from the date of the letter itself. Considering the said question, this Court held

that a person holding the office of Chairman of the said Board should resign from the said office and the same would take effect from the date of communication of the resignation to the Head of the Department in the Government of Himachal Pradesh.

32. On a different note, Mr. Salve pointed out from the Election Petition itself that the allegations made in paragraph 2(XVI) were verified by the Petitioner, both in the verification and the affidavit affirmed on 20.8.2012, as being true and correct on the basis of information received and believed to be correct. Mr. Salve submitted that under Rule 6 of Order XXXIX of the Supreme Court Rules, allegations of fact contained in an Election Petition challenging a Presidential election were required to be verified by an affidavit to be made personally by the Petitioner or by one of the Petitioners, in case there were more than one, subject to the condition that if the Petitioner was unable to make such an affidavit for the reasons indicated in the proviso to Rule 6, a person duly authorized by the Petitioner would be entitled, with the sanction of the Judge in Chambers, to make such an affidavit. Mr. Salve submitted that in the instant case there was no such occasion for the verification to be done by the Petitioner.

33. In regard to the post of "Leader of the House", Mr. Salve referred to the Practice and Procedure of Parliament, with particular reference to the Lok Sabha, wherein with regard to the resignation from the membership of other bodies, in the case of the Leader of the House, the procedure followed was that when a Member of the Lok Sabha representing Parliament or Government Committees, Boards, Bodies, sought to resign from the membership of that body by addressing the Speaker, he is required to address his resignation to the Chairman of that Committee, Board or Body and he ceases to be member of the Committee when he vacates that office. Mr. Salve submitted that by tendering his resignation to the Congress President and Chairperson of the Congress Party in Parliament

on 20th June, 2012, with immediate effect, such resignation came into force forthwith and no further formal acceptance thereof was necessary.

34. Mr. Salve submitted that notwithstanding the submissions made in regard to the expression "holder of an office of profit", the said argument was also not available to the Petitioner, since by virtue of amendment to Section 3 of the Parliament (Prevention of Disqualification) Act, 1959, in 2006, the office of Chairman of the Institute was excluded from the disqualification provisions of Article 58(2) of the Constitution of India. Mr. Salve submitted that the aforesaid Act had been enacted to declare that certain offices of profit under the Government, including the post of Chairman in any statutory or non-statutory body, would not disqualify the holders thereof from being chosen as, or for being Members of Parliament as contemplated under Article 102(1)(a) of the Constitution. By virtue of the said amendment, a new Table was inserted after the Schedule to the Principal Act which would be deemed to have been inserted with effect from 4th April, 1959. The Indian Statistical Institute, Calcutta, has been placed at Serial No.4 of the Table. Accordingly, the submissions advanced by Mr. Jethmalani with regard to the Respondent holding an office of profit as Chairman of the Institute on the date of filing of nomination for election to the Office of President, were incorrect and the same were liable to be discarded.

35. Mr. Salve submitted that having regard to the submissions made on behalf of the parties, the Election Petition filed by Shri Purno Agitok Sangma did not deserve a regular hearing, as contemplated in Rule 20 of Order XXXIX of the Supreme Court Rules, 1966, and was liable to be dismissed.

36. The learned Attorney General, Mr. Goolam E. Vahanvati, firstly urged that the expression "office of profit" ought not to be interpreted in a pedantic manner and has to be considered in the light of the duties and functions and the benefits to be derived by the holder of the office. Mr. Vahanvati

pointed out that the post of Chairman of the Institute was a purely honorary post, meant to honour the holder thereof. It did not require the active participation of the Chairman in the administration of the Institute, which was looked after by the President and his Council constituted under the Rules and Regulations of the Institute. Mr. Vahanvati also submitted that the post was purely honorary in nature and did not benefit the holder thereof in any way, either monetarily or otherwise, nor was there any likelihood of any profit being derived therefrom. Accordingly, even if Mr. Jethmalani's submission that on the date of filing of nominations the Respondent continued to hold the said office, it would not disqualify him from contesting the Presidential election.

37. In this regard, the learned Attorney General referred to the decision of this Court in *Consumer Education & Research Society vs. Union of India & Ors.* [(2009) 9 SCC 648], wherein the provisions of the 1959 Act, as amended by the Amending Act of 2006, regarding the disqualification of persons holding offices of profit from continuing as Members of Parliament, were under consideration. Considering the provisions of Articles 101(3)(a) and 103 in the Writ Petitions filed before this Court under Article 32 of the Constitution, the constitutionality of the Parliament (Prevention of Disqualification) Amendment Act, 2006, came to be questioned on the ground that the said Act retrospectively added to the list of "offices of profit" which do not disqualify the holders thereof for being elected as Members of Parliament. The Writ Petitioners contended that the amendment had been brought in to ensure that persons who had ceased to be Members of Parliament on account of incurring disqualifications, would be re-inducted to Parliament without election, which, according to the Writ Petitioners, violated the provisions of Articles 101 to 104 of the Constitution.

38. The said question was answered by this Court by holding that the power of Parliament to enact a law under

Article 102(1)(a) includes the power of Parliament to enact such law retrospectively, as was held in *Kanta Kathuria Vs. Manak Chand Surana* [(1969) 3 SCC 268] and later followed in the decision rendered in *Indira Nehru Gandhi Vs. Raj Narain* [1975 (Supp) SCC 1]. Accordingly, if a person was under a disqualification at the time of his election, the provisions of Articles 101(3)(a) and 103 of the Constitution would not apply and he would continue as a Member of Parliament, unless the High Court in an Election Petition filed on that ground declared that on the date of the election, he was disqualified and consequently declares his election to be void. In other words, the vacancy under Article 101(3)(a) would occur only after a decision had been rendered on such disqualification by the Chairman or the Speaker in the House.

39. Reference was also made to the decision of this Court in *Karbhari Bhimaji Rohamare Vs. Shanker Rao Genuji Kolhe & Ors.* [(1975) 1 SCC 252], wherein this Court held that a Member of the Wage Board for the sugar industry constituted by the Government of Maharashtra, which was an honorary post and the honorarium paid to the Members was in the nature of a compensatory allowance, exercised powers which were essentially a part of the judicial power of the State. Such Members did not, therefore, hold an office under the Government.

40. Further reference was made to another decision of this Court in *Pradyut Bordoloi Vs. Swapan Roy* [(2001) 2 SCC 19], in which the post of a Clerk Grade I in Coal India Ltd., a Company having 100% shareholding of Government, was held not to be an office of profit, which disqualified its holder under Section 10 of the Representation of the People Act, 1951, or under Article 191(1)(a) of the Constitution of India. While deciding the case, this Court had occasion to observe that the expression "office of profit" had not been defined in the Constitution. It was observed that the first question to be asked in this situation was as to whether the Government has power

to appoint and remove a person on and from the office and if the answer was in the negative, no further inquiry was called for. However, if the answer was in the positive, further inquiries would have to be conducted as to the control exercised by the Government over the holder of the post. Since in the said case, the Government of India did not exercise any control on appointment, removal, service conditions and functioning of the Respondent, it was held that the said Respondent did not hold an office of profit under the Government of India, and his being a Clerk in the Coal India Ltd. did not bring any influence or pressure on him in his independent functioning as a Member of the Legislative Assembly.

41. The learned Attorney General lastly cited the decision of this Court in *Ashok Kumar Bhattacharyya Vs. Ajoy Biswas & Ors.* [(1985) 1 SCC 151], where also what amounts to an office of profit under the Government came up for consideration and it was held that the employees in the local authority did not hold offices of profit under the Government and were not, therefore, disqualified either under Articles 102(1)(a) and 191(1)(a) of the Constitution of India or the provisions of the Bengal Municipal Act, 1932. Their Lordships held that on an analysis of the provisions of the Act, it was quite clear that though the Government exercised a certain amount of control and supervision, the respondent who was an Accountant Incharge of the Agartala Municipality in the State of Assam, was not an employee of the Government and was at the relevant time holding an office of profit under a local municipality, which did not bring him within the ambit of Article 102(1)(a) of the Constitution.

42. The learned Attorney General submitted that the Disqualification Act is not a defining Act and was never meant to be and one cannot import the definition in the Schedule where only the Institute is mentioned. Sharing the sentiments expressed by Mr. Salve, the learned Attorney General submitted that the Election Petition was liable to be dismissed.

43. Replying to the submissions made by Mr. Harish Salve and the learned Attorney General, Mr. Ram Jethmalani asserted that the 1959 Act was, in fact, a defining Act and falls under Entry 73 of the First List in the Seventh Schedule to the Constitution, which empowers the Parliament to legislate in regard to elections to Parliament, to the legislatures of the States and to the offices of President and Vice-President and the Election Commission. Mr. Jethmalani also reiterated that the Institute was controlled by the Central Government. The Act under which the Institute was formed was an Act by the Central Government and the post of Chairman must, therefore, be held to be an office of profit under the Central Government.

44. Reiterating his earlier stand that the Election Petition deserved to be regulaly heard, Mr. Jethmalani referred to the decision of this Court in *M.V. Rajashekaran's* case (supra), in which the Chairman of a One-man Commission, appointed by the Government of Karnataka to study the problems of Kannadigas and was accorded the status of a Minister of Cabinet rank and was provided by a budget of Rs.5 lakhs for defraying the expenses of pay and day-to-day expenditure of the Chairman, was held to be holding an office of profit under the Government. This Court observed that the question as to whether a person held an office of profit under the Government or not, would have to be determined in the peculiar facts and circumstances of the case.

45. Mr. Jethmalani lastly referred to the decision in the *Consumer Education & Research Society* case (supra), which had been referred to by the learned Attorney General, and drew the attention of the Court to the observations made in the judgment in paragraph 77, where it had been observed that what kind of office would amount to an office of profit under the Government and whether such an office of profit is to be exempted, is a matter to be considered by the Parliament. While making legislation exempting any office, the question whether such office is incompatible with his position as an M.P.

and whether his independence would be compromised and whether his loyalty to the Constitution will be affected, has to be kept in mind to safeguard the independence of the Members of the legislature and to ensure that they were free from any kind of undue influence from the executive. Mr. Jethmalani contended that since the Respondent had held office under the Central Government, it will have to be considered as to whether his functioning as the President of India would, in any way, be compromised or influenced thereby.

46. While replying, Mr. Jethmalani introduced a new dimension to his submissions by urging that the Rules and Bye-laws of the Institute did not permit a Chairman, once appointed, to resign from his post. Accordingly, even if the Respondent had tendered his resignation to the President, Dr. Menon, the same was of no effect and he continued to remain as the Chairman of the Institute. He was, therefore, disqualified from contesting the Presidential election and his election was liable to be declared void and in his place the Petitioner was liable to be declared as the duly-elected President of the country.

47. The Constitution provides for the manner in which the election of a President or a Vice-President may be questioned. Article 71 provides for matters relating to or connected with the election of a President or a Vice-President. Clause (1) of Article 71 provides that all doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court whose decision shall be final. Sub-clause (3) provides that subject to the provisions of the Constitution, Parliament may, by law, regulate any matter, relating to or connected with the election of a President or a Vice-President. In addition, the Presidential and Vice-Presidential Elections Act was enacted in 1952 with the object of regulating certain matters relating to or connected with elections to the Office of President and Vice-President of India. As indicated by Mr. Salve, Sections 14 and 14A of the 1952 Act, specially vest the jurisdiction to try Election

Petitions thereunder with the Supreme Court in the manner indicated therein. In fact, Part III of the said Act deals with disputes regarding elections to the posts of President and Vice-President of India, which contains Sections 14 and 14A, as also Sections 17 and 18 which empower the Supreme Court to either dismiss the Election Petition or to declare the election of the returned candidate to be void or declare the election of the returned candidate to be void and the Petitioner or any other candidate to have been duly elected.

48. In view of Sub-section (3) of Section 14 of the Act, the Supreme Court has framed Rules under Article 145 of the Constitution which are contained in Order XXXIX of the Supreme Court Rules, 1966. As has been discussed earlier, Rule 13 of Order XXXIX provides that upon presentation of a Petition relating to a challenge to election to the post of President of India, the same is required to be posted before a Bench of the Court consisting of five Judges for preliminary hearing and to consider whether the Petition deserved a regular hearing, as contemplated in Rule 20 of Order XXXIX, and, in that context, such Bench may either dismiss the Petition or pass any appropriate order as it thought fit.

49. It is under the aforesaid Scheme that the present Election Petition filed by Shri Purno Agitok Sangma challenging the election of Shri Pranab Mukherjee as the President of India has been taken up for preliminary hearing on the question as to whether it deserved a regular hearing or not.

50. The challenge is based mainly on the allegation that on the date of filing of nominations, the Respondent, Shri Pranab Mukherjee, held "offices of profit", namely,

(i) Chairman of the Indian Statistical Institute, Calcutta; and

(ii) Leader of the House in the Lok Sabha.

In regard to the aforesaid challenges, Mr. Ram Jethmalani,

appearing for the Petitioner, had urged that in order to arrive at a conclusive decision on the said two points, it was necessary that a regular hearing be conducted in respect of the Election Petition to ascertain the truth of the allegations made by the Petitioner. It was also submitted that the same required a full scale hearing in the manner as contemplated under Section 141 of the Code of Civil Procedure, as would be evident from Order XXXIX read with the provisions relating to the Original Jurisdiction of the Supreme Court, contained in Part III of the Supreme Court Rules, 1966.

51. On the other hand, it has been urged by Mr. Harish Salve, appearing for the Respondent, that on the date of filing of nominations, Shri Pranab Mukherjee was neither holding the Office of Chairman of the aforesaid Institute nor was he the Leader of the House in the Lok Sabha, inasmuch as, in respect of both the posts, he had tendered his resignation on 20th June, 2012.

52. There is some doubt as to whether the Office of the Chairman of the Indian Statistical Institute is an office of profit or not, even though the same has been excluded from the ambit of Article 102 of the Constitution by the provisions of the Parliament (Prevention of Disqualification) Act, 1959, as amended in 2006. Having been included in the Table of posts saved from disqualification from membership of Parliament, it must be accepted to be an office of profit. However, as argued by Mr. Salve, categorising the office as an "office of profit" did not really make it one, since it did not provide any profit and was purely honorary in nature. There was neither any salary nor honorarium or any other benefit attached to the holder of the said post. It was not such a post which, in fact, was capable of yielding any profit, which could make it, in fact, an office of profit.

53. The said proposition was considered in *Shibu Soren's* case (supra) where it was held that mere use of the word "honorarium" would not take the payment out of the concept of profit, if there was some pecuniary gain for the recipient in

addition to daily allowances in the nature of compensatory allowances, rent-free accommodation and chauffeur driven car at State expense.

54. Similar was the view expressed in *Jaya Bachchan's* case (supra) where also this Court observed that what was relevant was whether the office was capable of yielding a profit or pecuniary gain, other then reimbursement of out-of-pocket/ actual expenses and not whether the person actually received any monetary gain or did not withdraw the emoluments to which he was entitled. In other words, whether a person holding a post accepted the benefits thereunder was not material, what was material is whether the said office was capable of yielding a profit or pecuniary gain.

55. In the instant case, the office of Chairman of the Institute did not provide for any of the amenities indicated hereinabove and, in fact, the said office was also not capable of yielding profit or pecuniary gain.

56. In regard to the office of the Leader of the House, it is quite clear that the Respondent had tendered his resignation from membership of the House before he filed his nomination papers for the Presidential election. The controversy that the Respondent had resigned from the membership of the Indian National Congress and its Central Working Committee allegedly on 25th June, 2012, was set at rest by the affidavit filed by Shri Pradeep Gupta, who is the Private Secretary to the President of India. In the said affidavit, Shri Gupta indicated that through inadvertence he had supplied the date of the Congress Working Committee meeting held on 25th June, 2012, to bid farewell to Shri Mukherjee on his nomination for the Presidential Election being accepted. In any event, the disqualification contemplated on account of holding the post of Leader of the House was with regard to the provisions of Article 102(1)(a) of the Constitution, besides being the position of the leader of the party in the House which did not entail the holding of an office of profit under the Government. In any event, since

the Respondent tendered his resignation from the said post prior to filing of his nomination papers, which was duly acted upon by the Speaker of the House, the challenge thrown by the Petitioner to the Respondent's election as President of India on the said ground loses its relevance. In any event, the provisions of the Parliament (Prevention of Disqualification) Act, 1959, as amended in 2006, excluded the post of Chairman of the Institute as a disqualification from being a Member of Parliament.

57. The Constitutional Scheme, as mentioned in the Explanation to Clause (2) of Article 58 of the Constitution, makes it quite clear that for the purposes of said Article, a person would not be deemed to hold any office of profit, inter alia, by reason only that he is a Minister either for the Union or for any State. Article 102 of the Constitution contains similar provisions wherein in the Explanation to clause (1) it has been similarly indicated that for the purposes of the said clause, a person would not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister, either for the Union, or for such State. The argument that the aforesaid provisions of Article 102, as well as Article 58 of the Constitution, could not save a person elected to the office of President from disqualification, if he held an office of profit, loses much of its steam in view of the fact that as would appear from the materials on record, the Respondent was not holding any office of profit either under the Government or otherwise at the time of filing his nomination papers for the Presidential election.

58. The various decisions cited on behalf of the parties in support of their respective submissions, clearly indicate that in order to be an office of profit, the office must carry various pecuniary benefits or must be capable of yielding pecuniary benefits such as providing for official accommodation or even a chauffeur driven car, which is not so in respect of the post of Chairman of the Indian Statistical Institute, Calcutta, which was,

in fact, the focus and raison d'etere of Mr. Jethmalani's submissions.

59. We are also not inclined to accept Mr. Jethmalani's submissions that once a person is appointed as Chairman of the Indian Statistical Institute, Calcutta, the Rules and Bye-laws of the Society did not permit him to resign from the post and that he had to continue in the post against his wishes. There is no contractual obligation that once appointed, the Chairman would have to continue in such post for the full term of office. There is no such compulsion under the Rules and Bye-laws of the Society either. In any event, since the holder of the post of Chairman of the Institute has been excluded from disqualification for contesting the Presidential election, by the 2006 amendment to Section 3 of the Parliament (Prevention of Disqualification) Act, 1959, the submissions of Mr. Jethmalani in this regard is of little or no substance.

60. We are not convinced that in the facts and circumstances of the case, the Election Petition deserves a full and regular hearing as contemplated under Rule 20 of Order XXXIX of the Supreme Court Rules, 1966. Consequently, Mr. Jethmalani's submissions regarding the applicability of Section 141 of the Code of Civil Procedure for trial of the Election Petition is of no avail. We are also not convinced that Section 141 of the Code is required to be incorporated into a proceeding taken under Order XXXIX of the Supreme Court Rules read with Part II of the Presidential and Vice-Presidential Elections Act, 1952, which includes Sections 14 to 20 of the aforesaid Act and Article 71 of the Constitution of India.

61. It may not be inappropriate at this stage to mention that this Court has repeatedly cautioned that the election of a candidate who has won in an election should not be lightly interfered with unless circumstances so warrant.

62. We are not inclined, therefore, to set down the Election Petition for regular hearing and dismiss the same under Rule 13 of Order XXXIX of the Supreme Court Rules, 1966.

63. In the facts and circumstances of the case, the parties shall bear their own costs in these proceedings.

RANJAN GOGOI, J. 1. I have had the privilege of going through the opinion rendered by the learned Chief Justice of India. With utmost respect I have not been able to persuade myself to share the views expressed in the said opinion. The reasons for my conclusions are as indicated below -

2. The short question that has arisen for determination in the Election Petition, at this stage, is whether the same deserves a regular hearing under Rule 20 of Order XXXIX of the Supreme Court Rules, 1966.

3. The Election Petition in question has been filed challenging the election of the respondent to the office of the President of India (hereinafter referred to as 'the President'). The election in which the petitioner and the respondent were the contesting candidates was held to the following Schedule:

Issue of Notification calling the election	**16 June 2012**
Last date for making Nominations	**30 June, 2012**
Date for scrutiny	**2 July, 2012**
Last date for withdrawal	**4 July, 2012**
Date of poll, if necessary	**19 July, 2012**
Date of counting, if necessary	**22 July, 2012**

4. Both the Election Petitioner as well as the respondent filed their nomination papers before the Returning Officer on 28.6.2012. A total of 106 nomination papers filed by 84 persons were taken up for scrutiny on the date fixed i.e. 2.7.2012. The petitioner objected to the validity of the nomination of the respondent on the ground that the respondent

on the said date i.e. 2.7.2012 was holding the office of the Chairman of the Council of Indian Statistical Institute, Kolkata (hereinafter referred to as the Chairman ISI) which is an office of profit. According to the petitioner, at the request of the representative of the respondent, the scrutiny of the nomination of the respondent was deferred to 3.00 p.m. of the next day i.e. 3.7.2012 with liberty to file reply, if any, by 2.00 p.m. Coincidentally, certain objections having been raised to the nomination of the Election Petitioner, consideration of the same was also deferred to 11.00 a.m. of 3.7.2012. All the remaining nomination papers were rejected on the date fixed for scrutiny i.e. 2.7.2012.

5. On the next date i.e. 3.7.2012 at the appointed time, i.e. 11.00 a.m. the scrutiny of the nomination papers of the Election Petitioner were taken up and Returning Officer accepted the same. Thereafter, within the time granted on the previous date i.e. 2.00 p.m., the respondent submitted a written reply to the objections raised by the petitioner alongwith a copy of a resignation letter dated 20.6.2012 by which the respondent claimed to have resigned from the office of the Chairman ISI. The scrutiny of the nomination papers of the respondent was taken up at 3.00 p.m. on 3.7.2012 and thereafter the same was accepted by the Returning Officer.

6. As per the Schedule of the election published by the Election Commission the poll took place on 19.7.2012 and the result of the counting was announced on 22.7.2012 declaring the respondent to be duly elected to the office of the President of India.

7. Contending that on all the relevant dates, including the date of scrutiny i.e. 2.7.2012, the respondent was holding the office of the Chairman of the Council of Indian Statistical Institute, Kolkata as well as the office of Leader of the House (Lok Sabha) and Leader of the Congress Party in the Lok Sabha, which are offices of profit, the present Election Petition has been filed on the ground that by virtue of holding the

aforesaid offices of profit the respondent was not qualified to be a candidate for the election to the office of the President of India and that the nomination submitted by the respondent was wrongly accepted by the Returning Officer. According to the Election Petitioner, the election of the respondent was liable to be declared void on the said ground. In the Election Petition filed as well as in the short rejoinder that has been brought on record by the Election Petitioner the claim of the respondent that he had resigned from the office of the Chairman, ISI on 20.6.2012 has been disputed. According to the petitioner the resignation letter dated 20.6.2012 is forged and fabricated and has been subsequently brought into existence to counter the case put up by the Election Petitioner. Insofar as the other offices are concerned, according to the Election petitioner, though the respondent had resigned from the Union Cabinet on 26.6.2012, he continued to remain a Member of Parliament and the Leader of the Congress Legislature Party in the Lok Sabha up to 25.07.2012 i.e. date of assumption of office as President of India. In fact the Respondent was shown as a Member of Parliament and as the Leader of the House in the official Website of the Lok Sabha till 2.7.2012.

8. The respondent i.e. the returned candidate has filed a short counter for the purposes of the preliminary hearing. According to the respondent the office of the Chairman, ISI, is not an office of profit as it does not carry any emoluments remuneration or perquisites. In any case, according to the respondent, he had submitted his resignation from the said office on 20.6.2012 which had been accepted by the President of the Institute on the same day. Insofar as the other two offices are concerned it is the case of the respondent that he had held the said offices by virtue of being a Cabinet Minister of the Union. According to the respondent, under the Leaders and Chief Whips of Recognized Parties and Groups in Parliament (Facilities) Act, 1998 and the Rules framed thereunder the aforesaid offices do not carry any emoluments or perquisites or benefits beyond those attached to the office of a Cabinet

Minister of the Union. Furthermore, according to the respondent, he had resigned from the Congress Party and the office of the Leader of the Legislature Party in the Lok Sabha on 20.6.2012 and from the Union Cabinet on 26.6.2012. Therefore he had ceased to hold any office of profit on the relevant date i.e. date of scrutiny or acceptance of his nomination.

9. Article 71 of the Constitution provides for matters relating to, or connected with, the election of the President or Vice President. Clause (1) of Article 71 provides that all doubts and disputes arising out of or in connection with the election of a President or Vice President shall be inquired into and decided by the Supreme Court. Under Clause (3), Parliament has been empowered, subject to the provisions of the Constitution, to make laws to regulate any matter relating to or connected with the election of the President or Vice President.

10. In exercise of the power conferred by Article 71(3) read with Entry 72 of List I of the Seventh Schedule to the Constitution, Parliament has framed the Presidential and Vice-Presidential Election Act, 1952 (Act 31 of 1952). Part III of the aforesaid Act makes provisions with regard to disputes regarding elections. Section 14 (1) provides that no election shall be called in question except by presenting an election petition to the authority specified in sub-section (2) i.e. the Supreme Court. Section 14(3) provides that every election petition shall be presented in accordance with the provisions contained in Part III of the Act and such Rules as may be made by the Supreme Court under Article 145 of the Constitution. The next provision of the Act that would require specific notice is Section 15 which provides that the Rules made by the Supreme Court under Article 145 of the Constitution may regulate the form of Election Petitions, the manner in which they are to be presented, the persons who are to be made parties thereto, the procedure to be adopted in connection therewith and the circumstances in which petitions are to abate, or may be withdrawn, and in which new petitioners may be substituted, and

may require security to be given for costs. The rest of the provisions of the aforesaid Act would not require any recital insofar as the present case is concerned.

11. By virtue of powers conferred by Article 145 of the Constitution, the Supreme Court Rules, 1966 (hereinafter referred to as the Rules) have been framed by the Supreme Court with the approval of the President of India in order to regulate the practice and procedure of the Court. Order XXXIX contained in Part VII of the Supreme Court Rules, 1966 deals with election petitions filed under Part III of the Presidential and Vice Presidential Elections Act, 1952. The provisions of Rule 13 (inserted w.e.f. 20.12.1997), Rule 20 and Rule 34 of Order XXXIX being relevant may be extracted hereinbelow:

> *"13. Upon presentation of a petition the same shall be posted before a bench of the Court consisting of five Judges for preliminary hearing and orders for service of the petition and advertisement thereof as the Court may think proper and also appoint a time for hearing of the petition. Upon preliminary hearing, the Court, if satisfied, that the petition does not deserve regular hearing as contemplated in Rule 20 of this Order may dismiss the petition or pass any appropriate order as the Court may deem fit.]*
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> x x x x x
>
> 20. Every petition calling in question an election shall be posted before and be heard and disposed of by a Bench of the Court consisting of not less than five Judges.
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> x x x x x
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> 34. Subject to the provisions of this Order or any special order or directions of the Court, the procedure on an election petition shall follow, as nearly as may be, the procedure in proceedings before the Court in the exercise of its original jurisdiction."

12. Rule 13 of the Supreme Court Rules, 1966, as it existed prior to insertion of the present Rule 13 w.e.f. 20.12.1997 may also be extracted herein below for an effective determination of precise circumference of the '*preliminary hearing*' contemplated by Rule 13:

> *"Upon the presentation of the petition, the Judge in Chambers, or the Registrar, before whom, it is presented, may give such directions for service of the petition and advertisement thereof as he thinks proper and also appoint a time for the hearing of the petition."*

13. A preliminary hearing for determination of the question as to whether an election petition deserves a regular hearing under Rule 20 did not find any place in the Supreme Court Rules till insertion of Rule 13 in the present form w.e.f. 20.12.1997. Rule 34 of Order XXXIX provides that the procedure on an Election Petition shall follow, as nearly as may be, the procedure in proceedings before the Supreme Court in the exercise of its original jurisdiction. The procedure applicable to proceedings in the exercise of the original jurisdiction of the Supreme Court is contained in Order XXIII of Part III of the Supreme Court Rules. Order XXIII, Rule 1 contemplates institution of a suit by means of a plaint. After dealing with the requirements of a valid plaint, Order Rule 6 provides that a plaint shall be rejected

(a) where it does not disclose a cause of action;

(b) where the suit appears from the statement in the plaint to be barred by any law.

14. To make the narration complete it will be necessary to note that the other provisions of Part III of the Rules deal with the procedure that would apply to the disposal of a suit filed under Order XXIII Rule 1 and, inter alia, provide for :

(a) Issue and Service of Summons (Order XXIV)

(b) Written statement set off and counterclaims(Order XXV)

(c) Discovery and Inspection (Order XXVII)

(d) Summoning and Attendance of witnesses (Order XXIX)

(e) Hearing of the suit (Order XXXI)

15. Order XXIII, Rule 6, as noticed above, was a part of the Rules alongwith Rule 13 as it originally existed. In other words, insertion of the new Rule 13 providing for a preliminary hearing was made despite the existence of the provisions of Order XXIII Rule 6 and the availability of the power to reject a plaint and dismiss the suit (including an Election Petition) on the twin grounds mentioned in Rule 6 of Order XXIII. Therefore a preliminary hearing under Order XXXIX Rule 13 would require the Court to consider something more than the mere disclosure or otherwise of a cause of action on the pleadings made or the question of maintainability of the Election Petition in the light of any particular statutory enactment. A further enquiry, which obviously must exclude matters that would fall within the domain of a regular hearing under Rule 20 would be called for in the preliminary hearing under Rule 13 of Order XXXIX. In the course of such enquiry the Court must be satisfied that though the Election Petition discloses a clear cause of action and raise triable issue(s), yet, a trial of the issues raised will not be necessary or justified in as much as even if the totality of the facts on which the petitioner relies are to be assumed to be proved there will be no occasion to cause any interference with the result of the election. It is only in such a situation that the Election Petition must not be allowed to cross the hurdle of the preliminary hearing. If such satisfaction cannot be reached the Election Petition must be allowed to embark upon the journey of a regular hearing under Order 20 Rule XXXIX in accordance with the provisions of Part III of the Rules. In my opinion, the above is the scope and ambit of the preliminary hearing under Order XXXIX, Rule 13 of the Rules and it is within the aforesaid

confines that the question raised by the parties, at this stage, have to be answered.

16. At the very outset the issue with regard to the office of the Leader of the House and Leader of the Congress Party may be dealt with. Under the provisions of The Leaders and Chief Whips of Recognized Parties and Groups in Parliament (Facilities) Act, 1998 Act and Rules framed there under no remuneration to the Leader of the House or the Leader of the Legislature Party in the House is contemplated beyond the salary and perquisites payable to the holder of such an office if he is a Minister of the Union (in the present case the Respondent was a Cabinet Minister of the Union). That apart, either of the offices is not under the Government of India or the Government of any State or under any local or other authority as required under Article 58 (2) so as to make the holder of any such office incur the disqualification contemplated thereunder. Both the offices in question are offices connected with the Lok Sabha. Any incumbent thereof is either to be elected or nominated by virtue of his membership of the House or his position as a Cabinet Minister, as may be. The Election Petition insofar as the aforesaid offices are concerned, therefore, do not disclose any triable issue for a full length hearing under Order XXXIX, Rule 20 of the Rules.

17. The next question is with regard to the office of the Chairman of the Council of Indian Statistical Institute, Kolkata. Whether the said office carries any remuneration and/or perquisites or the same is under the control of the Union Government as also the question whether the respondent had resigned from the said office on 20.6.2012 are all questions of fact which are in dispute and, therefore, capable of resolution only on the basis of such evidence as may be adduced by the parties. The Court, therefore, will have to steer away from any of the said issues at the present stage of consideration which is one under Order XXXIX, Rule 13. Instead, for the present, we may proceed on the basis that the office in question is an office of profit which the Respondent held on the relevant date

(which facts, however, will have to be proved at the regular hearing if the occasion so arises) and on that assumption determine whether the election of the Respondent is still not void on the ground that, in view of the provisions of Article 58 (2) of the Constitution, the nomination of the Respondent had been wrongly accepted, as claimed by the respondent. In this regard the specific issue that has to be gone into as whether the office of the Chairman, ISI, Kolkata has been exempted from bringing any disqualification by virtue of the provisions of the Parliament (Prevention of Disqualification) Act 1959, as amended.

18. For an effective examination of the issue indicated above, the provisions of Articles 58, 84 and 102 of the Constitution would require a detailed notice and consideration. The said provisions are, therefore, extracted below:-

"Article 58 - Qualifications for election as President

(1) No person shall be eligible for election as President unless he—

(a) is a citizen of India,

(b) has completed the age of thirty-five years, and

(c) is qualified for election as a member of the House of the People.

(2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

Explanation.—For the purposes of this Article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice President of the Union or the Governor1[***] of any State or is a Minister either for the Union or for any State.

1. The words "or Rajpramukh or Uparajpramukh" omitted by the Constitution (Seventh Amendment) Act, 1956, section 29 and Schedule.

Article 84 - Qualification for membership of Parliament

A person shall not be qualified to be chosen to fill a seat in Parliament unless he—

> [1][(a) is a citizen of India, and makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;]
>
> (b) is, in the case of a seat in the Council of States, not less than thirty years of age and, in the case of a seat in the House of the People, not less than twenty-five years of age; and
>
> (c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

1. Substituted by the Constitution (Sixteenth Amendment) Act, 1963, section 3, for clause (a) (w.e.f. 5-9-1963)

Article 102 - Disqualifications for membership

(1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

[1][Explanation.— For the purposes of this clause] a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.

2(2) A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule.]

1. Substituted by the Constitution (Fifty-second Amendment) Act, 1985, section 3, for "(2) For the purposes of this Article" (w.e.f. 1-3-1985).

2. Inserted by the Constitution (Fifty-second Amendment) Act, 1985, section 3 (w.e.f. 1-3-1985).

19. Article 58(1)(c) requires a presidential candidate to be qualified for election as a Member of the House of the People. Does it mean that whosoever is qualified for election as a Member of the House of the People under Article 84 and does not suffer from any disqualification under Article 102 becomes automatically eligible for election to the office of the President? In other words, do the provisions of Articles 58, 84 and 102 of the Constitution envisage a composite and homogenous scheme?

20. Under Article 58(1)(b) a Presidential candidate must have completed the age of 35 years. At the same time, under

Article 58(1)(c) such a person must be eligible to seek election as a Member of the House of the People. Under Article 84(b) a candidate, seeking election to the House of the People must not be less than 25 years of age. In other words, a person qualified to be a Member of the House of the People but below 35 years of age will not be qualified to be a candidate for election to the office of the President. Similarly, to be eligible for membership of Parliament (including the House of the People) a candidate must make and subscribe an oath or affirmation according to the prescribed form. No such condition or stipulation is mandated for a Presidential candidate by Article 58. Insofar as Article 102 (1)(a) is concerned though holding an office of profit is a disqualification for election as or being a Member of either House of Parliament such a disqualification can be obliterated by a law made by Parliament. Under Article 58(2) though a similar disqualification (by virtue of holding an office of profit) is incurred by a Presidential candidate no power has been conferred on Parliament to remove such a disqualification. That apart, the Explanations to both Articles 58 and 102 contain provisions by virtue of which certain offices are deemed not to be offices of profit. The similarities as well as the differences between the two provisions of the Constitution are too conspicuous to be ignored or over looked. In a situation where Article 102(1)(a) specifically empowers Parliament to enact a law to remove the disqualification incurred for being a Member of Parliament by virtue of holding of an office of profit and in the absence of any such provision in Article 58 it will be impossible to read Article 58 alongwith Article 102 to comprehend a composite constitutional scheme. Keeping in view that the words in the Constitution should be read in their ordinary and natural meaning so that a construction which brings out the true legislative intent is achieved, Article 58 has to be read independently of Articles 84 and 102 and the purport of the two sets of Constitutional provisions have to be understood to be independent of each other. In fact such a view finds expression in an earlier opinion of this Court rendered in *Baburao Patel*

v. Dr. Zakir Hussain[1] which is only being reiterated herein.

21. The net result of the above discussion is that the Parliament (Prevention of Disqualification) Act, 1959 as amended by the Amendment Act No.31 of 2006 has no application insofar as election to the office of the President is concerned. The disqualification incurred by a Presidential candidate on account of holding of an office of profit is not removed by the provisions of the said Act which deals with removal of disqualification for being chosen as, or for being a Member of Parliament. If, therefore, it is assumed that the office of Chairman, ISI is an office of profit and the Respondent had held the said office on the material date(s) consequences adverse to the Respondent, in so far as the result of the election is concerned, are likely to follow. The said facts, will therefore, be required to be proved by the election Petitioner. No conclusion that a regular hearing in the present case will be a redundant exercise or an empty formality can be reached so as to dispense with the same and terminate the Election Petition at the stage of its preliminary hearing under Order XXXIX Rule 13. The Election Petition, therefore, deserves a regular hearing under Order XXXIX Rule 20 in accordance with what is contained in the different provisions of Part III of the Supreme Court Rules, 1966.

O R D E R

CHELAMESWAR, J. I have had the advantage of reading the judgments of both My Lord the Chief Justice and my learned brother Justice Ranjan Gogoi. I regret my inability to agree with the conclusion recorded by the learned Chief Justice that the instant Election Petition does not deserve a regular hearing. I shall pronounce my reasons for such disagreement shortly.

DECEMBER 11, 2012

CHELAMESWAR, J. 1. regret my inability to completely agree with the opinion of the majority delivered by Hon'ble the Chief Justice.

2. The pleadings and submissions relevant for the present purpose are elaborately mentioned in the judgment of Hon'ble the Chief Justice of India, therefore, I do not propose to reiterate the same.

3. The procedure that is required to be followed in an election petition calling in question the election of the respondent as the President of India is the subject matter of controversy. It is a long settled principle of law in this country that the elections to various bodies created under the Constitution cannot be questioned except in accordance with the law made by the appropriate legislation. Article 329 (b) declares that "no election to either House of Parliament or to the House or either House of the Legislature of a State (hereinafter collectively called 'legislative bodies') shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature". Similarly, Article 7[1] declares all doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court. Article 71 (3) stipulates that Parliament may by law

1. Article 71. Matters relating to, or connected with, the election of a president or Vice President.—(1) All doubts and disputes arising out of or in connection with the election with the election of a president or vice president shall be inquired into and decided by the Supreme Court whose decision shall be final.

(2) If the election of a person as President or Vice President is declared void by the Supreme Court, acts done by him in the exercise and performance of the powers and duties of the office of President or Vice President, as the case may be, on or before the date of the decision of the decision of the Supreme Court shall not be invalidated by reason of that declaration

(3) Subject to the provisions of this constitution, Parliament may by law regulate any matter relating to or connected with the election of a President or Vice President.

(4) The election of a person as President or Vice President shall not be called in question on the ground of the existence of any vacancy for whatever reasn among the members of the electoral college electing him.

regulate any matter relating to or connected with the election of a President or Vice-President and such regulations by the Parliament is, however, subject to provisions of the Constitution. In other words, while the forum for adjudication of disputes pertaining to legislative bodies under the Constitution is required to be determined by the appropriate legislature, the forum for the adjudication of disputes pertaining to the election of the President and Vice-President is fixed by the Constitution to be this Court. Whereas various other matters like the grounds on which such elections could be challenged, the procedure that is required to be followed in an election dispute are required to be provided by law in the case of the members of the legislative bodies - by the appropriate legislature and in the case of the President and Vice-President – only by the Parliament. In the context of the election disputes pertaining to the members of the legislative bodies, the authority to provide for such matters is vested in the appropriate legislature in view of the language of Article 329, Entry 11A of the III List, VII Schedule. Similarly, by virtue of Article 71 (3) read with Article 246 (1) and Entry 72 of List I to the VII Schedule, such power vests exclusively in the Parliament.

4. In exercise of such power, the Parliament made the Presidential and Vice-Presidential Elections Act, 1952, (hereinafter referred to as 'the Elections Act', for easy reference). Part III of the said Act deals with the disputes

2. 14A. Presentation of Petition.—(1) An election petition calling in question an election may be presented on one or more of the grounds specified in sub-section (1) of section 18 and section 19, to the Supreme Court by any candidate at such election, or—

(1) in the case of Presidential election, by twenty or more electors joined together as petitioners;

(ii) in the case of Vice-Presidential election, by ten or more electors joined together as petitioners.

(2) Any such petition may be presented at any time after the date of publication of the declaration containing the name of the returned candidate at the election under section 12, but not later than thirty days from the date of such publication.

regarding the election. Section 14 declares that the only mode of questioning of the election of either the President or Vice-President is by presenting an election petition to this Court. Section 14A[2] prescribes that the election of either the President or Vice-President could be challenged only on the grounds specified in Sections 18(1) and 19 of the Act. It also specifies the persons who are authorized to raise such a question. It limits the right to raise the question only to two categories of people – (1) the candidates at such an election; (2) twenty or more electors in the case of the President and ten or more electors in the case of the Vice-President. The said Section stipulates a limitation of 30 days for presenting such an election petition reckoned from the date of publication of the declaration contemplated under Section 12 thereof. While Section 16 stipulates the reliefs that could be claimed in an election petition, Section 15 provides as follows:-

> "Form of petitions, etc., and procedure.- Subject to the provisions of this Part, rules made [whether before or after the commencement of the Presidential and Vice-Presidential Elections (Amendment) Act, 1977] by the Supreme Court under article 145 may regulate the form of election petitions, the manner in which they are to be presented, the persons who are to be made parties thereto, the procedure to be adopted in connection therewith and the circumstances in which petitions are to abate, or may be withdrawn, and in which new petitioners may be substituted, and may require security to be given for costs."

It can be seen from Section 15 that the Parliament purports to authorize this Court to frame rules dealing with various aspects of the election petitions such as (1) the manner in which the petitions are to be presented; (2) the persons who are required to be made parties thereto; (3) the procedure to be followed in conducting the election petitions; (4) the circumstances in which the petitions are to abate or may be withdrawn, and (5) the circumstances in which the petitioners

may be substituted and may require security to be given for costs. Similarly, in the context of the election petition calling in question the election of a member of any one of the legislative bodies such procedure is meticulously provided for by the Parliament under the Representation of the People Act, 1951.

5. In my opinion both Sections 14(2) and 15 of the Elections Act, insofar as they purport to vest the jurisdiction in and authorize this Court to frame rules respectively with respect to the adjudication of the disputes pertaining to the election of the President, are superfluous because Articles 71 and 145 of the Constitution already expressly provide for the same.

6. Part V Chapter IV of the Constitution provides for the establishment, jurisdiction etc of this Court. Original jurisdiction of this Court obtains under Article 131 and 32 of the Constitution. Various other articles occurring in the said Part vest both civil and criminal appellate jurisdiction of this Court. Article 138[3] of the Constitution authorizes the Parliament to vest further jurisdiction in the Supreme Court by law. Such jurisdiction could either be original or appellate. It is axiomatic that the authority of the legislature (Parliament in the context of this case) to create jurisdiction takes within its sweep the authority to prescribe various matters which are necessary incidents of the jurisdiction such as, the limits of the jurisdiction – pecuniary, territorial etc., the procedure to be adopted in the exercise of such jurisdiction etc.

7. Since the Constitution itself vests jurisdiction in this Court under various heads and it also authorizes the Parliament to create/vest further jurisdiction in this Court by law, the

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3. Article 138. Enlargement of the jurisdiction of the Supreme Court - (1) The Supreme Court shall have such further jurisdiction and powers with respect to any of the matters in the Union List as Parliament may by law confer.

(2) The Supreme Court shall have such further jurisdiction and power with respect to any matter as the Government of India and the Government of any State may by special agreement confer, if Parliament by law provides for the exercise of such jurisdiction and powers by the Supreme Court.

Constitution recognized the need for regulating the procedure to be followed by this Court in exercise of such jurisdiction whatever be the source of such jurisdiction. Therefore, Article 145 is incorporated. Article 145 postulates that the Parliament may by law stipulate such procedure and in the absence of any such law this Court can prescribe the procedure with the approval of the President of India.

8. Article 145[4] of the Constitution authorizes this Court to make rules for regulating the practice and procedure of this Court with regard to its jurisdiction, either original or appellate

4. 145. Rules of Court, etc.—(1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generallythe practice and procedure of the COurt including—

(a) rules as to the persons practising before the Court;

(b) rules as to the procedure for hearing appeals, and other matters pertaining to appeals including the time within which appeals to the Court are to be enteres;

(c) rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III;

(cc) rules as to the proceedings in the Court under Article 139A;

(d) rules as to the entertainment of appeals under sub clause (c) of clause (1) of Article 134;

(e) rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entered;

(f) rules as the costs of and incident to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein;

(g) rules as to the granting of bail;

(h) rules as to stay of procedings;

(i) rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay;

(j) rules as to the procedure for inquiries referred to in clause (1) of Article 317;

(2) Subject to the provisions of clause (3), rules made under this article may fix the minimum nmber of Judges who are to sit for any purpose, and may provide for the powers of single Judges and Division Courts;

vested in this Court either by the Constitution or law. Such authority of this Court is, however, expressly made subject to the provisions of any law made by the Parliament and also subject to the approval of the President of India.

9. The submission that the Code of Civil Procedure applies to the conduct of the election petition on hand in view of section 141 of the CPC, in my view, is required to be refuted. Because the procedure that is required to be followed by this Court while exercising jurisdiction conferred by either the Constitution or the Parliament by law could be laid down only by the Parliament and until the Parliament makes such a law, by the rules made by this Court. CPC is not a law made by the Parliament but an "existing law" within the meaning of the expression under Article 366 (10) and deriving its force from Article 372 of the Constitution.

10. The Code of Civil Procedure, 1908 ('the Code' for short) is an enactment "consolidating the laws relating to the procedure of the Courts of Civil Judicature". Though there is

(3) The minimum number of Judges who are to sit fo the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under Article 143 shall be five:

Provided that, where the Court hearing an appeal under any of the provisions of this chapter other than Article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as the to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the dispose of the appeal in conformity with such opinion.

(4) No judgment shall be delivered by the Supreme Court save in open Court, and no report shall be made under Article 143 save in accordance with an opinion also delivered in open Court

(5) No judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion.

nothing express in the body of the Code which declares that the Code applies to the Courts of Civil Judicature, such a declaration is contained in the Preamble of the Code. By a long established practice and interpretation of the successive Codes, it is always understood that the Code of Civil Procedure applies to the proceedings only in a Court of Civil Judicature. The first Code was made in 1859 which was replaced by its successor (Act 10 of 1877). The brief history of the various enactments which regulated the procedure of the Courts of Civil Judicature is succinctly given in Mulla's Code of Civil Procedure, 7th Edition, at page 2[5]. What exactly is a Court of Civil Judicature is not defined either under the Code or under any other enactment. Such an expression is used in contradistinction to the courts exercising jurisdiction in criminal cases. Nor the word 'court' is defined under the Code. 'Revenue Courts' and Courts constituted under the various laws dealing with Small Causes are not treated to be Courts to which the Code is automatically applicable. (*See*: Sections 5, 7 and 8)

5. The first Code of Civil Procedure was Act 8 of 1859. Prior to that, the procedure of the mofussil courts was regulated by special Acts and Regulations repealed by Act 10 of 1861; and the procedure of the Supreme Court was under their own rules and orders and certain Acts, for example Act 17 of 1852 and Act 6 of 1854. The Code of 1859 applied to mofussil Courts only. In 1862, the Supreme Court and the Courts of Sadder Diwani Adalat in the Presidency towns were abolished by the High Courts Act 1861 (24 and 25 Vic C 104) and the powers of those Courts were vested in the chartered high Courts. The Letters Patent of 1862 establishing the high Courts extended to them the procedure of the Code of Civil Procedure, 1859. The Charters of 1865, which empowered the high Courts to make rules and orders regulating proceedings in civil cases required them to be guided as far as possible by the provisions of the Code of 1859 and subsequent Amending Acts.

   Such Amending Acts were: Act 4 of 1860; 43 of 1860; 23 of 1861; 9 of 1863; 20 of 1867; 7 of 1870; 14 of 1870; 9 of 1871; 32 of 1871 and 7 of 1872.

   The next Code was Act 10 of 1877, which repealed that of 1859. This was amended by Act 18 of 1878 and 12 of 1879; then superseded by the Code of 1882 (Act 14 of 1882). This was amended by Acts 15 of 1882; 14 of 1885; 4 of 1886; 10 of 1886; 7 of 1887; 8 of 18887; 6 of 1888; 10 of 1888; 13 of 1889; 8 of 1890; 6 of 1892; 5 of 1894; 7 of 1895 and 13 of 1895; and then superseded by the present Code of Civil Procedure.

The expression 'Revenue Court' is defined in Section 5(2)[6]. The nature of the jurisdiction exercised either by the Revenue Courts or the Small Causes Courts cannot be said to be anything other than civil jurisdiction. Even then the Legislature in its wisdom thought it fit not to extend the application of Code to these Courts. Therefore, the submission of Mr. Ram Jethmalani, learned senior counsel for the petitioner, that in view of the declaration contained in Section 141[7] of the Code, the Code applies to the conduct of the election petition under the Elections Act, in my opinion, is untenable.

11. Yet another reason for such a conclusion is that in the context of ouster of jurisdiction of civil courts under innumerable enactments, either of the Parliament or of the State Legislatures, this Court consistently took the view that this Court and the High Courts exercising jurisdiction under Article 32 or under Article 226 exercise jurisdiction vested in them by the Constitution and, therefore, the same cannot be taken away by any legislation short of a Constitutional amendment. The implication flowing thereby is that they are not ordinary civil courts within the meaning of such an expression employed in these various enactments attracting the bar of jurisdiction created by the statute. Therefore, I find it difficult to accept the submission that by virtue of the operation of Section 141 of the Code this Court is bound by the procedure contained in the Code while exercising its extraordinary jurisdiction under Article 71 of the Constitution of India.

12. Then the question remains as to what is the procedure

6. Section 5(2). 'Revenue Court' in sub-section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the tent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

7. 141. Miscellaneous proceedings—The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

that is required to be followed by this Court while adjudicating an election dispute under the Elections Act. This Court, in exercise of its authority under Article 145, made rules regulating the procedure of this Court, both in its original and appellate jurisdiction called the Supreme Court Rules, 1966, hereinafter referred to as 'the Rules'. Insofar as the election petitions under the Act are concerned, the procedure is prescribed under Order XXXIX which occurs in Part VII of the Rules. Rule 34[8] thereof stipulates that while adjudicating an election petition under the Act, this Court is required to follow (as nearly as may be) the procedure contained in Orders XXII to XXXIV of Part III of the Rules regulating the proceedings before this Court in exercise of its original jurisdiction[9]. Such a stipulation is expressly made subject to other provisions of Order XXXIX or any special order or direction by this Court. The stipulation that this Court is obliged to follow the procedure applicable to the proceedings under the original jurisdiction of this Court (Part III of the Rules) is made subject to the other provisions of Order XXXIX. In other words, if the procedure contained in Part III is inconsistent with any provisions contained in Part VII (Order XXXIX), this Court is not obliged to follow the procedure contained in Part III. Apart from that, in view of the clause….."or any special order or direction of the Court" ….. occurring under Rule 34 of Order XXXIX, it is always open to this Court in a given case not to follow the procedure contained thereunder Order XXXIX. The circumstances which justify the issuance of such "special orders or directions" by this Court require a separate examination as and when required.

13. Therefore, the question is –what is the procedure that is required to be followed by this Court on the receipt of an

8. 34. Subject to the provisions of this Order or any special order or directions of the Court, the procedure on an election petition shall follow, as nearly as may be, the procedure in proceedings before the Court in the exercise of its original jurisdiction.

9. Various rules occuring in Part III of the Rules expressly provide for the application of certain specified provisions of the CPC to such original proceedings before this Court.

election petition under the Act? Rules 13 to 15 of Order XXXIX prescribe the procedure to be followed by this Court. While Order XXIV Rule 1 occurring under Part III of the Rules mandates that when a suit is presented to this Court for adjudication in its original jurisdiction "summons shall be issued to the defendant to appear and answer the claim". Rule 13[10] of Order XXXIX prescribes a different procedure. It reads as follows:-

> "Upon presentation of a petition the same shall be posted before a bench of the Court consisting of five Judges for preliminary hearing and orders for service of the petition and advertisement thereof as the Court may think proper and also appoint a time for hearing of the petition. Upon preliminary hearing, the Court, if satisfied, that the petition does not deserve regular hearing as contemplated in Rule 20 of this Order may dismiss the petition or pass any appropriate order as the Court may deem fit."

14. A plain reading of Rule 13 indicates that on the due presentation of an election petition under the Act to this Court, [1] the same shall be posted before a bench of five Judges for a preliminary hearing and orders; [2] such a hearing and orders are regarding the service of the petition and advertisement thereof. Because Rules 14[11] and 15[12] respectively stipulate that

10. It may be mentioned that Rule 13, as it exists today, was substituted by GSR 407 dated 9th December, 1997, w.e.f. 20th December, 1997. Prior to such substitution, the Rule read differently.

11. Rule 14. Unless otherwise ordered, the notice of the presentation of the petition, accompanied by a copy of the petition, shall within five days of the presentation thereof or within such further time as the Court may allow, be served by the petitioner or his advocate on record on the respondent or respondent, the Secretary to the Election Commission, the Returning Officer and the Attorney General for India. Such service shall be effected personally or by registered post, as the Court or Registrar may direct. Immediately after such service the petitioner or his advocate on record shall file with the Registrar an affidavit of the time and manner of such service.

12. Rule 15. Unless dispensed with by the Judge in Chambers or the Registrar, as the case may be, notice of the presentation of the petition shall be published in the Official Gazette and also advertised in newspaper at the expense of the petitioner or petitioners, fourteen clear days before the date appointed for the hearing thereof in such manner as the Court or the Registrar may direct.

the notice of the presentation of the election petition under the Act is required to be served on the various persons specified under Rule 14. The said rule also provides for the method and manner of service. Whereas Rule 15 stipulates that the factum of the presentation of election petition under the Act shall be published in the Official Gazette and also advertised in newspapers at the expense of the petitioner, fourteen clear days before the date appointed for hearing. However, the obligations stipulated in Rule 14 and 15 are made expressly **subject to orders to the contrary by the Court**. It is for determining whether the normal procedure prescribed under Rule 14 and 15 discussed above is to be followed in a given case or not, an election petition under the Act is required to be listed for a preliminary hearing contemplated under Rule 13. Rule 13 further stipulates [3] upon such a preliminary hearing, if the Court comes to the conclusion that the petition does not deserve a regular hearing, contemplated under Rule 20, the Court may either dismiss the election petition or pass any appropriate orders as the Court deems fit.

15. Therefore, Order XXXIX Rule 13 prescribes a procedure contrary to the stipulation contained under Order XXIV Rule 1 which mandates that after due institution of an original suit before this Court, "summons shall be issued". It is worthwhile noticing that while Order XXIV requires summons to be issued, Order XXXIX Rule 14 contemplates that only a notice of the presentation of an election petition is to be issued. The distinction between summons and notice is very subtle but real which would be beyond the need and scope of this judgment to go into. I only take note of the distinction in the language of the abovementioned rules and the existence of a legal distinction pointed out.

16. It follows from the above discussion, Order XXXIX Rule 13 vests a discretion in the bench of five Judges before whom the election petition under the Act is posted for preliminary hearing to record a conclusion whether the petition deserves

a notice under Rule 14 or publication under Rule 15 and a regular hearing under Rule 20 or any other appropriate order such as (perhaps) directing some formal defects in the petition to be cured etc. I do not propose to examine the full scope and amplitude of such "appropriate order" for the purpose of this case as the same is not necessary.

17. However, it goes without saying that the discretion of the bench hearing the election petition to record a finding that the election petition does not deserve a regular hearing and, therefore, is required to be dismissed must be exercised on rational grounds known to law for clear and cogent reasons to be recorded. For such obligation is the only justification of the extraordinary degree of protection and immunities granted to the judiciary by our Constitution. Absence of rational grounds based on clear and cogent reasoning would lead to a popular misconception that this branch of the Constitutional governance is no different from the other two branches, a misconception which is certainly not conducive to the credibility (of the legal system) which is the ultimate strength of all judicial institutions.

18. Placing reliance on Order VII Rule 11 CPC, Shri Ram Jethmalani argued that an election petition can be rejected even prior to the stage of issuance of summons only when the election petition does not disclose a cause of action. He submitted that under any circumstances it cannot reasonably be argued that the election petition on hand does not disclose a valid cause of action. He further argued that the question whether the petitioner would be able to establish the truth of various allegations made by him in the election petition cannot be the subject matter of enquiry under Rule 13 but the enquiry can only be confined to - whether the allegations if proved do constitute sufficient cause of action to enable the petitioner to claim the relief such as that are claimed in the election petition?

19. On the other hand it is the case of the respondent that various factual allegations made in the election petition even if

proved to be true do not disclose a cause of action entitling the petitioner to relief as claimed in the election petition.

20. To examine the correctness of the above rival submissions, I deem it appropriate to examine the circumstances under which this Court can dismiss an election petition under the Act at the stage of preliminary hearing even before issuing notice to the respondent under rule 13.

21. I am of the opinion that it is not possible to give an exhaustive list of the circumstances in which this Court can render the finding that an election petition does not require a regular hearing but it can be said that having regard to the fact that an election petition is not a common law proceeding but the creature of the statute, non-compliance with the mandatory requirements of the statute under which the right to question an election under the Elections Act is created is certainly one of the grounds on which election petition can be dismissed at the stage of preliminary hearing.

22. For example, the right to question an election under the Elections Act is available only to two categories of people as enumerated under section 14A which is already taken note. In a case where the election petition is presented by somebody other than who is entitled to question the election irrespective of the allegations made in the election petition the same is required to be dismissed at the stage of preliminary hearing.

23. Similarly, section 14A declares that an election under the Act can be called in question only on the ground specified under sections 18[13] and 19[14]. Therefore, if the allegations made

13. Section 18. Grounds for declaring the election of a returned candidate to be void.—(1) If the Supreme Court is of opinion.,—

(a) that the offence of bribery or undue influence at the election has been committed by the returned candidate or by any person with the consent of the returned candidate; or

(b) that the result of the election has been materially affected—

(i) by the improper reception or refusal of a vote, or

in the election petition even if assumed to be true do not constitute one or some of the grounds on which an election under the Act can be challenged, it would be certainly one of the grounds enabling this Court to reach a conclusion that the election petition does not deserve a regular hearing.

24. It is in this background the question whether the instant election petition is required to be dismissed even without issuing notice to the respondent is required to be determined?

25. The entire thrust of the arguments of the respondent — who appeared before this court even before this court directed issuance of notice upon him — is that the election petition does not disclose a valid cause of action calling for issuance of notice or publication contemplated under Rules 14

(ii) by any non-compliance with the provisions of the Constitution or of this Act or of this Act or of any rules or orders made under this Act; or

(iii) by reason of the fact that the nomination of any candidate (other than the sucessful candidate), who has not withdrawn his candidature, has been wrongly accepted ; or

(c) that the nomination of any candidate has been wrongly rejected or the nomination of the successful candidate had been wrongly accepted;

the Supreme Court shall declare the election of the returned candidate to be void.

(2) For the purposes of this section, the offences of bribery and undue influence at an election have the same meaning as in Chapter IXA of the Indian Penal Code.

14. Section 19. Grounds for which a candidate other than the returned candidate may be declared to have been elected.—If any person who has lodges an election petition had, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate had been duly elected and the Supreme Court is of opinion that in fact the petitioner or such candidate received a majority of the valid votes, the Supreme Court shall, after declaring the election of the returned candidate to be void, declare the petitioner or such other candidate, as the case may be, to have been duly elected:

Provided that the petitioner or such candidate shall not be declated to be suly elected if it is proved that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election.

& 15 and a regular hearing contemplated under Order XXXIX Rule 20.

26. To accept or reject the submission of the respondent it is necessary to examine the grounds on which election of the respondent is challenged.

27. The only ground on which the election of the respondent is challenged is that he was not eligible to contest the election to the office of President of India. Such a ground is certainly one of the grounds on which election of the respondent as the President of India could be challenged, as Section 18(1)(iii) stipulates that if this court is of the opinion that the nomination of the successful candidate has been wrongly accepted, this court shall declare the election to be void.

28. The next question is whether the election petition contains necessary allegations to substantiate the above mentioned ground on which the election is challenged? The allegations, as disclosed by the election petition in this regard, are twofold and are sufficiently elaborated in the judgements of My Lord the Chief Justice and my learned brother Justice Ranjan Gogoi. Therefore, I do not propose to reiterate the same.

29. The respondent does not dispute the fact that he was the Chairman of the Indian Statistical Institute, Kolkata and also the leader of the political party called Indian National Congress in the Lok Sabha. However, the respondent took a categoric stand that he had resigned from both the abovementioned offices before the crucial date i.e. on the date of scrutiny of the nomination papers (2nd July 2012) - a stand which is seriously disputed by the election petitioner by an elaborate pleading in the petition that the respondent did not in fact cease to hold the abovementioned offices by the crucial date.

30. The respondent also took a categoric stand that: apart from his having had relinquished the abovementioned two offices by the crucial date, neither of the abovementioned

offices is an office the holding of which would make him ineligible to contest the election in question.

31. The issue that is required to be examined for the purpose of the order on the preliminary hearing under Rule 13 is whether the holding of either of the abovementioned two offices - **if really held on the crucial date** - would render the respondent ineligible to contest the election in question? If the answer is in the negative, this Court could dismiss the election petition on hand under Rule 13.

32. The answer to the issue in my opinion depends upon the answer to the question – Whether the said two offices are offices of profit which would in law render the respondent ineligible to contest the election in question? The question – Whether the respondent did infact hold those offices on the crucial date? is a question of fact which, in my opinion, cannot be the subject matter of enquiry at this stage.

33. To answer the first question, we must first examine what is the prohibition under the law which renders any person ineligible to contest the election in question.

34. Article 58 provides that:

"Qualifications for election as President.— (1) No person shall be eligible for election as President unless he

(a) is a citizen of India,

(b) has completed the age of thirty five years, and

(c) is qualified for election as a member of the House of the People

(2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

Explanation: For the purposes of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice President of the Union or the Governor of any State or is a Minister either for the Union or for any State."

35. It can be seen from the above that holding of an office of profit either under the Government of India or the Government of any State or any local or other authority subject to the control of any of the said Governments *inter alia* would render the holder of such office of profit ineligible for election as President.

36. The respondent's defence is that neither of the offices held by him are offices of profit falling under Article 58 (2) which would render him ineligible to contest the election in question. According to him the office of the Chairman of Indian Statistical Institute, Kolkata – whether an office of profit or not stood declared [by a law made by the Parliament as contemplated under Article 102(1)(a)[15] i.e. the Parliament (Prevention of

15. In the purported exercise of the power conferred under Article 102(1)(a), the Parliament from time to time made various enactments, last in the series is the Disqualification Act, 1959, which is also ameded from time to time, once in 1993 and later in 1996 and 2006. Section 3 of the said Act declares that none of the offices specified therein shall disqualify the holder thereof for being chosen as or for being a member of Parliament. Section 3 insofar as relevant reads as follows:

"3. Certain offices of profit not to disqualify.—It is hereby declared that none of the following offices, in so far as it is an office of profit under the Government of India or the Government of any State, shall disqualify the holder thereof for being chosen as, or for being, a member of Parliament, namely,—..."

Various offices are specified in various sub-clauses from (a) to (m) of the said section to be offices which do not disqualify the holders thereof from becoming or being members of the Parliament. An analysis of these various clauses inserted from time to time (which to my mind indicates a haphazard tinkering with the act) shows that some offices are statutory, some of the offices are brought into existence by virtue of executive orders of the Goverment of India or the State Government. Relevant in the context is clause (k) of the said section which reads as follows:

"(k). the office of Chairman, Deputy Chairman, Secretary or Member (by wharever name called) in any statutory or non-statutory body specified in the Table;"

Disqualification) Act, 1959] - not to disqualify a person from either being chosen as or for being a member of the Parliament. Therefore, it is argued that even assuming that it is an office of profit falling under Article 58(2), the holding of such an office did not render him ineligible to contest the election in question because of the declaration made in the Parliament (Prevention of Disqualification) Act, 1959 (hereinafter referred to as "the Disqualification Act, 1959") as the Constitution itself under Article 102(1)(a) authorises the Parliament to make such a law and Article 58(1)(c) declares that a person "qualified to be a member of the House of the People" is eligible to contest the Presidential election.

37. On the other hand it is argued by Shri Jethmalani that there is a difference in the language of Article 58(2) and Article 102(1)(a) both of which deal with certain offices of profit and the consequential disqualification attached to the holders of such offices to contest the election either to the office of President of India or to the Parliament respectively. The declaration made under the Disqualification Act, 1959 may in a given case confer sufficient legal immunity from the operation of the disqualification specified in Article 102(1)(a) to enable the holder of such a declared office to contest the election to either House of the Parliament but such declaration does not confer any immunity from the operation of the disqualification contained in Article 58(2).

Though holding of an office of profit under any body - other than the Central Government or a State Government - is not a disqualification for a person seeking election to the Parliament, the Parliament chose to include within its sweep of the provisions of Disqualification Act, 1959 the various offices mentioned in Section 3 (k) read with the table annexed to the Schedule of the Act. Whether it is really necessary to bring such offices under the protective umbrella of the Act to avoid any challenge on the ground of the holders of such office being disqualified from seeking election to the Parliament, is a moot question.

There is a table attached to the Schedule of the Actwhich came to be inserted by Act 31 of 2006 consisting of 55 entries. Entry 4 therein is the 'Indian Statistical Institute, Calcutta' of which the respondent was admittedly the Chariman.

38. Any person seeking to contest an election either to the office of the President of India or for the membership of anyone of the legislative bodies under the Constitution must satisfy certain eligibility criteria stipulated by the Constitution. Article 58 of the Constitution stipulates that no person shall be eligible for election as the President of India unless he is a citizen of India and is qualified for election as a member of the House of the People but has completed the age of 35 years. It must be noticed that the qualifications and disqualifications with regard to the membership of the Parliament are contained in Articles 84[16] and 102[17] respectively. Article 84 stipulates that to be

16. Article 84—Qualifications for membership of Parliament—A person shall not be qualified to be chosen to fill a seat in Parliament unless he—

(a) is a citizen of India, and makes and subscribes before some person authorized in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;

(b) is, in the case of a seat in the Council of States, not less than thirty five years of age and, in the cae of a seat in the House of the people, not less than twenty-five years of age, and

(c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

17. Article 102—Disqualifications for membership—(1) A person shall be disqualified for being chosen as, and for being a member of either House of Parliament-

(a) If he holds may office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent Court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or had voluntarily acquired the citizenship of a goreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;

(e) if he is so disqualififed by or under any law made by Parliament.

Explanation.—For the purposes of this clause a person shall not be deemed to hold an officeof profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.

(2) A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule.

qualified to be chosen as a member of Parliament, a person must be a citizen of India, he must also subscribe to an oath specified under the said Article read with the third Schedule to the Constitution and be aged not less than 25 years in the case of the House of the People and 35 years in the case of the Council of States. The Article also authorises that the Parliament may by law prescribe such other **qualifications**. Whereas Article 102 declares certain categories of person to be disqualified either for being chosen or for continuing after being chosen as a member of either House of Parliament. They are (1) persons holding any office of profit either under the Government of India or the Government of any State; (2) persons of unsound mind and stand so declared by a competent court; (3) any undischarged insolvents; (4) persons who are not citizens of India or those who acquired citizenship of any foreign State etc. Article 102 (e) authorises the Parliament to make laws prescribing further **disqualifications** for the membership of the Parliament. However, insofar as the first class of persons mentioned above (holders of offices of profit) Article 102(1)(a) authorises the Parliament to make a declaration by law the holding of such declared offices of profit would not be a disqualification for the membership of the Parliament. The explanation to Article 102 makes a categoric declaration that a person who is a Minister either of the Union or of a State shall not be deemed to be holding an office of profit contemplated under Clause (1)(a).

39. The Representation of the People Act, 1951, (hereinafter referred to as 'the R.P. Act, 1951') is a law made by the Parliament referable to Articles 84(c) and 102(e). In the context of the Parliament, Sections 3 and 4 prescribe that a person seeking an election to the Parliament shall necessarily be an elector for a parliamentary constituency in India. In other words, various qualifications prescribed for registration as an elector in the electoral roll contemplated under Section 15 of the Representation of the People Act, 1950 must also be satisfied for a person to become eligible to contest for the

Parliament. Sections 16 to 19 prescribe various qualifications and disqualifications in the context of registration of a person in an electoral roll. They pertain to the minimum age, qualifications, residence etc. Chapter III and IV of the R.P. Act, 1951 prescribe various disqualifications under Sections 8, 9, 9A, 11A thereof for becoming a member of any of the legislative bodies under the Constitution.

40. On an examination of the above provisions, it appears to me that eligibility and disqualification to become a member of parliament are two distinct things. In my view, any person who is eligible to become and not disqualified for becoming a member of Parliament would not automatically be eligible to contest the election to the office of the President of India. There is a difference in the eligibility criteria applicable to the election of the membership of Parliament and the election to the office of the President of India.

41. While Article 58 declares that a person who is qualified to be elected as a member of a House of the People shall be eligible for the election of the President, it stipulates a higher age qualification of 35 years for a person seeking election to the President of India while it is sufficient under Article 84 (b) for a person seeking election to the House of the People to be not less than 25 years only. Another distinction is that: Article 102 (1)(a) declares that persons holding an office of profit either under the Government of India or of the Government of any State (unless they are protected by the law made by the Parliament) are disqualified for being chosen as members of the Parliament whereas Article 58 sub-clause (2) disqualifies persons holding office of profit not only specified under Article 102(a) but also under any local or any other authority which is subject to the control of either of the above mentioned two governments. In other words, the holding of an office of profit under any local or other authority is not a disqualification for membership of Parliament while it is a disqualification for the election to the office of the President of India.

42. One more distinction is that while an office of profit, the holding of which renders a person disqualified for being chosen as a member of Parliament, can be declared by the Parliament not to be an office of profit holding of which would disqualify the holder from becoming a member of Parliament. Such an authority is not expressly conferred on the Parliament in the context of the candidates at an election to the office of the President of India.

43. Therefore, when Article 58(1)(c) stipulates that no person shall be eligible for election as the President of India unless he is qualified to be a member of the House of the People, the protective declaration made by the Parliament referable to Article 102(1)(a) regarding certain offices of profit does not render holders of such offices eligible for contesting the Presidential election. Particularly, holders of office of profit under any "local or other authority" are positively disqualified for being elected as President of India. The said disqualification cannot be removed by the Parliament as Article 102(1)(a) does not authorise the Parliament to make any such declaration in the context of the holders of an office of profit under any local or other authority subject to the control of either the Government of India or the State Government, obviously because the holding of such an office is not declared to be a disqualification under the Constitution for the membership of the Parliament. I accept the submission of Mr. Jethmalani. In my opinion, the Constitution prescribes more stringent qualifications for election to the office of President of India and the disqualification stipulated under Article 58(2) is incapable of being exempted by a law made by the Parliament.

44. My opinion derives support from a Constitution Bench decision of this Court in *Baburao Patel and others v. Dr. Zakir Hussain and others* AIR 1968 SC 904 wherein the interface between Articles 58 and 84 of the Constitution was examined. Challenging the election of Dr. Zakir Hussain as President of

India, an election petition came to be filed in this Court wherein the Court noted thus:

> "9. The contention of the petitioners is that because of …. cl. (a) of Art. 84 ….. it became necessary to take oath for a person standing for election to either House of Parliament in the form prescribed in the Third Schedule, a person standing for election as President had also to take a similar oath because Art. 58(1)(c) requires that a person to be eligible for election as President must be qualified for election as a member of the House of the People. ……. urged that no one is qualified …… for election as a member of the House of the People unless he makes and subscribes an oath in the form set out for the purpose in the Third Schedule, and therefore this provision applied to a person standing for election as President, for without such oath he would not be qualified to stand for election to the House of the People."

This Court in para 10 compared the language of Articles 58 and 84 of the Constitution and held as follows:-

> " …. and reading them together it would follow that a person standing for election as President would require such qualifications as may be prescribed in that behalf by or under any law made by Parliament. Further as cl. (c) of Art. 58(1) lays down that a person standing for presidential election has to be qualified for membership of the House of the People, Article 102 (which lays down disqualifications for members of Parliament) would also be attracted except in so far as there is a special provision contained in Article 58(2). Thus cl. (c) of Article 58(1) would bring in such qualifications for members of the House of the People as may be prescribed by law by Parliament, as required by Article 84(c). It will by its own force bring in Article 102 of the Constitution, for that Article lays down certain disqualifications which a presidential

> candidate must not have for he has to be eligible for election as a member of the House of the People. But it is clear to us that, what is provided in clauses (a) and (b) of Article 58(1) must be taken from there and we need not travel to cls. (a) and (b) of Article 84 in the matter of citizenship and of age of the presidential candidate. **Clauses (a) and (b) of Article 58(1) having made a specific provision in that behalf in our opinion exclude cls. (a) and (b) of Art. 84.** This exclusion was there before the Amendment Act."

This Court refused to read the requirement of subscribing to the oath according to the form set out in Third Schedule of the Constitution for contesting the presidential election.

45. For reaching such a conclusion this Court took note of the fact that prior to the 16th Constitutional amendment, the requirement of subscription to such an oath did not exist in the context of either the election to the Parliament or the office of the President. It was introduced by the 16th amendment as a necessary requirement for a person to be qualified to contest the election to the Parliament. The omission to make such an amendment that refers to the persons contesting election to the office of the President is a clear indication that the Constitution ever intended such a requirement to be applied for the presidential election also. In paragraph 12 this Court held thus:

> "Now if the intention of Parliament was that an oath similar in form to the oath to be taken by persons standing for election to Parliament had to be taken by persons standing for election to the office of the President there is no reason why a similar amendment was not made in Article 58(1)(a). Further if the intention of Parliament was that a presidential candidate should also take an oath before standing for election, the form of oath should also have been prescribed either in the Third Schedule or by amendment of Article 60, which provides for oath by a person elected as President before he takes his office. But we find that no change was

made either in Article 58(1)(a) or in Article 60 or in the Third Schedule prescribing the form of oath to be taken by the presidential candidate before he could stand for election. This to our mind is the clearest indication that Parliament did not intend, when making the Amendment Act, that an oath similar to the oath taken by a candidate standing for election to Parliament had to be taken by a candidate standing for election to the office of the President. So there is no reason to import the provision of Article 84(a) as it stood after the Amendment Act into Article 58(1)(a), which stood unamended. That is one reason why we are of opinion that so far as the election to the office of the President is concerned, the candidate standing for the same has not to take any oath before becoming eligible for election as President."

46. Therefore, I have no hesitation to reach to the conclusion that the declaration made by the Parliament in the Disqualification Act, 1959 would not provide immunity for a candidate seeking election to the office of the President of India if such a candidate happens to hold an office of profit contemplated under Article 58(2).

47. Assuming for the sake of argument that the declaration of law made by Parliament [contemplated and made under Article 102(a)] can obliterate the disqualification even with respect to a candidate at the presidential election, Article 102(a) authorises the parliament to make such a declaration with respect to only the offices of profit either under the Government of India or Government of any State but not with respect to the offices of profit under "local or other authorities". Therefore, the legal nature of Indian Statistical Institute and of the office of its Chairman is required to be examined.

48. Whether the office of the Chairman of the abovementioned Institute can be called an office of profit either under the Government of India or the State Government or local or other authority attracting the prohibition under Article 58(2)

and rendering the respondent ineligible to contest the election in question?

49. This Court in *B.S. Minhas v. Indian Statistical Institute and others* (1983) 4 SCC 582 held that the Indian Statistical Institute is an authority falling under Article 12 of the Constitution of India, therefore, 'State' for the purpose of Part-III of the Constitution. Under the scheme of Indian Statistical Institute Act, the Government of India has deep and pervasive control on the administration of the Institute. It also provides financial support to the Institute.

50. The said Institute is a body registered under the Societies Registration Act, 1860 whose activities to some extent are regulated by the enactment of the Parliament titled "The Indian Statistical Institute Act, 1959 (No.57 of 1959), hereinafter referred to as the Institute Act. The Preamble to the Act declares as follows:

> "An Act to declare the institution known as the Indian Statistical Institute having at present its registered office in Calcutta to **be an institution of national importance** and to provide for certain matters connected therewith."

51. It must be remembered that Entry 64 of List-I of the 7th Schedule read with Article 246 (1) authorises the Parliament to make laws with respect to:

> "Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance."

52. Section 4 of the Institute Act authorises the Institute to grant degrees and diplomas for various disciplines specified therein. Section 5 authorises the Government to pay such sums as appropriated by the Parliament in each financial year to the Institute. The Act (Section 6) also obligates the Institute to get its accounts audited by such auditors as may be appointed by the Government of India in consultation with the Auditor-General

of India and the Institute. Section 7[18] prohibits Institute from taking certain actions without the previous approval of the Government of India. The full details of the Act are not necessary for the present case.

53. But from the above it can be safely concluded that the Institute is an authority subject to the control of the Government of India within the meaning of Article 58(2).

54. As it can be seen from the Scheme of the Institute Act and the preamble that the administration of the society is still to be run in accordance with its bye-laws and regulations of the Society except insofar as those activities which are specifically regulated by the Act (57 of 1959). The office of the Chairman of the Institute is not an office created by any statute but is an office created by the bye-laws of the Society. The Chairman is required to be elected by a Council created under the regulations of the Society. Therefore, it is certainly not an office (profit or no profit) either under the Central or State Government.

55. The learned counsel for the petitioner very vehemently argued that the very fact that the Parliament thought it fit to specifically include the office of the Chairman of the Indian

18. Section 7. Prior Approval of Central Government necessary for certain action by the Institute.—Notwithstanding anything contained in the Societies Registration Act, 1860, or in the memorandum or rules and regulatins, the Institute shall not except with previous approval of the Central Government,

(a) alter, extend or abridge any of the purposes for which it has been established or for which it is being used immediately before the commencement of this Act, or amalgamate itself either wholly or partially with any other Institution or society; or

(b) alter or amend in any manner the memorandum or rules and regulations; or

(c) sell or otherwise dispose of any property acquired by the Institute with money specifically provided for such acquisition by the Central Government:

Provided that no such approval shall be necessary in the case of any such movable property or class of movable property as may be specified by the Central Government in this behalf by general or special order; or

(d) be dissolved.

Statistical Institute in the table annexed to the Disqualification Act, 1959 would *ipso facto* imply that the office in question is an office of profit. He relied upon *M.V. Rajashekaran and others v. Vatal Nagaraj and others* (2002) 2 SCC 704 at page 711 wherein this Court observed thus:

> "5. …. The fact that the office of the chairman or a member of a committee is brought within the purview of this **Act implies that** the office **concerned must necessarily be regarded as an office of profit**, but for the exclusion under the clause by the legislature, the holder of such office could not have been eligible for being chosen as a Member of the Legislature. The object of this provision is to grant exemption to holders of office of certain description and the provision in substance is that they will enjoy the exemption, even though otherwise they might be regarded as holders of offices of profit…"

56. It is argued by Shri Harish Salve appearing for the respondent that while interpreting the provisions of the Constitution, the understanding of the legislature regarding the fact whether a particular office is an office of profit need not necessarily be the correct understanding and this court is required to independently examine this question.

57. It is argued by Shri Salve that the office of the Chairman of the Indian Statistical Institute cannot be said to be either an office of profit either under the Government of India or the Government of a State, which would render the holder of such an office disqualified for becoming either a member of Parliament or the President of India.

58. The learned Attorney General argued that the Disqualification Act, 1959 is not a defining enactment. It nowhere defines what is an office of profit but an enactment made *ex abundanti cautela* to avoid any possible challenge to election of some of the members of the Parliament on the ground that they are holders of offices of profit and, therefore,

this Court is still obliged to examine whether a particular office is an office of profit rendering the holder thereof ineligible to become a member of Parliament or the President of India.

59. This Court In *M.V. Rajashekaran (supra)* dealt with the question of office of profit under the State of Karnataka in the context of the election of one Nagaraj to the legislative council of Karnataka. Nagaraj was appointed a One-Man Commission by the State of Karnataka to study certain problems. In that capacity he was entitled to certain pay and reimbursement of day to day expenditure. Subsequently, while continuing in the office of One-Man Commission, Nagaraj filed his nomination for election to the Legislative Council of the State of Karnataka. On an objection raised, Nagaraj was disqualified to contest the election on the ground of his having had held an office of profit, the nomination of Nagaraj was rejected. Nagaraj successfully questioned the election of Rajashekaran and others on the ground that his nomination was illegally rejected. Rajashekaran appealed to this Court. The issue revolved around interpretation of Article 191, a provision corresponding to Article 102 in the context of the elections to the legislative assembly or legislative council of a State. The enactment called Karnataka Legislature (Prevention of Disqualification) Act, 1956 was made by the State of Karnataka to protect the holders of some of the offices from incurring disqualification on the ground that those offices were offices of profit contemplated under Article 191.

60. This Court opined that Nagaraj was holding an office of profit contemplated under Article 191 and therefore disqualified from contesting the election because Nagaraj was appointed a One-Man Commission by the Government of Karnataka and he was obliged to study the problem entrusted to him and submit a report to the Government; that the Government of Karnataka conferred the status of a Minister of the Cabinet rank on the office and made budgetary provision to defray the expenses of pay and day-to-day expenditure of Nagaraj. This Court also recorded the conclusion that:

> "remuneration that Nagaraj was getting cannot be held to be "compensatory allowance" within the ambit of section 2(b) of the Act and, therefore, he was holder of an office of profit."

61. During the process of examination of various provisions of the Karnataka Legislature (Prevention of Disqualification) Act, 1956, this Court made the observation relied upon by Shri Jethmalani. (para 55 supra) In my opinion, this Court in *Rajashekaran's case* never specifically examined the issue whether mere inclusion of office in an enactment preventing the disqualification falling under Article 191 or Article 102 (as the case may be) would imply in law that the office specified in such an Act is necessarily an office of profit. Therefore, the above extracted statement in my view does not constitute the *ratio decidendi* of the said judgment.

62. Even otherwise the inclusion of various offices in the Schedule of the Disqualification Act only reflects the understanding of the Parliament that those offices are offices of profit contemplated under Article 102(1)(a). But such an understanding is neither conclusive or binding on this Court while interpreting the Constitution. As argued by the learned Attorney General, such inclusion appears to be an exercise – '*ex majure cautela*'[19]. It is the settled position of law that interpretation of the Constitution and the laws is "emphatically

19. Also see the short counter affidavit filed on behalf of the respondent, at page 11 para 33, wherein ir is stated:

"...Further the amendment to the said Act in the year 2006 was carried out in view of the judgment of this Hon'ble Court in the matter of Jaya Bachan reported in (2006) 5 SCC 266. The amendment to the Act was made ex majore cautela- as is obvious from the Statement of Objects and Reasons to the amendment itself. The assumption that an express exclsion under that Act is conclusive of whether the office constitutes an Office of Profit, is patently untenable- a number of amendments were made ex majore cautela so as avoid any controversy in relation to the holders of such office. The mere fact that an office is excluded under that Act does not establish that for all other statutes and Art. 58, the Officer is necessarily an office of profit."

the province and duty" of the judiciary. Therefore, I reject the submission of Mr. Jethmalani.

63. Therefore, the meaning of the expressions "office of profit" and "office of profit under the State Government/Central Government" are required to be examined.

64. In *Shivamurthy Swami Inamdar v. Agadi Sanganna Andanappa* (1971) 3 SCC 870 this Court dealt with the question – what is an office of profit? and held as follows:

> "14. … office in question must have been held under a Government and to that some pay, salary, emoluments or allowance is attached. The word 'profit' connotes the idea of pecuniary gain. If there is really a gain, its quantum or amount would not be material; but the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the office really carries any profit…."

reiterating the principle laid down in *Ravanna Subanna v. G.S. Kaggerappa*, AIR 1954 SC 653.

65. In *Shibu Soren v. Dayanand Sahay and others* (2001) 7 SCC 425 both the questions were considered[20].

66. The question in the said case was whether the Chairman of the Interim Jharkhand Area Autonomous Council

20. Para 26. The expression "office of profit" has not been defined either in the Constitution or in the Representation of the People Act. In common parlance the expression "profit" connotes an idea of some pecuniary gain. If there is really sone gain, its label—"honorarium"—"remuneration"—"salary" is not material—it is the substance and not the form which matters and even the quantum or amount or "pecuniary gain" is not relevant—what needs to be found our is whether the amount of money receivable by the person concerned in connection with the office he holds, gives to him some "pecuniary gain", other than as "compensation" to defray his our-of-pocket expenses, which may have the possibility to bring that person under the influence of the executive, which is conferring that benefit on him.

set up under section 20 of the Jharkhand Area Autonomous Council Act, 1994 was holding an office of profit under the State Government. This Court had to examine both the questions – whether the office in question was an **office of profit** at all and secondly whether it was an **office of profit under the State Government?** This Court confirmed the opinion of the High Court that the Chairman of the Interim Jharkhand Area Autonomous Council was not only an office of profit but an office of profit under the State Government. The Court noticed that the expression "office of profit" is not defined under law and, therefore, indicated the considerations relevant for determining the question whether a particular office is an office of profit. The Court reached to such a conclusion on consideration of various facts that the various amounts paid to Shibu Soren could not be said to be in the nature of "compensatory allowance" and was in the nature of remuneration or salary inherently implying an element of "profit" and of giving "pecuniary gain" to Shibu Soren and the office of the Chairman of Interim Council was temporary in nature with limited lifespan and the members of the Interim Council were appointed by the State to hold their offices at the pleasure of the State.

67. The test as pointed out by the Court was whether the office gives the incumbent some pecuniary gain other than as compensation to defray his out-of-pocket expenses which may have the possibility to bring that person under the influence of

Para 27. With a view to determine the office concerned is an "office of profit", the court must, howecer, take a realistic view. Taking a broad or general view, ignoring essectial details is not desirable not is it permissible to take a narrow view by which technicality may overtake reality. It is a rule of interpretation of statutes that the statutory provisions are so construed as to avoid absurdity and to further rather than defeat or frustrate the objection of the enactment. Courts, therefore, while construing a statute avoid strict construction by construing the *entire* Act. (See with advantage *Ashok Kumar Bhattacharya* v. *Ajoy Biswas* (1985) 1 SCC 151, *Tinsukhia Electric Supply Co. Ltd.* v. *State of Assam* (1989) 3 SCC 709 and *CIT v. J.H.* Gotla (1985) 4 SCC 343.

the executive. In coming to such conclusion this Court examined a number of earlier judgments on the issue.

68. Both the abovementioned cases and the earlier authorities cited therein examined the question as to what is an office of profit and what are the tests relevant to determine whether such an office is held under the Government but the question what is an office of profit under a local or other authority subject to the control of either the Central or State Government contemplated under Article 58(2) never fell for the consideration of this Court in those cases.

69. That leads me to the next question whether the office of the Chairman of the Indian Statistical Institute, Calcutta, which I already concluded to be an authority for the purpose of Article 58(2), is an office of profit as explained by this Court in various abovementioned judgments. I proceed on the basis that tests relevant for determining whether an office of profit contemplated under Article 58(2) are the same as the test laid down by this Court in the context of Article 102(1)(a). The answer to the said question depends upon the terms and conditions subject to which the respondent held that office. Whether the amounts if any paid to him in that capacity are compensatory in nature or amounts capable of conferring pecuniary gain are questions of fact which ought in my view to be decided only after ascertaining all the relevant facts which

21. Without prejudice to the aforesaid, it is submitted that in any event the position of Chariman of ISI is not an Office of Profit in so far as the office does not enjoy any benefits and remuneration let alone any salary, emolument, perks etc. of any kind. It is submitted that ISI isa society registered under the Societies Registration Act. It is also governed by the ISI Act, 1954. The executive powers of the institute lie with the Director of ISI. Both the President and the Chairman of the Institute is, in protocol, ranked higher than the Director, ISI but both the President and the Chariman below him are neither entitled to nor receive any emoluments, perquisites or benefits from the Institute. As such, it is submitted that the office of Chariman of ISI is not an Office of Profit. The Chariman has no executive role. As such, the disqualification under Article 58 of the Constitution does not apply to the said office.

are obviously in the exclusive knowledge either of the respondent or the abovementioned institute. I must also state that the respondent in his short counter made a statement[21] that he did not derive pecuniary gain by holding the abovementioned office. After such an appropriate enquiry into such conflicting statements of facts if it is to be concluded that the said office is an office of profit inevitably the question whether the respondent had tendered his resignation by the crucial date is required to be ascertained once again an enquiry into a question of fact.

70. Whether a decision on such questions of facts can be rendered on the basis of the affidavit of the respondent, the veracity of which is not subjected to any further scrutiny? The petitioner if permitted to inspect or seek discovery of records of the Indian Statistical Institute might or might not secure information to demonstrate truth or otherwise of the respondent's affidavit.

71. The issue is not whether the petitioner would eventually be able to establish his case or not. The issue is whether the petitioner is entitled to a rational procedure of law to establish his case? The stake in the case for the parties is enormous, nothing but the Presidency of this country. The Constitution creates only one forum for the adjudication of such disputes. All other avenues are closed. By holding that the petition does not deserve a regular hearing contemplated under Rule 20, in my opinion, would not be consistent with the requirement that justice must not only be done but it must also appear to have been done.

72. Adjudication of rights of the parties under the Anglo-Saxon jurisprudence, which we follow, requires the establishment of relevant facts which constitute the cause of action necessary for the party claiming a relief from the Court. Such facts are to be established by adducing evidence either oral or documentary. Recognizing the possibility (that in a given

case) the party making an assertion of fact may not have within its control all the evidence necessary for proving such a fact, courts of civil judicature are empowered to order the discovery, inspection, production etc. of documents and also summon the persons in whose custody such relevant documents are available. (*See*: Section 30 read with Order XI etc. of the Code of Civil Procedure). Such empowerment is a part of a rational procedure designed to serve the ends of justice.

73. If the adjudication of the election petition requires securing of information which is exclusively available with the respondent and the Indian Statistical Institute and which may be relevant can the petitioner be told that he would not be able to secure such information on the ground that letter of the law does not provide for such opportunity? We have already come to the conclusion that the CPC does not apply to the election petition. The rules framed by this Court under Article 145 are silent in this regard. But the very fact that this Court is authorised to frame rules regulating the procedure applicable to trial of the election petitions implies that this court has powers to pass appropriate orders to secure such information. To hold to the contrary would be to tell a litigant who might as well have been the first citizen of this country (given a more favourable political regime) that the law of the Sovereign Democratic Republic of India does not afford even that much of a rational procedure which was made available by the foreign rulers to the ordinary citizens of this country - which is still available to an ordinary litigant of this country.

74. Similarly, accepting the statement of the respondent that he did not derive any pecuniary benefit by virtue of his having had been Chairman of the Indian Statistical Institute without permitting the petitioner to test the correctness of that statement by cross-examining the respondent or confronting the respondent with such documents which the petitioner might discover if such a discovery is permitted would be a denial of equality of law to the petitioner guaranteed under Article 14 of

the Constitution of India. Such facility is afforded to every litigant pursuing litigation in a court of civil judicature in this country. Therefore, I do not subscribe to the view that the election petition does not deserve a regular hearing.

75. At stake is not the Presidency of India but the constitutional declaration of equality and the credibility of the judicial process.

76. In view of the majority opinion that the election petition does not deserve a regular hearing I do not propose to examine the question whether the second office held by the respondent as Leader of the Lok Sabha is an office of profit attracting the disqualification under Article 58(2).

R.P. Election Petition dismissed.

RITESH SINHA
v.
THE STATE OF UTTAR PRADESH & ANR.
(Criminal Appeal No. 2003 of 2012)

DECEMBER 7, 2012.

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Investigation:

Identification of accused – Voice sample – Power of Magistrate to issue summons to accused to appear before Investigating Officer and give his voice sample – Held: Taking voice sample of an accused by the police during investigation is not hit by Art. 20(3) of the Constitution – However, there is no specific provision either in the Code of Criminal Procedure or in any other law under which a Magistrate can authorize the investigating agency to record voice sample of a person accused of an offence – There being difference of opinion as regards the interpretation of the provisions of s.53 CrPC and s. 5 of the Prisoners Act so as to trace the power of the Magistrate to authorise obtaining of voice sample of the accused, the matter referred to a bench of three Judges – Code of Criminal Procedure, 1973 – ss.2(h), 53, Explanation (a), and s.54A – Identification of Prisoners Act, 1920 – s. 5 – Constitution of India, 1950 – Art.20(3).

The instant appeal was filed by the appellant challenging the order of the High Court whereby it rejected the petition filed by the appellant u/s 482 Cr.P.C. seeking to quash the order of the Chief Judicial Magistrate issuing summons to the appellant to appear before the investigating officer and give his voice sample in the course of investigation into an FIR alleging collection of money from people for getting them recruited in the police department. The questions for consideration

before the Court were: (i) "Whether Article 20(3) of the Constitution of India, which protects a person accused of an offence from being compelled to be a witness against himself, extends to protecting such an accused from being compelled to give his voice sample during the course of investigation into an offence?" and (ii) "Assuming that there is no violation of Article 20(3) of the Constitution of India, whether in the absence of any provision in the Code, can a Magistrate authorize the investigating agency to record the voice sample of the person accused of an offence?"

Referring the matter to a bench of three Judges, the Court

HELD: (Per Ranjana Prakash Desai, J.)

1. If an accused person is directed to give his voice sample during the course of investigation of an offence, there is no violation of his right under Art. 20(3) of the Constitution. When an accused is asked to give voice sample, he is not giving any testimony of the nature of a personal testimony. It cannot be said, by any stretch of imagination that by giving voice sample, the accused conveyed any information based upon his personal knowledge and became a witness against himself. The accused by giving the voice sample merely gives 'identification data' to the investigating agency. He is not subjected to any testimonial compulsion. Thus, taking voice sample of an accused by the police during investigation is not hit by Art. 20(3). [Para 18] [710-F-G; 711-B-D]

State of Bombay v. Kathi Kalu Oghad & Ors., **(1962) 3 SCR 10 - relied on.**

Selvi and others v. State of Karnataka **2010 (5) SCR 381 = (2010) 7 SCC 263; and** *M.P. Sharma v. Satish Chandra &*

Ors. **1954 SCR 1077;** *Shyamlal Mohanlal v. State of Gujarat* **1965 2 SCR 457;** *V.S. Kuttan Pillai v. Ramakrishnan & Anr.* **1980 (1) SCR 673 = (1980) 1 SCC 264 – referred to.**

2.1 There is no specific provision either in the Code or in any other law under which a Magistrate can authorize the investigating agency to record voice sample of a person accused of an offence. The Law Commission, in its 87th Report, suggested that the Prisoners Act should be amended *inter alia* to include voice sample within the ambit of s.5 thereof. Parliament however has not amended the Prisoners Act nor is the Code of Criminal Procedure, 1973 amended to add any such provision therein. Resultantly, there is no specific legal provision under which such a direction can be given. [Para 19] [711-E-G]

2.2 However, a careful study of the relevant provisions of the Code and other relevant statutes discloses a scheme which aims at strengthening the hands of the investigator. Sections 53, 54A and 311A of the Code, s.73 of the Evidence Act and the Prisoners Act reflect Parliament's efforts in that behalf. [Para 20] [711-G-H; 712-A]

2.3 Tape recorded conversation is a relevant fact and is admissible u/s 7 of the Evidence Act. In view of this legal position, to make the tape recorded conversation admissible in evidence, there must be provision under which the police can get it identified. For that purpose, the police must get the voice sample of the accused. The purpose of taking voice sample which is non-testimonial physical evidence is to compare it with tape recorded conversation. It is a physical characteristic of the accused. It is identificatory evidence. [Para 28] [716-D-E-F]

Central Bureau of Investigation, New Delhi v. Abdul

Karim Ladsab ***Telgi and others*** **2005 Crl. L.J. 2868 – approved.**

Rakesh Bisht v. C.B.I. **2007 (1) JCC 482 and MANU/DE/0338/2007 – disapproved.**

Amrit Singh v. State of Punjab **2006(8) Suppl. SCR 889 = (2006) 12 SCC 79 – distinguished.**

R.M. Malkani v. State of Maharashtra **1973 (2) SCR 417= (1973) 1 SCC 471 – referred to.**

2.4 Collection of voice sample of an accused is a step in investigation. It is the duty of a Police Officer or any person (other than a Magistrate) authorized by a Magistrate to collect evidence, and proceedings under the Code for the collection of evidence are included in 'Investigation'. The investigating officer cannot take physical evidence from an accused unless he is authorized by a Magistrate to do so. He cannot assume powers which he does not possess. He can only act on the strength of a direction given to him by a Magistrate and the Magistrate must have power to issue such a direction. Though, the subordinate criminal courts do not have inherent powers, they can exercise such incidental powers as are necessary to ensure proper investigation. [Para 22] [712-H; 713-A, F-H; 714-B]

Bindeshwari Prasad Singh v. Kali Singh **1977 (1) SCR 125 = (1977) 1 SCC 57;** *Adalat Prasad v. Rooplal Jindal* **(2004) 7 SCC 338 and** *Sakiri Vasu v. State of Uttar Pradesh* **2007 (12) SCR 1100 = (2008) 2 SCC 409; and** *State of West Bengal v. Swapan Guha* **1982 (3) SCR 121 = (1982) 1 SCC 561 – referred to.**

2.5 Prisoners Act is aimed at securing identification of the accused. It is an Act to authorize the taking of measurements and photographs of convicts and others. Section 5 provides for power of a Magistrate to order a

person to be measured or photographed. Voice prints are like finger prints. Each person has a distinctive voice with characteristic features. It is clear that voiceprint identification of voice involves measurement of frequency and intensity of sound waves. Therefore, measuring frequency or intensity of the speech-sound waves falls within the ambit of inclusive definition of the term 'measurement' appearing in the Prisoners Act. Voice sample can be included in the inclusive definition of the term "measurements" appearing in s. 2(a) of the Prisoners Act, which states that measurements include finger impressions and foot impressions. If voice prints are like finger prints, they would be covered by the term '*measurements'.* Therefore, a Magistrate acting u/s 5 of the Prisoners Act can give a direction to any person to give his voice sample for the purposes of any investigation or proceeding under the Code. [Para 23, 30-31] [714-F, G; 718-C-D; 719-F-H, 720-A]

"Scientific Evidence in Criminal Cases" by *Andre A. Moenssens, Ray Edward Moses* **and** *Fred E. Inbau*, Chapter 12; *"Law Enforcement and Criminal Justice – an introduction"* by Bennett-Sandler, Frazier, Torres, Waldron; and *Law Commission of India,* **87th Report and** *"Law Enforcement and Criminal Justice – an introduction"* **– referred to.**

State of U.P. v. Ram Babu Misra **(1980) 2 SCC 242 – referred to.**

2.6 Section 53 of the Code pertains to examination of the accused by medical practitioner at the request of a police officer. Explanation (a) to s.53 states what is 'examination'. It is an inclusive definition. It states that the examination shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered

medical practitioner thinks necessary in a particular case. This explanation was substituted by the Code of Criminal Procedure (Amendment) Act, 2005. It cannot be said that the term "such other tests" mentioned in Explanation (a) is controlled by the words "which the registered medical practitioner thinks necessary". Under s.53(1) the registered medical practitioner can act only at the request of a police officer. Obviously, he can have no say in the process of investigation. The decision to get the accused examined is to be taken by the investigating officer and not by the medical practitioner. It is the expertise of the medical practitioner which the investigator uses to decide the method of the test. [Para 36-37] [723-E-H; 724-B-D]

2.7 Voice sample is physical non-testimonial evidence. It does not communicate to the investigator any information based on personal knowledge of the accused which can incriminate him. Voice sample cannot be held to be conceptually different from physical non-testimonial evidence like blood, semen, sputum, hair etc. Taking of voice sample does not involve any testimonial responses. [Para 41] [725-H; 726-A-B]

2.8 The tenor of the judgment in *Selvi* **makes it clear that tests pertaining to physical non-testimonial evidence can be included in the purview of the words "and such other tests" with the aid of the doctrine of '*ejusdem generis*'. The tests mentioned in Explanation (a) are of bodily substances, which are examples of physical evidence. Even if voice sample is not treated as a bodily substance, it is still physical evidence involving no transmission of personal knowledge. There is no difficulty in including voice sample test in the phrase "such other tests" appearing in Explanation (a) to s.53 by applying the doctrine of** '*ejusdem generis*' **as it is a test pertaining to physical non-testimonial evidence like blood, sputum etc. Such interpretation of** *Selvi* **would be in tune with the general scheme of the Code which**

contains provisions for collection of evidence for comparison or identification at the investigation stage in order to strengthen the hands of the investigating agency. [Para 41] [726-E-H; 727-A]

2.9 Section 53 talks of examination by registered medical practitioner of the person of the accused but, does not use the words "medical examination". Similarly, Explanation (a) to s.53 does not use the words "medical examination". Section 53 need not be confined to medical examination. It must be remembered that s.53 is primarily meant to serve as aid in the investigation. Examination of the accused is to be conducted by a medical practitioner at the instance of the police officer, who is in charge of the investigation. On a fair reading of s.53 of the Code, under that Section, the medical practitioner can conduct the examination or suggest the method of examination. [Para 42] [727-B-C-F-G]

2.10 By adding the words '*and such other tests*' **in the definition of term contained in Explanation (a) to s.53 of the Code, the legislature took care of including within the scope of the term 'examination' similar tests which may become necessary in the facts of a particular case. Legislature exercised necessary caution and made the said definition inclusive, not exhaustive and capable of expanding to legally permissible limits with the aid of the doctrine of** '*ejusdem generis'***. [Para 43] [728-A-C]**

2.11 Section 54A of the Code makes provision for identification of arrested persons. It states that where a person is arrested on a charge of committing an offence and his identification by any other person or persons is considered necessary for the purpose of investigation of such offence, the court having jurisdiction, may on the request of the officer in charge of a police station, direct the person so arrested to subject himself to identification by any person or persons in such manner as the court

may deem fit. Identification of the voice is precondition for admission of tape recorded conversation in evidence. Since s.54A of the Code uses the words "the Court, ... may ... direct the person so arrested to subject himself to identification by any person or persons in such manner as the court may deem fit", voice sample can be identified by means of voice identification parade u/s 54A or by some other person familiar with the voice. [Para 44] [728-D-F]

R.M. Malkani v. State of Maharashtra **1973 (2) SCR 417 = (1973) 1 SCC 471;** *Nilesh Paradkar v. State of Maharashtra* **2011 (3) SCR 792 = (2011) 4 SCC 143 and** *Mohan Singh v. State of Bihar* **2011 (12) SCR 327 = (2011) 9 SCC 272 – referred to.**

Levack, Hamilton Caesar & Ors. v. Regional Magistrate, Wynberg & Anr. **[2003] 1 All SA 22 (SCA) (28th November 2002) – referred to**

2.12 The Magistrate's power to authorize the investigating agency to record voice sample of the person accused of an offence can be traced to s.5 of the Prisoners Act and s.53 of the Code. The Magistrate has an ancillary or implied power u/s 53 of the Code to pass an order permitting taking of voice sample to aid investigation. [Para 47] [732-F-G]

2.13 The principle that a penal statute should be strictly construed is not of universal application. Therefore, whether the penal statute should be given strict interpretation or not will depend on facts of each case. Considerations of public health, preservation of nation's wealth, public safety may weigh with the court in a given case and persuade it not to give a narrow construction to a penal statute. In the facts of the instant case, a narrow construction to the provisions of the Prisoners Act and s.53 of the Code need not be given.

Judicial note can be taken of the fact that there is a great deal of technological advance in means of communication and use thereof in the commission of crimes. Therefore, in order to strengthen the hands of investigating agencies, purposive interpretation need be given to the provisions of the Prisoners Act and s.53 of the Code instead of giving a narrow interpretation to them. However, Parliament needs to bring in more clarity and precision by amending the Prisoners Act. The Code also needs to be suitably amended. Technological and scientific advance in the investigative process could be more effectively used if required amendments are introduced by Parliament. This is necessary to strike a balance between the need to preserve the right against self incrimination guaranteed under Art. 20(3) of the Constitution and the need to strengthen the hands of the investigating agency to bring criminals to book. [Para 48] [733-B-E-G; 734-A-D]

Murlidhar Meghraj Loya v. State of Maharashtra **1977 (1) SCR 1 = AIR 1976 SC 1929;** *Kisan Trimbak Kothula & Ors. v. State of Maharashtra* **1977 (2) SCR 102 = AIR 1977 SC 435 and** *State of Maharashtra v. Natwarlal Damodardas Soni* **1980 (2) SCR 340 =AIR 1980 SC 593 – referred to.**

2.14 Thus, there is no infirmity in the impugned order passed by the High Court confirming the order passed by Chief Judicial Magistrate, summoning the appellant to the court for recording the sample of his voice. [Para 49] [734-E]

S.N. Sharma v. Bipen Kumar Tiwari **1970 (3) SCR 946 = (1970) 1 SCC 653;** *Balraj Bhalla v. Sri Ramesh Chandra Nigam* **AIR 1960 All 157;** *Regional Provident Fund Commissioner v. Hooghly Mills Co. Ltd. And others* **(2012) 2 SCC 489;** *H.N. Rishbud & Anr. V. State of Delhi* **1955 SCR 1150 = AIR 1955 SC 196;** *Mahipal Maderna & Anr. V. State of Rajasthan* **1971 Cr.L.J. 1405;** *Jamshed v. State of U.P.* **1976 Cri.L.J. 1680;** *State of U.P. v. Boota Singh* **1979 (1) SCR 298 = (1979) 1 SCC 31- cited**

Bennion on Statutory Interpretation **5th Edition at P. 516- cited**

Per Aftab Alam, J. (Dissenting, but partly concurring):

1. Broadly speaking, taking voice sample of an accused by the police during investigation is not hit by Article 20(3) of the Constitution. [para 5] [736-D]

State of Bombay v. Kathi Kalu Oghad & Others **(1962) 3 SCR 10;** *Selvi and others v. State of Karnataka* **2010 (5) SCR 381 = (2010) 7 SCC 263 – referred to.**

2.1 On the question of compelling the accused to give voice sample, the law must come from the legislature and not through the court process. First, because the compulsion to give voice sample does in some way involve an invasion of the rights of the individual and to bring it within the ambit of the existing law would require more than reasonable bending and stretching of the principles of interpretation. Secondly, the legislature even while making amendments in the Code of Criminal Procedure 2005, aimed at strengthening the investigation, despite express reminders chose not to include voice sample either in the newly introduced explanation to s.53 or in ss.53A, and 311A. [para 2] [735-D-F]

2.2 There is no provision in the Code of Criminal Procedure to compel the accused to give his voice sample and, therefore, a Magistrate cannot authorize the investigating agency to record the voice sample of the person accused of an offence, regardless of the constitutional guarantee against self-incrimination and assuming that in case a provision in that regard is made in the law that would not offend Art. 20 (3) of the Constitution. [para 4 and 7] [736-C-F-G; 737-A]

2.3 Explanation (a) to s.53 of the Code of Criminal Procedure, 1973 cannot be said to include voice sample and the ratio of the decision in *Selvi* does not enlarge but restricts the ambit of the expressions 'such other tests' occurring in the Explanation. The Explanation in question deals with material and tangible things related to the human body and not to something disembodied as voice. [para 16-17] [740-B-C]

2.4 Section 53, CrPC applies to a situation where the examination of the person of the accused is likely to provide evidence as to the commission of an offence. Whether or not the examination of the person of the accused would afford evidence as to the commission of the offence undoubtedly rests on the satisfaction of the police officer not below the rank of sub-inspector. But, once the police officer makes a request to the registered medical practitioner for the examination of the person of the accused, what other tests (apart from those expressly enumerated) might be necessary in a particular case can only be decided by the medical practitioner and not the police officer referring the accused to him. Therefore, any tests other than those expressly mentioned in the Explanation can only be those which the registered medical practitioner would think necessary in a particular case. And further that in any event a registered medical practitioner cannot take a voice sample. [para 18] [740-D-G]

2.5 The principal object of the Identification of Prisoners Act, 1920 is to sanction certain coercive measures (which would otherwise invite criminal or tortuous liability) in order to facilitate the identification of (i) convicts, (ii) persons arrested in connection with certain offences, and (iii) persons ordered to give security in certain cases. It is to be noted that the expression "measurements" occurs not only in s.5 of the 1920 Act but also in ss. 3 and 4 thereof. Thus, if the term

"measurements" is to be read to include voice sample then on arresting a person in a case relating to an offence punishable with rigorous imprisonment for a term of one year or upwards (and voice sample would normally be required only in cases in which the punishment is one year or upward) it would be open to the police officer (of any rank) to require the arrested person to give his/her voice sample on his own and without seeking any direction from the Magistrate u/s 5. Further, applying the same parameters, not only voice sample but many other medical tests, for instance, blood tests such as lipid profile, kidney function test, liver function test, thyroid function test etc., brain scanning etc. would equally qualify as "measurements" within the meaning of the Identification of Prisoners Act. Thus, on arresting a person in a case relating to an offence punishable with rigorous imprisonment for a term of one year or upwards it would be possible for the police officer (of any rank) to obtain not only the voice sample but the full medical profile of the arrested person without seeking any direction from the magistrate u/s 5 of the Identification of Prisoners Act or taking recourse to the provisions of s.53 or 53A of the Code of Criminal Procedure. It would be impossible to extend the provisions of the Identification of Prisoners Act to that extent. [para 21,30-31] [741-F-G; 745-F-H; 746-A-C]

2.6 In exercise of the rule-making powers u/s 8 of the 1920 Act, some of the State Governments have framed rules. From a perusal of the rules so framed, it would appear that all the State Governments understood "measurements" to mean the physical measurements of the body or parts of the body. The framing of the rules by the State Government would not be binding on this Court in interpreting a provision in the rules. But it needs to be borne in mind that unless the provision are incorporated in the Act in regard to the manner of taking voice sample and the person competent to take voice

sample etc. there may be difficulty in carrying out the direction of the court. [para 32] [746-D-F]

Central Bureau of Investigation, New Delhi v. Abdul Karim Ladsab Telgi and others **2005 Crl.L.J. 2868 – disapproved.**

State of Uttar Pradesh v. Ram Babu Misra **1980 (2) SCR 1067 = (1980) 2 SCC 343 – referred to.**

Rakesh Bisht v. Central Bureau of Investigation **2007 Cri. L.J. 1530 = MANU/DE/0338/2007 – approved.**

Law Commission of India, **87th Report – referred to.**

2.7 It is pertinent to note that the Law Commission of India in its 87th Report submitted in 1980 had recommended appropriate amendments in relevant provisions to include voice identification. However, the Code of Criminal Procedure was amended in 2005 when the Explanation was added to s.53, and ss. 53A and 311A were inserted into the Code. Voice sample was not included either in the Explanation to s.53 or s.311A. [Para 37, 41] [749-A-B; 751-C]

2.8 Therefore, the court should not insist that voice sample is included in the definition of "measurements" under the Identification of Prisoners Act and in the Explanation to s.53 of the Code of Criminal Procedure. [Para 42] [751-D-E]

3. In view of the difference of opinion, the case be listed for hearing before a bench of three Judges. [para 45] [751-G]

Case Law Reference:

Per (Smt.) Ranjana Prakash Desai, J.

(2004) 7 SCC 338	**referred to**	**Para 5**

1982 (3) SCR 121	**referred to**	**para 5**
2010 (5) SCR 381	**referred to**	**para 5**
1970 (3) SCR 946	**cited**	**para 5**
(1980) 2 SCC 242	**referred to**	**Para 5**
AIR 1960 All 157	**cited**	**para 5**
(2012) 2 SCC 489	**cited**	**para 5**
(1962) 3 SCR 10	**relied on**	**Para 6**
1954 SCR 1077	**relied on**	**Para 10**
2007 (12) SCR 1100	**referred to**	**Para 5**
2007 (1) JCC 482 = MANU/DE/0338/2007	**disapproved**	**Para 6**
2005 Crl.L.J. 2868	**approved**	**para 6**
1955 SCR 1150	**cited**	**para 7**
1971 Cr.L.J. 1405	**cited**	**para 7**
1976 Cri.L.J. 1680	**cited**	**para 7**
1979 (1) SCR 298	**cited**	**para 7**
1965 2 SCR 457	**referred to**	**para 16**
1980 (1) SCR 673	**referred to**	**para 16**
1977 (1) SCR 125	**referred to**	**Para 22**
2006(8) Suppl. SCR 889	**distinguished**	**Para 24**
2011 (3) SCR 792	**referred to**	**Para 45**
2011 (12) SCR 327	**referred to**	**Para 45**
[2003] 1 All SA 22 (SCA)	**referred to**	**para 46**

1977(1) SCR 1	**referred to**	**Para 48**
1977 (2) SCR 102	**referred to**	**Para 48**
1980 (2) SCR 340	**referred to**	**Para 48**
Per Aftab Alam, J.		
[1962] 3 SCR 10	**referred to**	**para 5**
2010 (5) SCR 381	**referred to**	**para 5**
2005 Crl.L.J. 2868	**disapproved**	**para 33**
2007 Cri. L.J. 1530= MANU/DE/0338/2007	**approved**	**Para 33**
1980 (2) SCR 1067	**referred to**	**Para 36**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2003 of 2012.

From the Judgment and Order dated 09.07.2010 of the High Court of Judicature at Allahabad in Criminal Appeal No. 3272 of 2010.

Aman Ahluwalia (AC), Siddhartha Dave, Jemtiben Ao, Vibha Datta Makhija, R.K. Dash, Atif Suhrawardy, Abhisth Kumar (for Kamlendra Mishra) for the Appearing Parties.

The Judgments of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. Leave granted.

2. On 7/12/2009, one Prashant Kapil, In-charge, Electronics Cell, P.S. Sadar Bazar, District Saharanpur lodged a First Information Report alleging that one Dhoom Singh in connivance with the appellant was collecting money from people on the pretext that he would get them recruited in the police department. After his arrest, one mobile phone was seized from

Dhoom Singh. As the police wanted to verify whether the recorded conversation, which is in their possession, is between accused Dhoom Singh and the appellant, they needed voice sample of the appellant. The police, therefore, filed an application before learned Chief Judicial Magistrate, Janpad Saharanpur, praying that the appellant be summoned to the court for recording the sample of his voice. On 8/1/2010, learned Chief Judicial Magistrate, Saharanpur issued summons to the appellant to appear before the investigating officer and give his voice sample. The appellant approached the Allahabad High Court under Section 482 of the Code of Criminal Procedure, 1973 (for short, "**the Code**") for quashing of the said order. The High Court by the impugned order dated 9/7/2010 rejected the said application, hence, this appeal by special leave.

3. In my view, two important questions of law raised in this appeal, which we need to address, are as under:

> "(i) Whether Article 20(3) of the Constitution of India, which protects a person accused of an offence from being compelled to be a witness against himself, extends to protecting such an accused from being compelled to give his voice sample during the course of investigation into an offence?
>
> (ii) Assuming that there is no violation of Article 20(3) of the Constitution of India, whether in the absence of any provision in the Code, can a Magistrate authorize the investigating agency to record the voice sample of the person accused of an offence?"

4. We have heard, at considerable length, Mr. Siddhartha Dave, learned counsel for the appellant, Mr. Aman Ahluwalia, learned amicus curiae and Mr. R.K. Dash, learned counsel for the respondent – State of Uttar Pradesh. We have also perused the written submissions filed by them.

5. Mr. Dave, learned counsel for the appellant, at the outset, made it clear that he was not pressing the challenge that the order passed by the Magistrate violates the appellant's fundamental right of protection from self-incrimination as guaranteed under Article 20(3) of the Constitution. Counsel submitted, however, that there is no provision in the Code or in any other law which authorizes the police to make an application for an order directing the accused to permit recording of his voice for voice sample test. Counsel submitted that a Magistrate has no inherent powers and, therefore, learned Magistrate could not have given such a direction (*Adalat Prasad v. Rooplal Jindal*[1]). Counsel submitted that because there is no other provision providing for a power, it ought not to be read in any other provision (*State of U.P. v. Ram Babu Misra*[2], *S.N. Sharma v. Bipen Kumar Tiwari*[3]). Counsel pointed out that in *Ram Babu Misra,* this Court restricted the scope of Section 73 of the Indian Evidence Act and took-out from the purview of Section 5 of the Identification of Prisoners Act, 1920 (for short, **"the Prisoners Act**), handwritings and signatures. As suggested by this Court, therefore, the Code was amended and Section 311A was inserted. Counsel submitted that Section 5 of the Prisoners Act is inapplicable to the present case because it is enacted only for the purpose of keeping a record of the prisoners and other convicts and not for collection of evidence (*Balraj Bhalla v. Sri Ramesh Chandra Nigam*[4]). Counsel submitted that this is supported by Section 7 of the Prisoners Act, which provides for destruction of photographs and records of measurement on acquittal. The term "*measurement*" defined in Section 2(a) of the Prisoners Act covers only those things which could be physically measured. Counsel submitted that the Prisoners Act, being a penal statute, the term measurement appearing therein must

1. (2004) 7 SCC 338.
2. (1980) 2 SCC 242.
3. (1970) 1 SCC 653.
4. AIR 1960 All 157.

be given a restricted meaning (*Regional Provident Fund Commissioner v. Hooghly Mills Co. Ltd. and others*[5]*).* Counsel submitted that investigation has to be conducted within the parameters of the Code. It is not uncontrolled and unfettered (*State of West Bengal v. Swapan Guha*[6]). Counsel submitted that the High Court judgments, where unamended Section 53 of the Code is involved, are not relevant. Counsel submitted that Explanation (a) to Section 53 of the Code was introduced in 2005 and, therefore, those judgments cannot be relied upon for interpreting the said Section as it stands today. Counsel submitted that various examinations listed in the said Explanation are the ones for which the police can have the accused examined by a medical practitioner. These tests are all of physical attributes present in the body of a person like blood, nail, hair etc., which once taken can be examined by modern and scientific techniques. Voice sample specifically has not been included as one of the tests in the said Explanation even though the amendment was made in 2005 when Parliament was well aware of such test being available and, has, therefore, been intentionally omitted. Counsel submitted that the words "*such other tests"* mentioned in the said Explanation are controlled by the words *"which the registered medical practitioner thinks necessary"*. Therefore, the discretion, as to the choice of the test, does not vest in the police but it vests in the medical practitioner. This would clearly exclude voice test on the principle of *ejusdem generis*. Counsel submitted that in *Selvi and others v. State of Karnataka*[7] this Court has held that Section 53 of the Code has to be given a restrictive interpretation and not an expansive one. Counsel submitted that the decision of this Court in *Sakiri Vasu v. State of Uttar Pradesh*[8] is inapplicable since to do an act under ancillary power the main power has to be conferred, which has

5. (2012) 2 SCC 489.
6. (1982) 1 SCC 561.
7. (2010) 7 SCC 263.
8. (2009) 2 SCC 409.

not been conferred in this case. Therefore, there is no question of resorting to ancillary power. Counsel submitted that the High Court fell into a grave error in refusing to quash the order passed by learned Magistrate summoning the appellant for the purpose of giving sample of his voice to the investigating officer.

6. Mr. Aman Ahluwalia, learned Amicus Curiae has submitted a very detailed and informative note on the issues involved in this case. Gist of his submissions could be stated. Counsel submitted that voice sample is only a material for comparison with something that is already in possession of the investigating agency. Relying on 11 Judges' Bench decision of this court in *State of Bombay v. Kathi Kalu Oghad & Ors.*[9], counsel submitted that evidence for such identification purposes would not attract the privilege under Article 20(3) of the Constitution. According to learned counsel, there is no specific provision enabling the Magistrate to direct an accused to give his voice sample. There are certain provisions of the Code in which such power can be read into by the process of implication viz. Section 2(h), Section 53, Section 311A and Section 54A. So far as Section 311A of the Code is concerned, counsel however, fairly pointed out that in *Rakesh Bisht v. C.B.I.*[10] the Delhi High Court has held that with the aid of Section 311A of the Code the accused cannot be compelled to give voice sample. Counsel also relied on Section 5 of the Prisoners Act and submitted that it expressly confers power on the Magistrate to direct collection of demonstrative evidence during investigation. Counsel submitted that in *Central Bureau of Investigation, New Delhi v. Abdul Karim Ladsab Telgi and others*[11] the Bombay High Court has interpreted the term "*measurement*" appearing in Section 5 of the Prisoners Act expansively and purposefully to include measurement of voice i.e. speech sound waves. Counsel submitted that Section 53

9. (1962) 3 SCR 10.

10. 2007 (1) JCC 482 and MANU/DE/0338/2007.

11. 2005 Crl.L.J. 2868.

of the Code could be construed expansively on the basis of presumption that an *updating construction* can be given to the statute *(Bennion on Statutory Interpretation*[12]*).* Relying on *Selvi,* counsel submitted that for the purpose of Section 53 of the Code, persons on anticipatory bail would be deemed to be arrested persons. It is, therefore, reasonable to assume that where the person is not actually in the physical custody of the police, the investigating agency could approach the Magistrate for an order directing the person to submit himself for examination under Section 53 of the Code. Counsel also submitted that in *Sakiri Vasu,* this Court has referred to the incidental and implied powers of a Magistrate during investigation. Counsel submitted that in *Selvi,* Explanation to Section 53 has been given a restrictive meaning to include physical evidence. Since voice is physical evidence, it would fall within the ambit of Section 53 of the Code. The Magistrate has, therefore, ancillary or implied powers under Section 53 of the Code to direct a person to give voice sample in order to aid investigation. Counsel submitted that the most natural construction of the various statutes may lead to the conclusion that there is no power to compel a person to give voice sample. However, the administration of justice and the need to control crime effectively require the strengthening of the investigative machinery. While considering various provisions of law this angle may be kept in mind.

7. Mr. Dash, learned counsel for the State of Uttar Pradesh submitted that the definition of the term 'investigation' appearing in the Code is inclusive. It means collection of evidence for proving a particular fact. A conjoint reading of the definition of the term 'investigation' and Sections 156 and 157 of the Code would show that while investigating a crime, the police have to take various steps (*H.N. Rishbud & Anr. v. State of Delhi*[13]). Counsel pointed out that in *Selvi*, meaning and

12. 5th Edition at P. 516.

13. AIR 1955 SC 196.

scope of the term 'investigation' has been held to include measures that had not been enumerated in the statutory provisions. In this connection, in *Selvi,* this Court took note of Rajasthan High Court judgment in *Mahipal Maderna & Anr. v. State of Rajasthan*[14] and Allahabad High Court judgment in *Jamshed v. State of U.P.*[15] Relying on *Kathi Kalu Oghad & Ors.*[15], counsel submitted that taking of thumb impressions, impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused for the purpose of identification is not furnishing evidence in the larger sense because Constitution makers never intended to put obstacles in the way of effective investigation. Counsel also relied on *State of U.P. v. Boota Singh*[16] where the contention that taking specimen signatures of the respondents by police during investigation was hit by Section 162 of the Code was rejected. Counsel submitted that the question of admissibility of tape recorded conversation is relevant for the present controversy. In this connection, he relied on *R.M. Malkani v. State of Maharashtra*[17]. Counsel submitted that under Section 5 of the Prisoners Act, a person can be directed to give voice sample. In this connection, he relied on the Bombay High Court's judgment in *Telgi*. Counsel submitted that a purposive interpretation needs to be put on the relevant sections to strengthen the hands of the investigating agency to deal with the modern crimes where tape recorded conversations are often very crucial.

8. Though, Mr. Dave, learned counsel for the appellant has not pressed the submission relating to infringement of guarantee enshrined in Article 20(3) of the Constitution, since extensive arguments have been advanced on Article 20(3) and since the right against self-incrimination enshrined therein is of

14. 1971 Cr.L.J. 1405.

15. 1976 Cri.L.J. 1680.

16. (1979) 1 SCC 31.

17. (1973) 1 SCC 471.

great importance to criminal justice system, I deem it appropriate to deal with the said question also to make the legal position clear.

9. Article 20(3) of the Constitution reads thus:

> **"Article 20:** Protection in respect of conviction for offences.
>
> (1) … … …
>
> (2) … … …
>
> (3) No person accused of any offence shall be compelled to be a witness against himself."

10. In *M.P. Sharma v. Satish Chandra & Ors.*[18], a seven Judges Bench of this court did not accept the contention that the guarantee against testimonial compulsion is to be confined to oral testimony while facing trial in the court. The guarantee was held to include not only oral testimony given in the court or out of court, but also the statements in writing which incriminated the maker when figuring as an accused person.

11. In *Kathi Kalu Oghad*, this court agreed with the above conclusion drawn in *M.P. Sharma*. This court, however, did not agree with the observation made therein that "to be a witness" may be equivalent to "furnishing evidence" in larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for the purpose of identification. This court expressed that the observations in *M.P. Sharma* that Section 139 of the Evidence Act which says that a person producing a document on summons is not a witness, has no bearing on the connotation of the word "witness" is not entirely well-founded in law. It is necessary to have a look at *Kathi Kalu Oghad.*

18. 1954 SCR 1077.

12. In *Kathi Kalu Oghad,* the prosecution adduced in evidence a chit stated to be in the handwriting of the accused. In order to prove that the chit was in the handwriting of the accused, the police had taken specimen signatures of the accused while he was in police custody. Handwriting expert opined that the chit was in the handwriting of the accused. Question was raised as to the admissibility of the specimen writings in view of Article 20(3) of the Constitution. The High Court had acquitted the accused after excluding the specimen writings from consideration. The questions of constitutional importance which this court considered and which have relevance to the case on hand are as under:

(a) Whether by production of the specimen handwriting, the accused could be said to have been a witness against himself within the meaning of Article 20(3) of the Constitution?

(b) Whether the mere fact that when those specimen handwritings had been given, the accused was in police custody, could by itself amount to compulsion, apart from any other circumstances which could be urged as vitiating the consent of the accused in giving these specimen handwritings?

(c) Whether a direction given by a court to an accused present in court to give his specimen writing and signature for the purpose of comparison under Section 73 of the Indian Evidence Act infringes the fundamental right enshrined in Article 20(3) of the Constitution?

13. While departing from the view taken in *M.P. Sharma* that "*to be witness is nothing more than to furnish evidence*" and such evidence can be furnished through lips or by production of a thing or of a document or in other modes, in *Kathi Kalu Oghad* this Court was alive to the fact that the investigating agencies cannot be denied their legitimate power

to investigate a case properly and on a proper analysis of relevant legal provisions it gave a restricted meaning to the term "*to be witness*". The relevant observations may be quoted.

> "'*To be a witness' may be equivalent to 'furnishing evidence' in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body. 'Furnishing evidence' in the latter sense could not have been within the contemplation of the Constitution-makers for the simple reason that – thought they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject – they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions or parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice."*

14. In support of the above assertion, this court referred to Section 5 of the Prisoners Act which allows measurements and photographs of an accused to be taken and Section 6 thereof which states that if anyone resists taking of measurements and photographs, all necessary means to secure the taking of the same could be used. This court also referred to Section 73 of the Indian Evidence Act which authorizes the court to permit the taking of finger impression or specimen handwriting or signature of a person present in the court, if necessary for the purpose of comparison. This court observed that self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical

process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge. Example was cited of an accused who may be in possession of a document which is in his writing or which contains his signature or his thumb impression. It was observed that production of such document with a view to comparison of the writing or the signature or the impression of the accused is not the statement of an accused person, which can be said to be of the nature of a personal testimony. I may quote another relevant observation of this court:

> "When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness."

15. Four of the conclusions drawn by this court, which are relevant for our purpose, could be quoted:

> "(3) 'To be a witness' is not equivalent to 'furnishing evidence' in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.
>
> (4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.
>
> (5) 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise.
>
> (6) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence, orally or in writing."

16. Before I proceed further, it is necessary to state that our attention was drawn to the judgment of this Court in *Shyamlal Mohanlal v. State of Gujarat*[19]. It was pointed out that, there is some conflict between observations of this Court in *M.P. Sharma* as reconsidered in *Kathi Kalu Oghad* and, *Shyamlal Mohanlal* and this is noted by this Court in *V.S. Kuttan Pillai v. Ramakrishnan & Anr.*[20]. I, however, find that in *V.S. Kuttan Pillai*, this Court has not specifically given the nature of the conflict. Having gone through *Shyamlal Mohanlal v. State of Gujarat*[21], I find that in that case, the Constitution Bench was considering the question whether Section 94 of the Code of Criminal Procedure (Act 5 of 1898) (Section 91(1) of the Code) applies to accused persons. The Constitution Bench observed that in *Kathi Kalu Oghad* it has been held that an accused person cannot be compelled to disclose documents which are incriminatory and based on his own knowledge. Section 94 of the Code of Criminal Procedure (Act 5 of 1898) permits the production of all documents including the documents which are incriminatory and based on the personal

19. 1965 2 SCR 457.

20. (1980) 1 SCC 264.

21. (1965) 2 SCR 457.

knowledge of the accused person. The Constitution Bench observed that if Section 94 is construed to include an accused person, some unfortunate consequences follow. If the police officer directs an accused to attend and produce a document, the court may have to hear arguments to determine whether the document is prohibited under Article 20 (3). The order of the trial court will be final under the Code for no appeal or revision would lie against that order. Therefore, if Section 94 is construed to include an accused person, it would lead to grave hardship to the accused and make investigation unfair to him. The Constitution Bench concluded that Section 94 does not apply to an accused person. Though there is reference to *M.P. Sharma* as a judgment stating that calling an accused to produce a document does amount to compelling him to give evidence against himself, the observations cannot be read as taking a view contrary to *Kathi Kalu Oghad*, because they were made in different context. As I have already noted, the conclusion drawn in *Kathi Kalu Oghad* that the accused cannot be compelled to produce documents which are incriminatory and based on his own knowledge has been restated. I, therefore, feel that it is not necessary to go into the question of alleged conflict.

17. In *Selvi* a three Judge Bench of this Court was considering whether involuntary administration of certain scientific techniques like narco-analysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) tests and the results thereof are of a '*testimonial character*' attracting the bar of Article 20(3) of the Constitution. This Court considered the protective scope of right against self-incrimination, that is whether it extends to the investigation stage and came to the conclusion that even the investigation at the police level is embraced by Article 20(3). After quoting extensively from *Kathi Kalu Oghad,* it was observed that the scope of '*testimonial compulsion'* is made clear by two premises. The first is that ordinarily it is the oral or written statements which convey the personal knowledge of a person in respect of relevant facts that

amount to '*personal testimony'* thereby coming within the prohibition contemplated by Article 20(3). In most cases, such '*personal testimony'* can be readily distinguished from material evidence such as bodily substances and other physical objects. The second premise is that in some cases, oral or written statements can be relied upon but only for the purpose of identification or comparison with facts and materials that are already in the possession of the investigators. The bar of Article 20(3) can be invoked when the statements are likely to lead to incrimination by themselves or furnish a link in the chain of evidence. It was held that all the three techniques involve testimonial responses. They impede the subject's right to remain silent. The subject is compelled to convey personal knowledge irrespective of his/her own volition. The results of these tests cannot be likened to physical evidence so as to exclude them from the protective scope of Article 20(3). This Court concluded that compulsory administration of the impugned techniques violates the right against self-incrimination. Article 20(3) aims to prevent the forcible conveyance of personal knowledge that is relevant to the facts in issue. The results obtained from each of the impugned tests bear a testimonial character and they cannot be categorized as material evidence such as bodily substances and other physical objects.

18. Applying the test laid down by this court in *Kathi Kalu Oghad* which is relied upon in *Selvi,* I have no hesitation in coming to a conclusion that if an accused person is directed to give his voice sample during the course of investigation of an offence, there is no violation of his right under Article 20(3) of the Constitution. Voice sample is like finger print impression, signature or specimen handwriting of an accused. Like giving of a finger print impression or specimen writing by the accused for the purposes of investigation, giving of a voice sample for the purpose of investigation cannot be included in the expression "to be a witness". By giving voice sample the accused does not convey information based upon his personal

knowledge which can incriminate him. A voice sample by itself is fully innocuous. By comparing it with tape recorded conversation, the investigator may draw his conclusion but, voice sample by itself is not a testimony at all. When an accused is asked to give voice sample, he is not giving any testimony of the nature of a personal testimony. When compared with the recorded conversation with the help of mechanical process, it may throw light on the points in controversy. It cannot be said, by any stretch of imagination that by giving voice sample, the accused conveyed any information based upon his personal knowledge and became a witness against himself. The accused by giving the voice sample merely gives 'identification data' to the investigating agency. He is not subjected to any testimonial compulsion. Thus, taking voice sample of an accused by the police during investigation is not hit by Article 20(3) of the Constitution.

19. The next question which needs to be answered is whether there is any provision in the Code, or in any other law under which a Magistrate can authorize the investigating agency to record voice sample of a person accused of an offence. Counsel are *ad idem* on the point that there is no specific provision either in the Code or in any other law in that behalf. In its 87th Report, the Law Commission suggested that the Prisoners Act should be amended *inter alia* to include voice sample within the ambit of Section 5 thereof. Parliament however has not amended the Prisoners Act in pursuance to the recommendation of the Law Commission nor is the Code amended to add any such provision therein. Resultantly, there is no specific legal provision under which such a direction can be given. It is therefore, necessary to see whether such power can be read into in any of the available provisions of law.

20. A careful study of the relevant provisions of the Code and other relevant statutes discloses a scheme which aims at strengthening the hands of the investigator. Section 53, Section 54A, Section 311A of the Code, Section 73 of the Evidence

Act and the Prisoners Act to which I shall soon refer reflect Parliament's efforts in that behalf. I have already noted that in *Kathi Kalu Oghad,* while considering the expressions "to be a witness" and "furnishing evidence", this Court clarified that "to be a witness" is not equivalent to "furnishing evidence" in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused for the purpose of identification because such interpretation would not have been within the contemplation of the Constitution makers for the simple reason that though they may have intended to protect an accused person from the hazards of self-incrimination, they could not have intended to put obstacles in the way of efficient and effective investigation into crime and bringing criminal to justice. Such steps often become necessary to help the investigation of crime. This Court expressed that it is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and law courts with legitimate powers to bring offenders to justice. This, in my opinion, is the basic theme and, the controversy regarding taking of voice sample involved in this case will have to be dealt with keeping this theme in mind and by striking a balance between Article 20(3) and societal interest in having a legal framework in place which brings to book criminals.

21. Since we are concerned with the stage of investigation, it is necessary to see how the Code defines 'investigation'. Section 2 (h) of the Code is material. It reads thus:

> "Investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf."

22. It is the duty of a Police Officer or any person (other than a Magistrate) authorized by a Magistrate to collect

evidence and proceedings under the Code for the collection of evidence are included in 'Investigation'. Collection of voice sample of an accused is a step in investigation. It was argued by learned counsel for the State that various steps which the police take during investigation are not specifically provided in the Code, yet they fall within the wider definition of the term 'investigation' and investigation has been held to include measures that had not been enumerated in statutory provisions and the decisions to that effect of the Rajasthan High Court in *Mahipal Maderna* and Allahabad High Court in *Jamshed* have been noticed by this Court in *Selvi* and, therefore, no legal provision need be located under which voice sample can be taken. I find it difficult to accept this submission. In the course of investigation, the police do use force. In a country governed by rule of law police actions which are likely to affect the bodily integrity of a person or likely to affect his personal dignity must have legal sanction. That prevents possible abuse of the power by the police. It is trite that every investigation has to be conducted within the parameters of the Code. The power to investigate into a cognizable offence must be exercised strictly on the condition on which it is granted. (*State of West Bengal v. Swapan Guha)***.** The accused has to be dealt with strictly in accordance with law. Even though, taking of physical evidence which does not amount to communicating information based on personal knowledge to the investigating officer by the accused which may incriminate him, is held to be not violative of protection guaranteed by Article 20(3), the investigating officer cannot take physical evidence from an accused unless he is authorized by a Magistrate to do so. He cannot assume powers which he does not possess. He can only act on the strength of a direction given to him by a Magistrate and the Magistrate must have power to issue such a direction. In *Bindeshwari Prasad Singh v. Kali Singh*[22], this Court has clarified that subordinate criminal courts have no inherent powers. Similar view has been taken by this court in *Adalat*

22. (1977) 1 SCC 57.

Prasad. Our attention was drawn to *Sakiri Vasu* in support of the submission that the Magistrate has implied or incidental powers. In that case, this Court was dealing with the Magistrate's powers under Section 156(3) of the Code. It is observed that Section 156(3) includes all such powers as are necessary for ensuring a proper investigation. It is further observed that when a power is given to an authority to do something, it includes such incidental or implied powers which would ensure proper doing of that thing. It is further added that where an Act confers jurisdiction, it impliedly also grants power of doing all such acts or employ such means as are essentially necessary for execution. If we read *Bindeshwar Prasad, Adalat Prasad* and *Sakiri Vasu* together, it becomes clear that the subordinate criminal courts do not have inherent powers. They can exercise such incidental powers as are necessary to ensure proper investigation. Against this background, it is necessary to find out whether power of a Magistrate to issue direction to a police officer to take voice sample of the accused during investigation can be read into in any provisions of the Code or any other law. It is necessary to find out whether a Magistrate has implied or ancillary power under any provisions of the Code to pass such order for the purpose of proper investigation of the case.

23. In search for such a power, I shall first deal with the Prisoners Act. As its short title and preamble suggests it is aimed at securing identification of the accused. It is an Act to authorize the taking of measurements and photographs of convicts and others. Section 2(a) defines the term '*measurements*' to include finger-impressions and foot-print impressions. Section 3 provides for taking of measurements, etc., of convicted persons and Section 4 provides for taking of measurements, etc., of non-convicted persons. Section 5 provides for power of a Magistrate to order a person to be measured or photographed. Section 6 permits the police officer to use all means necessary to secure measurements etc. if such person puts up resistance. Section 7 states that all

measurements and photographs taken of a person who has not been previously convicted shall be destroyed unless the court directs otherwise, if such person is acquitted or discharged. In *Kathi Kalu Oghad*, this Court referred to the Prisoners Act as a statute empowering the law courts with legitimate powers to bring offenders to justice.

24. In *Amrit Singh v. State of Punjab*[23] the appellant was charged for offences under Sections 376 and 302 of the Indian Penal Code (for short **"the IPC"**) and an application was filed by the investigating officer for obtaining the appellant's hair sample. He refused to give hair sample. It was argued that hair sample can be taken under the provisions of the Prisoners Act. This Court held that the Prisoners Act may not be ultra vires the Constitution, but it will have no application to the case before it because it cannot be said to be an area contemplated under it.

25. In *Telgi,* the Bombay High Court was dealing with a challenge to the order passed by the Special Judge, Pune, rejecting application filed by the investigating agency praying that it may be permitted to record the voice samples of the accused. The High Court relying on *Kathi Kalu Oghad* rejected the contention that requiring the accused to lend their voice sample to the investigating officer amounts to testimonial compulsion and results in infringement of the accused's right under Article 20(3) of the Constitution. The High Court held that measuring frequency or intensity of the speech sound waves falls within the ambit of the scope of the term "*measurement"* as defined in Section 2(a) of the Prisoners Act. The High Court also relied on Sections 5 and 6 of the Prisoners Act as provisions enabling the court to pass such orders.

26. In *Rakesh Bisht*, the Delhi High Court disagreed with the view taken by the Bombay High Court in *Telgi*. The Delhi High Court held that if after investigation, charges are framed

23. (2006) 12 SCC 79.

and in the proceedings before the court, the court feels that voice sample ought to be taken for the purposes of establishing identity, then such a direction may be given provided the voice sample is taken only for the purposes of identification and it does not contain inculpatory statement so as to be hit by Article 20(3) of the Constitution.

27. Having carefully perused the provisions of the Prisoners Act, I am inclined to accept the view taken by the Bombay High Court in *Telgi* as against the view taken by the Delhi High Court in *Rakesh Bisht*. Voice sample stands on a different footing from hair sample with which this Court was concerned in *Amrit Singh because* there is no provision express or implied in the Prisoners Act under which such a hair sample can be taken. That is not so with voice sample.

28. The purpose of taking voice sample which is non-testimonial physical evidence is to compare it with tape recorded conversation. It is a physical characteristic of the accused. It is identificatory evidence. In *R.M. Malkani*, this Court has taken a view that tape recorded conversation is admissible provided the conversation is relevant to the matters in issue; there is identification of the voice and the tape recorded conversation is proved by eliminating the possibility of erasing the tape recorded conversation. It is a relevant fact and is admissible under Section 7 of the Evidence Act. In view of this legal position, to make the tape recorded conversation admissible in evidence, there must be provision under which the police can get it identified. For that purpose, the police must get the voice sample of the accused.

29. The dictionary meaning of the term '*measurement*' is the act or process of measuring. The voice sample is analysed or measured on the basis of time, frequency and intensity of the speech-sound waves. A voice print is a visual recording of voice. Spectrographic Voice Identification is described in Chapter 12 of the Book "*Scientific Evidence in Criminal*

Cases" written by *Andre A. Moenssens, Ray Edward Moses* and *Fred E. Inbau*. The relevant extracts of this chapter could be advantageously quoted.

"Voiceprint identification requires (1) a recording of the questioned voice, (2) a recording of known origin for comparison, and (3) a sound spectrograph machine adapted for 'voiceprint' studies."

12.02 Sound and Speech

In order to properly understand the voiceprint technique, it is necessary to briefly review some elementary concepts of sound and speech.

Sound, like heat, can be defined as a vibration of air molecules or described as energy in the form of waves or pulses, caused by vibrations. In the speech process, the initial wave producing vibrations originate in the vocal cords. Each vibration causes a compression and corresponding rarefications of the air, which in turn form the aforementioned wave or pulse. The time interval between each pulse is called the frequency of sound; it is expressed generally in hertz, abbreviated as hz., or sometimes also in cycles-per-second, abbreviated as cps. It is this frequency which determines the pitch of the sound. The higher the frequency, the higher the pitch, and vice versa.

Intensity is another characteristic of sound. In speech, intensity is the characteristic of loudness. Intensity is a function of the amount of energy in the sound wave or pulse. To perceive the difference between frequency and intensity, two activities of air molecules in an atmosphere must be considered. The speed at which an individual vibrating molecule bounces back and forth between the other air molecules surrounding it is the frequency. Intensity, on the other hand, may be measured by the

number of air molecules that are being caused to vibrate at a given frequency."

"12.03 The Sound Spectrograph

The sound spectrograph is an electromagnetic instrument which produces a graphic display of speech in the parameters of time, frequency and intensity. The display is called a sound spectrogram."

30. Thus, it is clear that voiceprint identification of voice involves measurement of frequency and intensity of sound waves. In my opinion, therefore, measuring frequency or intensity of the speech-sound waves falls within the ambit of inclusive definition of the term 'measurement' appearing in the Prisoners Act.

31. There is another angle of looking at this issue. Voice prints are like finger prints. Each person has a distinctive voice with characteristic features. Voice print experts have to compare spectrographic prints to arrive at an identification. In this connection, it would be useful to read following paragraphs from the book "**Law Enforcement and Criminal Justice – an introduction**" by Bennett-Sandler, Frazier, Torres, Waldron.

"**Voiceprints**. The voiceprint method of speaker identification involves the aural and visual comparison of one or more identified voice patterns with a questioned or unknown voice. Factors such as pitch, rate of speech, accent, articulation, and other items are evaluated and identified, even though a speaker may attempt to disguise his or her voice. Through means of a sound spectrograph, voice signals can be recorded magnetically to produce a permanent image on electrically sensitive paper. This visual recording is called a voiceprint.

A voiceprint indicates resonance bars of a person's voice (called formants), along with the spoken word and how it

is articulated. Figure 9.7 is an actual voiceprint sample. The loudness of a voice is indicated by the density of lines; the darker the lines on the print, the greater the volume of the sound. When voiceprints are being identified, the frequency and pitch of the voice are indicated on the vertical axis; the time factor is indicated on the horizontal axis. At least ten matching sounds are needed to make a positive identification, while fewer factors lead to a probable or highly probable conclusion.

Voiceprints are like fingerprints in that each person has a distinctive voice with characteristic features dictated by vocal cavities and articulators. Oral and nasal cavities act as resonators for energy expended by the vocal cords. Articulators are generated by the lips, teeth, tongue, soft palate, and jaw muscles. Voiceprint experts must compare spectrographic prints or phonetic elements to arrive at an identification. These expert laboratory technicians are trained to make subjective conclusions, much as fingerprint or criminalistic experts must make determinations on the basis of evidence." (emphasis supplied.)

Thus, my conclusion that voice sample can be included in the inclusive definition of the term "measurements" appearing in Section 2(a) of the Prisoners Act is supported by the above-quoted observation that voice prints are like finger prints. Section 2(a) states that measurements include finger impressions and foot impressions. If voice prints are like finger prints, they would be covered by the term '*measurements'.* I must note that the Law Commission of India in its 87th Report referred to the book "**Law Enforcement and Criminal Justice – an introduction**". The Law commission observed that voice prints resemble finger prints and made a recommendation that the Prisoners Act needs to be amended. I am, therefore, of the opinion that a Magistrate acting under Section 5 of the Prisoners Act can give a direction to any person to give his

voice sample for the purposes of any investigation or proceeding under the Code.

32. I shall now turn to Section 73 of the Indian Evidence Act to see whether it empowers the court to give such a direction. It reads thus:

"Section 73 - Comparison of signature, writing or seal with others admitted or proved.

In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

The Court may direct any person present in court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person."

[This section applies also, with any necessary modifications, to finger-impressions.]

33. In *Ram Babu Misra,* the investigating officer made an application to the Chief Judicial Magistrate, Lucknow seeking a direction to the accused to give his specimen writing for the purpose of comparison with certain disputed writings. Learned Magistrate held that he had no power to do so when the case was still under investigation. His view was upheld by the High Court. This Court held that the second paragraph of Section 73 enables the court to direct any person present in court to give specimen writings "for the purpose of enabling the court to compare" such writings with writings alleged to have been written by such person. The clear implication of the words "for the purpose of enabling the court to compare" is that there is some proceeding before the court in which or as a

consequence of which it might be necessary for the court to compare such writings. This Court further observed that the direction is to be given "for the purpose of enabling the court to compare" and not for the purpose of enabling the investigating or other agency to compare. While dismissing the appeal, this Court expressed that a suitable legislation may be made on the analogy of Section 5 of the Prisoners Act to provide for the investiture of Magistrates with the power to issue directions to any person including an accused person to give specimen signatures and writings. Thus Section 73 of the Evidence Act does not empower the court to direct the accused to give his specimen writings during the course of investigation. Obviously, Section 73 applies to proceedings pending before the court. They could be civil or criminal. In view of the suggestion made by this Court by Act 25 of 2005 with effect from 23.6.2006, Section 311A was added in the Code empowering the Magistrate to order a person to give specimen signature or handwriting during the course of investigation or proceeding under the Code.

34. Section 311A of the Code reads thus:

"311A. Power of Magistrate to order person to give specimen signatures or handwriting:

If a Magistrate of the first class is satisfied that, for the purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting:

Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding."

A bare reading of this Section makes it clear that Section 311A cannot be used for obtaining a direction from a Magistrate for taking voice sample.

35. Section 53 of the Code pertains to examination of the accused by medical practitioner at the request of a police officer. Section 53A refers to examination of person accused of rape by medical practitioner and section 54 refers to examination of arrested person by a medical officer. Section 53 is material. It reads as under:

"Section 53 - Examination of accused by medical practitioner at the request of police officer

(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonable necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

Explanation:-

In this section and in sections 53A and 54,

(a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences,

sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) "registered medical practitioner" means a medical practitioner who possess any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956(102 of 1956) and whose name has been entered in a State Medical Register.

1. Substituted by The Code of Criminal Procedure (Amendment) Act, 2005. Earlier the text was as under:

Explanation.-In this section and in section 54, "registered medical practitioner" means a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956), and whose name has been entered in a State Medical Register."

36. In short, this section states that if a police officer feels that there are reasonable grounds for believing that an examination of the person of the accused will afford evidence as to commission of the offence, he may request a registered medical practitioner to make such examination of his person as is reasonably necessary. For such examination, it is permissible to use such force as may be reasonably necessary. Explanation (a) to Section 53 states what is 'examination'. It is an inclusive definition. It states that the examination shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case. This explanation was substituted by the Code of Criminal Procedure (Amendment) Act, 2005. The question is whether with the aid of the doctrine '*ejusdem generis*' voice

sample test could be included within the scope of the term '*examination*'.

37. I am not impressed by the submission that the term "such other tests" mentioned in Explanation (a) is controlled by the words "which the registered medical practitioner thinks necessary". It is not possible to hold that Explanation (a) vests the discretion to conduct examination of the accused in the registered medical practitioner and not in the investigating officer and therefore the doctrine of '*ejusdem generis*' cannot be pressed into service. Under Section 53(1) the registered medical practitioner can act only at the request of a police officer. Obviously, he can have no say in the process of investigation. The decision to get the accused examined is to be taken by the investigating officer and not by the medical practitioner. It is the expertise of the medical practitioner which the investigator uses to decide the method of the test. It would be wrong, therefore, to state that the discretion to get the accused examined vests in the medical practitioner. This submission must, therefore, be rejected.

38. It is argued that voice sample test cannot be included in the definition of 'examination' because in *Selvi,* this Court has held that Section 53 needs to be given a restrictive interpretation. I must, therefore, revisit *Selvi.*

39. In *Selvi,* it was contended that the phrase "modern and scientific techniques including DNA profiling and such other tests" should be liberally construed to include narco-analysis test, polygraph examination and the BEAP test. These tests could be read in with the help of the words "and such other tests", because the list of "modern and scientific techniques" contemplated was illustrative and not exhaustive. This Court observed that it was inclined to take the view that the results of the impugned tests should be treated as testimonial acts for the purpose of invoking the right against self-incrimination and, therefore, it would be prudent to state that the phrase "and such

other tests" appearing in Explanation (a) to Section 53 of the Code should be read so as to confine its meaning to include only those tests which involve the examination of physical evidence. This Court accepted the submission that while bodily substances such as blood, semen, sputum, sweat, hair and finger nail clippings can be characterized as physical evidence, the same cannot be said about the techniques in question. This Court reiterated the distinction between physical evidence and testimonial acts and accepted the submission that the doctrine of 'ejusdem generis' entails that the meaning of general words which follow specific words in a statutory provision should be construed in light of commonality between those specific words. This Court acknowledged that the substances mentioned in Explanation (a) to Section 53 are examples of physical evidence and, hence, the words "and such other tests" mentioned therein should be construed to include the examination of physical evidence but not that of testimonial acts. This Court made it clear that it was not examining what was the legislative intent in not including the tests impugned before it in the Explanation.

40. Our attention was drawn to the observation of this Court in *Selvi* that the dynamic interpretation of the amended Explanation to Section 53 is obstructed because the general words "and such other tests" should ordinarily be read to include tests which are of the same genus as the other forms of medical examination which are examinations of bodily substances. It is argued that voice sample is not a bodily substance like blood, sputum, finger nail clippings etc.

41. Voice emanates from the human body. The human body determines its volume and distinctiveness. Though it cannot be touched or seen like a bodily substance, being a bodily emanation, it could be treated as a part of human body and thus could be called a bodily substance. But, I feel that there is no need to stretch the meaning of the term 'bodily substance' in this case. I have already expressed my opinion that voice

sample is physical non-testimonial evidence. It does not communicate to the investigator any information based on personal knowledge of the accused which can incriminate him. Voice sample cannot be held to be conceptually different from physical non-testimonial evidence like blood, semen, sputum, hair etc. Taking of voice sample does not involve any testimonial responses. The observation of this Court in *Selvi* that it would not be prudent to read Explanation (a) to Section 53 of the Code in an expansive manner is qualified by the words "so as to include the impugned techniques". What must be borne in mind is that the impugned techniques were held to be testimonial and hit by Article 20(3) of the Constitution. This Court emphasized that Explanation (a) to Section 53 does not enumerate certain other kinds of medical examination that involve testimonial acts, such as psychiatric examination among others and this demonstrates that the amendment made to this provision was informed by a rational distinction between the examination of physical substances and testimonial acts. If this Court wanted to interpret Explanation (a) as referring only to bodily substances there was no reason for it to draw such distinction. Pertinently, this distinction was employed while applying the doctrine of '*ejusdem generis*' to Section 53. The tenor of this judgment makes it clear that tests pertaining to physical non-testimonial evidence can be included in the purview of the words "and such other tests" with the aid of the doctrine of '*ejusdem generis*'. In my opinion, *Selvi* primarily rests on the distinction between physical evidence of non-testimonial character as against evidence involving testimonial compulsions. The tests mentioned in Explanation (a) are of bodily substances, which are examples of physical evidence. Even if voice sample is not treated as a bodily substance, it is still physical evidence involving no transmission of personal knowledge. On the reasoning of *Selvi* which is based on *Kathi Kalu Oghad,* I find no difficulty in including voice sample test in the phrase "such other tests" appearing in Explanation (a) to Section 53 by applying the doctrine of '*ejusdem generis*' as it is a test pertaining to physical non-testimonial evidence like

blood, sputum etc. In my opinion, such interpretation of *Selvi* would be in tune with the general scheme of the Code which contains provisions for collection of evidence for comparison or identification at the investigation stage in order to strengthen the hands of the investigating agency.

42. It was argued that Section 53 of the Code only contemplates medical examination and taking of voice sample is not a medical examination. Section 53 talks of examination by registered medical practitioner of the person of the accused but, does not use the words "medical examination". Similarly, Explanation (a) to Section 53 does not use the words "medical examination". In my opinion, Section 53 need not be confined to medical examination. It is pertinent to note that in ***Selvi***, this court was considering whether narco-analysis, polygraph examination and the BEAP tests violate Article 20(3) of the Constitution. While examining this question, this Court analyzed Section 53 and stated that because those tests are testimonial in nature, they do not fall within the ambit of Section 53 of the Code but this Court did not restrict examination of person contemplated in Section 53 to medical examination by a medical practitioner even though the tests impugned therein were tests that were clearly not to be conducted by the medical practitioner. It must be remembered that Section 53 is primarily meant to serve as aid in the investigation. Examination of the accused is to be conducted by a medical practitioner at the instance of the police officer, who is in charge of the investigation. On a fair reading of Section 53 of the Code, I am of the opinion that under that Section, the medical practitioner can conduct the examination or suggest the method of examination.

43. I must also deal with the submission of learned counsel for the appellant that non-inclusion of voice sample in Explanation (a) displays legislative intent not to include it though legislature was aware of such test. In *Selvi*, this court has made it clear that it was not examining the question regarding

legislative intent in not including the test impugned before it in Explanation (a). Therefore, *Selvi* does not help the appellant on this point. On the contrary, in my opinion, by adding the words '*and such other tests*' in the definition of term contained in Explanation (a) to Section 53 of the Code, the legislature took care of including within the scope of the term 'examination' similar tests which may become necessary in the facts of a particular case. Legislature exercised necessary caution and made the said definition inclusive, not exhaustive and capable of expanding to legally permissible limits with the aid of the doctrine of '*ejusdem generis*'. I, therefore, reject this submission.

44. Section 54A of the Code makes provision for identification of arrested persons. It states that where a person is arrested on a charge of committing an offence and his identification by any other person or persons is considered necessary for the purpose of investigation of such offence, the court having jurisdiction, may on the request of the officer in charge of a police station, direct the person so arrested to subject himself to identification by any person or persons in such manner as the court may deem fit. Identification of the voice is precondition for admission of tape recorded conversation in evidence (*R.M. Malkani*). Since Section 54A of the Code uses the words "the Court, …. may …… direct the person so arrested to subject himself to identification by any person or persons in such manner as the court may deem fit", voice sample can be identified by means of voice identification parade under Section 54A or by some other person familiar with the voice.

45. I may usefully refer to the judgment of this Court in *Nilesh Paradkar v. State of Maharashtra*[24] where the voice test identification was conducted by playing cassette in the presence of panchas, police officers and prosecution witnesses. This Court rejected the voice identification evidence because precautions similar to the precautions which are normally taken

24. (2011) 4 SCC 143.

in visual identification of suspects by witnesses were not taken. But this court did not reject the evidence on the ground that voice identification parade is not contemplated under Section 54A of the Code. It is important to note that in *Mohan Singh v. State of Bihar*[25], after noticing *Nilesh Paradkar*, this Court held that where the witnesses identifying the voice had previous acquaintance with the caller i.e. the accused, such identification of voice can be relied upon; but identification by voice has to be considered carefully by the court. This, however, is no answer to the question of availability of a legal provision to pass an order directing the accused to give voice sample during investigation. The legal provision, in my opinion, can be traced to the Prisoners Act and Section 53 of the Code.

46. I am mindful of the fact that foreign decisions are not binding on our courts. But, I must refer to the judgment of the Supreme Court of Appeal of South Africa in *Levack, Hamilton Caesar & Ors. v. Regional Magistrate, Wynberg & Anr.*[26] because it throws some light on the issue involved in the case. In that case, the Magistrate had granted an order under Section 37(3) of the Criminal Procedure Act 51 of 1977 (for short, "**South African Act**") directing the accused to give voice samples as specified by a named 'voice expert' in the presence of the legal representatives of the accused. The object was to compare the samples with tape recordings of telephone conversations in the State's possession, for possible later use during the trial. The accused were unsuccessful in the High Court in their challenge to the said order of the lower court. Hence, they appealed to the Supreme Court of South Africa. Under Section 37(1) of the South African Act, any police officer may take the fingerprints, palm-prints and foot-prints or may cause any such prints to be taken, inter alia, of any person arrested upon any charge. Sections 37(1)(a)(i) and (ii) and Section 37(1)(c) of the South African Act read thus:

25. (2011) 9 SCC 272.

26. [2003] 1 All SA 22 (SCA) (28th November 2002)

"37. Powers in respect of prints and bodily appearance of accused.—(1) Any police official may—

(a) take the finger-prints, palm-prints or foot-prints or may cause any such prints to be taken—

(i) of any person arrested upon any charge;

(ii) of any such person released on bail or on warning under section 72;

(iii) xxx xxx xxx

(iv) xxx xxx xxx

(v) xxx xxx xxx

(b) xxx xxx xxx

(c) take such steps as he may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance: Provided that no police official shall take any blood sample of the person concerned nor shall a police official make any examination of the body of the person concerned where that person is a female and the police official concerned is not a female;"

The first question which fell for consideration was whether voice of a person is a characteristic or distinguishing feature of the body. The Supreme Court of South Africa considered the Oxford Dictionary meaning of 'voice' as '1. Sound formed in larynx etc. and uttered by mouth, especially human utterance in speaking, shouting, singing, etc. 2. Use of voice, utterance. 3. (Phonetic) Sound uttered with resonance of vocal chords, not with mere breath'. It observed that voice is thus a sound formed in the larynx and uttered by the mouth and emanates from and is formed by the body. Therefore, there can be no doubt that it

is a 'characteristic' (in the sense of a distinctive trait or quality) of the human body. Though voice sample was not specifically mentioned in Section 37, it was held that it fell within the scope of Section 37. It was observed that Section 37 does not expressly mention the voice because it is one of the 'innumerable' bodily features that the wording expressly contemplates. Section 37 merely contemplates bodily appearance of the accused. It was further observed that it is true that the voice, unlike palm or other prints, is not itself part of the body. It is a sound. But, the sound is a bodily emanation. And the body from which it emanates determines its timbre, volume and distinctive modulations. It was further observed that nothing in the provision suggests that the 'distinguishing features' it envisages should be limited to those capable of apprehension through the senses of touch and sight (or even taste or smell). Relevant observation of the Supreme Court of South Africa could be quoted.

> "14. Hearing is as much a mode of physical apprehension as feeling or seeing. For the sight-impaired it is indeed the most important means of distinguishing between people. It would therefore be counter-literal to interpret the section as though the ways of 'ascertaining' bodily features it contemplates extend only to what is visible or tangible."

The Supreme Court of South Africa then considered the question of self-incrimination. It observed that it is wrong to suppose that requiring the accused to submit voice samples infringes their right either to remain silent in the court proceedings against them or not to give self-incriminating evidence. It was further observed that voice falls within the same category as complexion, stature, mutilations, marks and prints i.e. 'autoptic evidence' – evidence derived from the accused's own bodily features. It was held that there is no difference in principle between the visibly discernible physical traits and features of an accused and those that under law can be extracted from him through syringe and vial or through the

compelled provision of a voice sample. In neither case is the accused required to provide evidence of a testimonial or communicative nature, and in neither case is any constitutional right violated. The Supreme Court of South Africa then examined as to under which provision a Magistrate could issue a direction to the accused to supply his voice samples. It observed that Section 37(1)(a)(i) and (ii) permit any police officer to take the finger-prints, palm-prints or foot-prints or may cause any such prints to be taken of any person arrested upon any charge. Section 37(1)(c) states that any police officer may take such steps as he may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance. Though 'voice sample' was not specifically mentioned anywhere, on a conjoint reading of the two provisions, the Supreme Court of South Africa held that the police retained the power under Section 37(1)(c) to take steps as they might deem necessary to ascertain the characteristic or distinguishing features of the accused's voice. That included the power to request the accused to supply voice samples. The court further observed that this power, in turn, could properly be supplemented by a court order requiring the accused to do so.

47. In the ultimate analysis, therefore, I am of the opinion that the Magistrate's power to authorize the investigating agency to record voice sample of the person accused of an offence can be traced to Section 5 of the Prisoners Act and Section 53 of the Code. The Magistrate has an ancillary or implied power under Section 53 of the Code to pass an order permitting taking of voice sample to aid investigation. This conclusion of mine is based on the interpretation of relevant sections of the Prisoners Act and Section 53 of the Code and also is in tune with the concern expressed by this court in *Kathi Kalu Oghad* that it is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice.

48. The principle that a penal statute should be strictly construed is not of universal application. In *Murlidhar Meghraj Loya v. State of Maharashtra*[27], this court was dealing with the Prevention of Food Adulteration Act, 1954. Speaking for this court, Krishna Iyer, J. held that any narrow and pedantic, literal and lexical construction of Food Laws is likely to leave loopholes for the offender to sneak out of the meshes of law and should be discouraged and criminal jurisprudence must depart from old canons defeating criminal statutes calculated to protect the public health and the nation's wealth. Similar view was taken in *Kisan Trimbak Kothula & Ors. v. State of Maharashtra*[28]. In *State of Maharashtra v. Natwarlal Damodardas Soni*[29], while dealing with Section 135 of the Customs Act and Rule 126-H(2)(d) of the Defence of India Rules, a narrow construction given by the High Court was rejected on the ground that that will emasculate these provisions and render them ineffective as a weapon for combating gold smuggling. It was further held that the provisions have to be specially construed in a manner which will suppress the mischief and advance the object which the legislature had in view. Therefore, whether the penal statute should be given strict interpretation or not will depend on facts of each case. Considerations of public health, preservation of nation's wealth, public safety may weigh with the court in a given case and persuade it not to give a narrow construction to a penal statute. In the facts of this case, I am not inclined to give a narrow construction to the provisions of the Prisoners Act and Section 53 of the Code. Judicial note can be taken of the fact that there is a great deal of technological advance in means of communication. Criminals are using new methodology in committing crimes. Use of landlines, mobile phones and voice over internet protocol (VoIP) in the commission of crimes like kidnapping for ransom, extortion, blackmail and for terrorist

27. AIR 1976 SC 1929.

28. AIR 1977 SC 435.

29. AIR 1980 SC 593.

activities is rampant. Therefore, in order to strengthen the hands of investigating agencies, I am inclined to give purposive interpretation to the provisions of the Prisoners Act and Section 53 of the Code instead of giving a narrow interpretation to them. I, however, feel that Parliament needs to bring in more clarity and precision by amending the Prisoners Act. The Code also needs to be suitably amended. Crime has changed its face. There are new challenges faced by the investigating agency. It is necessary to note that many local amendments have been made in the Prisoners Act by several States. Technological and scientific advance in the investigative process could be more effectively used if required amendments are introduced by Parliament. This is necessary to strike a balance between the need to preserve the right against self incrimination guaranteed under Article 20(3) of the Constitution and the need to strengthen the hands of the investigating agency to bring criminals to book.

49. In the view that I have taken, I find no infirmity in the impugned order passed by the High Court confirming the order passed by learned Chief Judicial Magistrate, Saharanpur summoning the appellant to the court for recording the sample of his voice. The appeal is dismissed.

50. Before I part with this judgment, I must express my sincere thanks to learned counsel Mr. Siddhartha Dave, Mr. Aman Ahluwalia and Mr. R.K. Dash, who have very ably assisted the court.

AFTAB ALAM, J. 1. Leave granted.

2. In to-day's world when terrorism is a hard reality and terrorist violence is a common phenomenon, the police needs all the forensic aids from science and technology. The technology is in position to-day to say whether two voice-recordings are of the same person or of two different people and, thus, to provide valuable aid in investigation. But, the question is whether the law has any provision under which a

person, suspected of having committed an offence, may be compelled to give his voice sample to aid the police in investigation of the case. The next and the more important question is, in case there is no express or evidently applicable provision in law in that regard, should the court invent one by the process of interpretation. My sister Desai J. seems to think that the gap in the law is so vital that the court must step in to bridge the gap. I hesitate to do so.

2. There are, indeed, precedents where the court by the interpretative process has evolved old laws to meet cotemporary challenges and has planted into them contents to deal with the demands and the needs of the present that could not be envisaged at the time of the making of the law. But, on the question of compelling the accused to give voice sample, the law must come from the legislature and not through the court process. First, because the compulsion to give voice sample does in some way involve an invasion of the rights of the individual and to bring it within the ambit of the existing law would require more than reasonable bending and stretching of the principles of interpretation. Secondly, if the legislature even while making amendments in the Criminal Procedure Code, aimed at strengthening the investigation, as late as in 2005, is oblivious to something as obvious as this and despite express reminders chooses not to include voice sample either in the newly introduced explanation to section 53 or in sections 53A, and 311A, then it may even be contended that in the larger schemes of things the legislature is able to see something which perhaps the Court is missing.

3. Coming now to the specifics, I would briefly record my reasons for not being able to share the view taken by Desai J.

4. At the beginning of her judgment Desai J. has framed two questions that the Court is called upon to answer in this case. These are:

"(i) Whether Article 20(3) of the Constitution of India, which

protects a person accused of an offence from being compelled to be a witness against himself, extends to protecting such an accused from being compelled to give his voice sample during the course of investigation into an offence?

(ii) Assuming that there is no violation of Article 20(3) of the Constitution of India, whether **in the absence of any provision in the Code**, can a Magistrate authorize the investigating agency to record the voice sample of the person accused of an offence?"

(emphasis added)

5. As regards the first question, relying primarily on the eleven (11) Judges' Bench decision of this Court in *State of Bombay v. Kathi Kalu Oghad & Others*[1] which was followed in the more recent decision in *Selvi and others v. State of Karnataka*[2] she held that "taking voice sample of an accused by the police during investigation is not hit by Article 20 (3) of the Constitution."

6. I am broadly in agreement with the view taken by her on Article 20 (3) but, since I differ with her on the second question, I think the issue of constitutional validity in compelling the accused to give his/her voice sample does not really arise in this case.

7. Coming to the second question, as may be seen, it has the recognition that there is no provision in the Criminal Procedure Code to compel the accused to give his voice sample. That being the position, to my mind the answer to the question can only be in the negative, regardless of the constitutional guarantee against self-incrimination and assuming that in case a provision in that regard is made in the

1. [1962] 3 SCR 10.
2. (2010) 7 SCC 263.

law that would not offend Article 20 (3) of the Constitution.

8. Desai J., however, answers the question in the affirmative by means of a learned and elaborate discourse. She has navigated the arduous course to the conclusion at which she arrived very painstakingly and skillfully.

9. First, she firmly rejects the submission advanced on behalf of the State that in the absence of any express provision in that regard, it was within the inherent and implied powers of the Magistrate to direct the accused to give his/her voice sample to ensure a proper investigation. In this regard, she observes as follows:-

> "In the course of investigation, the police do use force. In a country governed by rule of law police actions which are likely to affect the bodily integrity of a person or likely to affect his personal dignity must have legal sanction. That prevents possible abuse of the power by the police. It is trite that every investigation has to be conducted within the parameters of the Code. The power to investigate into a cognizable offence must be exercised strictly on the condition on which it is granted. (***State of West Bengal v. Swapan Guha).*** The accused has to be dealt with strictly in accordance with law. Even though, taking of physical evidence which does not amount to communicating information based on personal knowledge to the investigating officer by the accused which may incriminate him, is held to be not violative of protection guaranteed by Article 20(3), the investigating officer cannot take physical evidence from an accused unless he is authorized by a Magistrate to do so. He cannot assume powers which he does not possess. He can only act on the strength of a direction given to him by a Magistrate and the Magistrate must have power to issue such a direction."

10. I am fully in agreement with what is said above.

11. However, having rejected the submission based on the inherent and implied powers of the Magistrate she makes a "search" for the power of the Magistrate to ask the accused to give his/her voice sample. She shortlists for that purpose (i) the provisions of the Identification of Prisoners Act, 1920, (ii) Section 73 of the Evidence Act and (iii) Sections 311A and 53 of the Code of Criminal Procedure.

12. She finds and holds that Section 73 of the Evidence Act and Section 311A of the Code of Criminal Procedure are of no help and those two provisions cannot be used for obtaining a direction from the Magistrate for taking voice sample and finally rests her conclusion on the provisions of The Identification of Prisoners Act, 1920 and Section 53 of the Code of Criminal Procedure.

13. Section 53 of the Code of Criminal Procedure originally read as under:-

> **"53. Examination of accused by medical practitioner at the request of police officer. –** (1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.
>
> (2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner."

14. In the year 2005, a number of amendments were made in the Criminal Procedure Code by Act 25 of 2005. Those amendments included the addition of an explanation to Section 53 and insertion of Sections 53-A and 311-A. The explanation added to Section 53 reads as under:-

"[*Explanation.* – In this section and in sections 53A and 54, -

(a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and **such other tests** *which the registered medical practitioner thinks necessary in a particular case*;

(emphasis added)

(b) "registered medical practitioner" means a medical practitioner who possess any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register.]"

15. Desai J. rejects the submission made on behalf of the appellant that "the term 'such other tests' mentioned in Explanation (a) is controlled by the words 'which the registered medical practitioner thinks necessary'" and relying heavily upon the decision of this Court in *Selvi* holds:

"…by adding the words 'and such other tests' in the definition of term contained in Explanation (a) to Section 53 of the Code, the legislature took care of including within the scope of the term 'examination' similar tests which may become necessary in the facts of a particular case. Legislature exercised necessary caution and made the said definition inclusive, not exhaustive and capable of

expanding to legally permissible limits with the aid of the doctrine of '*ejusdem generis*'."

16. I am completely unable to see how Explanation (a) to Section 53 can be said to include voice sample and to my mind the ratio of the decision in *Selvi* does not enlarge but restricts the ambit of the expressions 'such other tests' occurring in the Explanation.

17. In my opinion the Explanation in question deals with material and tangible things related to the human body and not to something disembodied as voice.

18. Section 53 applies to a situation where the examination of the person of the accused is likely to provide evidence as to the commission of an offence. Whether or not the examination of the person of the accused would afford evidence as to the commission of the offence undoubtedly rests on the satisfaction of the police officer not below the rank of sub-inspector. But, once the police officer makes a request to the registered medical practitioner for the examination of the person of the accused, what other tests (apart from those expressly enumerated) might be necessary in a particular case can only be decided by the medical practitioner and not the police officer referring the accused to him. In my view, therefore, Mr. Dave, learned counsel for the appellant, is right in his submission that any tests other than those expressly mentioned in the Explanation can only be those which the registered medical practitioner would think necessary in a particular case. And further that in any event a registered medical practitioner cannot take a voice sample.

19. Apart from Section 53 of the Code of Criminal Procedure, Desai J. finds another source for the power of the Magistrate in Section 5 of the Identification of Prisoners Act, 1920. Referring to some technical literature on voice print identification, she holds:

"Thus, it is clear that voiceprint identification of voice involves measurement of frequency and intensity of sound waves. In my opinion, therefore, measuring frequency or intensity of the speech-sound waves falls within the ambit of inclusive definition of the term 'measurement' appearing in the Prisoners Act"

And further:

"Thus, my conclusion that voice sample can be included in the inclusive definition of the term "measurements" appearing in Section 2(a) of the Prisoners Act is supported by the above-quoted observation that voice prints are like finger prints. Section 2(a) states that measurements include finger impressions and foot impressions. If voice prints are like finger prints, they would be covered by the term '*measurements*'."

She finally concludes:

"I am, therefore, of the opinion that a Magistrate acting under Section 5 of the Prisoners Act can give a direction to any person to give his voice sample for the purposes of any investigation or proceeding under the Code."

20. I am unable to agree.

21. In order to clearly state my views on the provisions of the Identification of Prisoners Act, I may refer to the object and the scheme of the Act. The principal object of the Act is to sanction certain coercive measures (which would otherwise invite criminal or tortuous liability) in order to facilitate the identification of (i) convicts, (ii) persons arrested in connection with certain offences, and (iii) persons ordered to give security in certain cases. The scheme of the Act is as follows. The first section relates to the short title and the extent of the Act. The second section has the definition clauses and defines 'measurements' and 'prescribed' in clauses (a) and (c) respectively which are as under:

"2. Definitions. – (1) In this Act, unless there is anything repugnant in the subject or context, -

(a) "measurements" include finger impressions and foot-print impressions;

(b) xxx xxx xxx

(c) "prescribed" means prescribed by rules made under this Act."

22. Then there are the three substantive provisions of the Act. Section 3 deals with taking of measurements, etc of **convicted** persons. It is as under:

"3. Taking of measurements, etc., of convicted persons. – Every person who has been –

(a) convicted of any offence punishable with rigorous imprisonment for a term of one year or upwards, or of any offence which would render him liable to enhanced punishment on a subsequent conviction; or

(b) ordered to give security for his good behaviour under section 118 of the Code of Criminal Procedure, 1898 (5 of 1898),

shall, if so required, allow his measurements and photograph to be taken by a police officer in the prescribed manner."

23. Section 4 deals with taking of measurement, etc. of **non-convicted** persons. It is as under:

"4. Taking of measurements, etc., of non-convicted persons. – Any person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards shall, if so required by a police officer, allow his measurements to be taken in the prescribed manner."

24. Section 5 deals with the power of Magistrate to order a person to be measured or photographed. It is as under:

> **"5. Power of Magistrate to order a person to be measured or photographed. –** If a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the Code of Criminal Procedure, 1898 (5 of 1898), it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer:
>
> Provided that no order shall be made directing any person to be photographed except by a Magistrate of the First Class:
>
> Provided further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding."

25. The rest of the provisions from Section 6 to Section 9 deal with incidental or consequential matters. Section 6 deals with resistance to the taking of measurements, etc. and it is as under:

> **"6. Resistance to the taking of measurements, etc. –** (1) If any person who under this Act is required to allow his measurements or photograph to be taken resists or refuses to allow the taking of the same, it shall be lawful to use all means necessary to secure the taking thereof.
>
> (2) Resistance to or refusal to allow the taking of measurements or photograph under this Act shall be deemed to be an offence under section 186 of the Indian Penal Code (45 of 1860)."

26. Section 7 deals with destruction of photographs and records of measurements, etc., on acquittal and it is as under:

> **"Destruction of photographs and records of measurements, etc., on acquittal. –** Where any person who, not having been previously convicted of an offence punishable with rigorous imprisonment for a term of one year or upwards, has had his measurements taken or has been photographed in accordance with the provisions of this Act is released without trial or discharged or acquitted by any court, all measurements and all photographs (both negatives and copies) so taken shall, unless the court or (in a case where such person is released without trial) the District Magistrate or Sub-Divisional Officer for reasons to be recorded in writing otherwise directs, be destroyed or made over to him."

27. Section 8 gives the State Governments the power to make rules and it is as under:

> **"8. Power to make rules. –** (1) The State Government may, [by notification in the Official Gazette,] make rules for the purpose of carrying into effect the provisions of this Act.
>
> (2) In particular and without prejudice to the generality of the foregoing provision, such rules may provide for –
>
> (a) restrictions on the taking of photographs of persons under section 5;
>
> (b) the places at which measurements and photographs may be taken;
>
> (c) the nature of the measurements that may be taken;
>
> (d) the method in which any class or classes of measurements shall be taken;
>
> (e) the dress to be worn by a person when being

photographed under section 3; and

(f) the preservation, safe custody, destruction and disposal of records of measurements and photographs.

[(3) Every rule made under this section shall be laid, as soon as may be after it is made, before State Legislature.]"

28. Section 9 finally lays down the bar of suits.

29. A careful reading of Sections 3, 4 and 5 would make it clear that the three provisions relate to three categories of persons. Section 3 relates to a convicted person. Section 4 relates to a person who has been arrested in connection with an offence punishable with rigorous imprisonment for term of 1 year or upwards. Section 5 is far wider in amplitude than Sections 3 and 4 and it relates to any person, the taking of whose measurements or photographs might be expedient for the purposes of any investigation or proceeding under the Code of Criminal Procedure. In the case of the first two categories of persons, the authority to take measurements vests in a police officer but in the case of Section 5, having regard to its much wider amplitude, the power vests in a Magistrate and not in any police officer.

30. It is to be noted that the expression "measurements" occurs not only in Section 5 but also in Sections 3 and 4. Thus, if the term "measurements" is to be read to include voice sample then on arresting a person in a case relating to an offence punishable with rigorous imprisonment for a term of 1 year or upwards (and voice sample would normally be required only in cases in which the punishment is one year or upward!) it would be open to the police officer (of any rank) to require the arrested person to give his/her voice sample on his own and without seeking any direction from the Magistrate under Section 5. Further, applying the same parameters, not only voice sample but many other medical tests, for instance, blood tests such as lipid profile, kidney function test, liver function test,

thyroid function test etc., brain scanning etc. would equally qualify as "measurements" within the meaning of the Identification of Prisoners Act. In other words on arresting a person in a case relating to an offence punishable with rigorous imprisonment for a term of 1 year or upwards it would be possible for the police officer (of any rank) to obtain not only the voice sample but the full medical profile of the arrested person without seeking any direction from the magistrate under Section 5 of the Identification of Prisoners Act or taking recourse to the provisions of Section 53 or 53A of the Code of Criminal Procedure.

31. I find it impossible to extend the provisions of the Identification of Prisoners Act to that extent.

32. It may not be inappropriate here to point out that in exercise of the rule-making powers under Section 8 of the Identification of Prisoners Act some of the State Governments have framed rules. I have examined the rules framed by the States of Maharashtra, Madhya Pradesh, Orissa, Pondicherry and Jammu & Kashmir. From a perusal of those rules it would appear that all the State Governments understood "measurements" to mean the physical measurements of the body or parts of the body. The framing of the rules by the State Government would not be binding on this Court in interpreting a provision in the rules. But it needs to be borne in mind that unless the provision are incorporated in the Act in regard to the manner of taking voice sample and the person competent to take voice sample etc. there may be difficulty in carrying out the direction of the Court.

33. For arriving at her conclusion regarding the scope of Section 5 of the Identification of Prisoners Act, Desai J. has considered two High Court judgments. One is of the Bombay High Court in *Central Bureau of Investigation, New Delhi v. Abdul Karim Ladsab Telgi and others*[3] and the other by the

3. 2005 Crl. L.J. 2868.

Delhi High Court in *Rakesh Bisht v. Central Bureau of Investigation*[4] she has approved the Bombay High Court decision in *Telgi's* case and disapproved the Delhi High Court decision in *Bisht's* case. The Bombay decision is based on exactly the same reasoning as adopted by Desai J that the definition of "measurements" in Section 2(a) is wide enough to include voice sample and hence a Magistrate is competent to order a person to give his voice sample. The relevant passage in the decision is as under:-

> "Be that as it may, the expression "measurements" occurring in Section 5 has been defined in Section 2(a), which reads thus:
>
> 2. Definitions. - In that Act …….
>
> (a) "measurements include finger-impressions and foot-print impressions".
>
> The said expression is an inclusive term, which also includes finger-impressions and foot-print impressions. Besides, the term measurement, as per the dictionary meaning is the act or an instance of measuring; an amount determined by measuring; detailed dimensions. With the development of Science and Technology, the voice sample can be analysed or measured on the basis of time, frequency, and intensity of the speech-sound waves so as to compare and identify the voice of the person who must have spoken or participated in recorded telephonic conversation. The expression "measurements" occurring in Section 5, to my mind, can be construed to encompass even the act undertaken for the purpose of identification of the voice in the tape-recorded conversation. Such construction will be purposive one without causing any violence to the said enactment, the purpose of which was to record or make note of the identity of specified persons."

4. 2007 Cri. L.J. 1530 = MANU/DE/0338/2007.

34. For the reasons discussed above, I am unable to accept the views taken in the Bombay decision and to my mind the decision in *Telgi* is not the correct enunciation of law.

35. The Delhi High Court decision in the case of *Bisht* pertains to the period prior to June 23, 2006, when the amendments made in the Code of Criminal Procedure by Act 25 of 2005 came into effect. It, therefore, did not advert to Sections 53 or 311A and considered the issue of taking voice sample of the accused compulsorily, primarily in light of Section 73 of the Indian Evidence Act, 1872. Though the decision does not refer to the provisions of the Criminal Procedure Code that came into force on June 23, 2006, in my view, it arrives at the correct conclusions.

36. At this stage, I may also refer to the decision of this Court in *State of Uttar Pradesh v. Ram Babu Misra*[5] where the Court considered the issue whether the Magistrate had the authority to direct the accused to give his specimen writing during the course of investigation. The first thing to note in regard to this decision is that it was rendered long before the introduction of Section 311A in the Code of Criminal Procedure which now expressly empowers the Magistrate to order a person to give specimen signature or handwriting for the purposes of any investigation or any proceeding under the Code. In *Ram Babu Misra* the Court noted that signature and writing are excluded from the range of Section 5 of the Identification of Prisoners Act, though finger impression was included therein. In that decision the Court made a suggestion to make a suitable law to provide for the investiture of Magistrates with the power to issue directions to any person, including an accused person, to give specimen signatures and writings. The suggestions made by the Court materialized 25 years later when Section 311A was introduced in the Code of Criminal Procedure.

5. (1980) 2 SCC 343.

37. The decision in *Ram Babu Misra* was rendered by this Court on February 19, 1980 and on August 27, the same year, the Law Commission of India submitted its 87th Report which was aimed at a complete revamp of the Identification of Prisoners Act, 1920 and to update it by including the scientific advances in the aid of investigation. In Paragraph 3.16 of the Report it was observed as under:

> "3.16 Often, it becomes desirable to have an accused person speak for the purposes of giving to the police an opportunity to hear his voice and try to identify it as that of the criminal offender … **However, if the accused refuses to furnish such voice, there is no legal sanction for compelling him to do so, and the use of force for that purpose would be illegal.**"
>
> (emphasis added)

38. Further, in Paragraph 5.26 it was stated as under:

> "5.26 The scope of section 5 needs to be expanded in another respect. The general power of investigation given to the police under the Criminal Procedure Code may not imply the power to require the accused to furnish a specimen of his voice. Cases in which the voice of the accused was obtained for comparison with the voice of the criminal offender are known but the question whether the accused can be *compelled* to do so does not seem to have been debated so far in India.
>
> **There is no specific statutory provision in India which expressly gives power to a police officer or a court to require an accused person to furnish a specimen of his voice."**
>
> (emphasis added)

39. I am not suggesting for a moment that the above extracts are in any way binding upon the Court but they do

indicate the response of a judicial mind while reading the provisions of the Indian Prisoners Act normally, without any urge to give the expression 'measurements' any stretched meaning.

40. The Report then discussed where a provision for taking voice sample can be appropriately included; whether in the Identification of Prisoners Act or in the Evidence Act or in the Code of Criminal Procedure. It concluded that it would be appropriate to incorporate the provision by amending Section 5 of the Identification of Prisoners Act as follows:

> "(1) If a Magistrate is satisfied that, for the purpose of any investigation or proceeding under the Code of Criminal Procedure, 1973, it is expedient to direct any person –
>
> (a) to allow his measurements or photograph to be taken, or
>
> (b) *to furnish a specimen of his signature or writing, or*
>
> (c) to furnish a specimen of his voice by uttering the specified words or making the specified sounds.
>
> the Magistrate may make an order to that effect, *recording his reasons for such an order*.
>
> (2) The person to whom the order relates –
>
> (a) shall be produced or shall attend at the time and place specified in the order, and
>
> (b) shall allow his measurements or photograph to be taken by a police officer, *or furnish the specimen signature or writing or furnish a specimen of his voice, as the case may be in conformity with the orders of the Magistrate before a police officer*.
>
> (3) No order directing any person to be photographed *shall be made* except by a *metropolitan Magistrate* or a Magistrate of the first class.

(4) No order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.

(5) *Where a court has taken cognizance of an offence a Magistrate shall not under this section, give to the person accused of the offence any direction which could, under section 73 of the Indian Evidence Act 1872, be given by such Magistrate*."

41. The Report as noted was submitted in 1980. The Code of Criminal Procedure was amended in 2005 when the Explanation was added to Section 53 and Sections 53A and 311A were inserted into the Code. Voice sample was not included either in the Explanation to Section 53 or Section 311A.

42. Should the Court still insist that voice sample is included in the definition of "measurements" under the Identification of Prisoners Act and in the Explanation to Section 53 of the Code of Criminal Procedure? I would answer in the negative.

43. In light of the above discussion, I respectfully differ from the judgment proposed by my sister Desai J. I would allow the appeal and set aside the order passed by the Magistrate and affirmed by the High Court.

44. Let copies of this judgment be sent to the Union Law Minister and the Attorney General and their attention be drawn to the issue involved in the case.

45. In view of the difference of opinion between us, let this case be listed for hearing before a bench of three Judges after obtaining the necessary direction from the Honourable the Chief Justice of India.

R.P. Matter referred to a Bench of three Judges.

NARAIN PANDEY
v.
PANNALAL PANDEY
(Civil Appeal No. 6363 of 2004)

DECEMBER 10, 2012

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

Advocates:

Professional misconduct –Punishment – Advocate filing Vakalatnamas without any authority and subsequently filing fictitious compromises – Also reprimanded previously by Disciplinary Committee of BCI – Disciplinary Committee of State Bar Council holding the charges proved and debarring the advocate from practice for 7 years – DC, BCI, modifying the punishment by reprimand and costs of Rs.1000/- – Held: In view of the specific finding recorded by Disciplinary Committee of State Bar Council, the professional misconduct committed by the advocate is extremely grave and serious – He deserves punishment commensurate with degree of misconduct that meets the twin objectives; i.e. deterrence and correction – Advocate debarred from practice for 3 years from date – Administration of justice – Practice and Procedure.

Practice and Procedure:

Misconduct of advocate – Disciplinary Committee of State Bar Council, on the basis of oral and documentary evidence, holding the charges proved – Disciplinary Committee of BCI, accepting the oral submission and affidavit of advocate, reversing the finding of Disciplinary Committee of State Bar Council – Held: The Disciplinary Committee, BCI accepted the oral submission of the advocate without realizing that he even did not offer himself for cross-examination in respect of the affidavit that he filed in support

of his reply – As a matter of fact, the advocate did not tender any evidence whatsoever in rebuttal – Mere oral submission unsupported by oral or documentary evidence on behalf of the advocate did not justify reversal of thorough and well-considered finding by the Disciplinary Committee of State Bar Council on analysis of the oral and documentary evidence let in by the complainant in support of the complaint – Findings of Disciplinary Committee of State Bar Council restored – Evidence.

On a complaint filed by the appellant against the respondent-advocate, the Disciplinary Committee of the State Bar Council held that the respondent was involved in a very serious professional misconduct by filing vakalatnamas without any authority and later on filing fictitious compromises which adversely affected the interests of the parties concerned. It also noticed the previous conduct of the respondent with regard to which the Bar Council of India (BCI) had affirmed the raprimand order and had also imposed a fine of Rs.1000/- on him. In the circumstances, the Disciplinary Committee of the Stae Bar Council passed the order dated 28.5.2002 debarring the respondent from practice for a period of seven years. On appeal, the Disciplinary Committee, BCI did not agree with the said finding and modified the order of punishment. It reprimanded the advocate and also imposed a cost of Rs.1000/- to be paid by him to BCI. Aggrieved, the complainant filed the appeal.

Allowing the appeal in part, the Court

HELD: 1.1. The consideration of the matter by the Disciplinary Committee, BCI is clearly flawed. It overlooked the most vital aspect that seven witnesses tendered in evidence by the complainant had stated clearly and unequivocally that the respondent-advocate had filed forged and fabricated vakalatnamas on their behalf and they had not filed any compromise in

Consolidation Court. The respondent-advocate had not at all cross-examined these witnesses on the said aspect. There was ample documentary evidence as well which proved the allegations made in the complaint. The Disciplinary Committee, BCI accepted the oral submission of the respondent-advocate without realizing that he even did not offer himself for cross-examination in respect of the affidavit that he filed in support of his reply. As a matter of fact, the respondent-advocate did not tender any evidence whatsoever in rebuttal. Mere oral submission unsupported by oral or documentary evidence on behalf of the respondent-advocate did not justify reversal of thorough and well-considered finding by the Disciplinary Committee of the State Bar Council on analysis of the oral and documentary evidence let in by the complainant in support of the complaint. The finding recorded by the Disciplinary Committee, BCI cannot be sustained. [para 9-10] [758-G-H; 759-A-D-F-G]

1.2. On careful consideration of the entire material placed on record, this Court is of the considered view that the findings recorded by the Disciplinary Committee of the State Bar Council that the respondent-advocate was involved in a very serious professional misconduct by filing vakalatnamas without any authority and later on filing fictitious compromises which adversely affected the interest of the parties concerned is restored. [para 11] [759-G-H; 760-A]

2.1. Awarding of punishment for a professional misconduct is a delicate and sensitive exercise. The professional misconduct committed by the respondent is extremely grave and serious and deserves punishment commensurate with the degree of misconduct that meets the twin objectives – deterrence and correction. Fraudulent conduct of a lawyer cannot be viewed leniently lest the interest of the administration of justice and the highest traditions of the Bar may become

casualty. Any compromise with the purity, dignity and nobility of the legal profession is surely bound to affect the faith and respect of the people in the rule of law. Moreover, the respondent-advocate had been previously found to be involved in a professional misconduct and he was reprimanded. [para 13 and 18] [760-D; 766-A-D]

Bar Council of Maharashtra v. M.V. Dabholkar and others **1976 (1) SCR 306 = 1975 (2) SCC 702;** *V.C. Rangadurai v. D. Gopalan and Others* **1979 (1) SCR 1054 = 1979 (1) SCC 308;** *M. Veerabhadra Rao v. Tek Chand* **1985 SCR 1003 = 1984 Suppl. SCC 571;** *Dhanraj Singh Choudhary v. Nathulal Vishwakarma* **2011 (16) SCR 240 = 2012 (1) SCC 741 - referred to.**

2.2. Having regard to all the aspects, it would be just and proper if the respondent-advocate is suspended from practice for a period of three years from date. The order passed by the Disciplinary Committee, BCI is modified and the respondent-advocate is awarded punishment accordingly for his professional misconduct. [para 18-19] [766-E-F]

Case Law Reference:

1976 (1) SCR 306	**referred to**	**para 14**
1979 (1) SCR 1054	**referred to**	**para 15**
1985 SCR 1003	**referred to**	**para 16**
2011 (16) SCR 240	**referred to**	**para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6363 of 2004.

From the Judgment & Order dated 20.6.2004 of the Disciplinary Committee of Bar Council of India in D.C. Appeal No. 67 of 2002.

Anantha Narayana M.G., R.D. Upadhyay for the Appellant.

Dinesh Kumar Garg for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The complainant is in appeal under Section 38 of the Advocates Act, 1961 (for short, '1961 Act') aggrieved by the judgment and order dated 20.6.2004 passed by the Disciplinary Committee of the Bar Council of India.

2. The appellant filed a complaint against the respondent, an advocate practicing in Tehsil Gyanpur, District Sant Rabidass Nagar, Bhadohi under Section 35 of the 1961 Act before the Bar Council of Uttar Pradesh (for short, 'BCUP') alleging that he is involved in number of false cases by forging and fabricating documents including settlement documents without the knowledge of the parties in the Consolidation Court. The complainant alleged that besides the cases of other people, in the case of the complainant also without his knowledge and other co-khatedars, the respondent filed a compromise deed by forging and fabricating their signatures and obtained orders from the Consolidation Court. The complainant gave the details of four cases in this regard. The complainant also stated in the complaint that respondent has been earlier held guilty of professional misconduct and, in this regard, referred to the judgment in the matter of Diwakar Prasad Shukla v. Panna Lal Pandey. The complainant prayed that the respondent be proceeded with the professional misconduct and be punished by cancelling his license to practice.

3. The complaint was referred to its Disciplinary Committee by BCUP. The respondent filed written statement to the complaint and denied the allegations made in the complaint. In his reply, the respondent denied that he has forged signatures or created any fictitious compromise documents. He set up the plea that the complaint has been filed against him due to enmity.

4. The complainant filed his affidavit in support of the complaint and in the course of enquiry examined seven witnesses. The complainant also produced documentary evidence. On the other hand, although the respondent filed his affidavit in support of the reply but neither he offered himself for cross-examination nor he let in any evidence in opposition to the complaint and in support of his reply.

5. The Disciplinary Committee, BCUP considered the evidence tendered by the complainant at quite some length and observed that all the witnesses produced by the complainant had supported the allegations made in the complaint; the witnesses had stated that compromises which were filed by the respondent-advocate were not signed by them and they had never engaged the respondent as their advocate to conduct their cases in the Consolidation Court. The Disciplinary Committee, BCUP also observed that the respondent-advocate did not cross-examine the witnesses of the complainant on this point. On careful analysis of the evidence, the Disciplinary Committee, BCUP concluded as follows :

> "From the above discussion and from the perusal of documents it is clear that accused Advocate is involved in a very serious professional misconduct by filing vakalatnamas without any authority and later on filing fictitious compromise which adversely affect the interest of the parties concerned……."

6. Insofar as respondent's past conduct was concerned, the Disciplinary Committee, BCUP noted thus :-

> "From the perusal of judgment passed by State Bar Council and Bar Council of India, it is established that State Bar Council had taken lenient view by reprimanding the accused Advocate which was modified by Bar Council of India who affirmed the reprimand order and also imposed Rs. 1000/- as cost, failing which accused Advocate will be suspended for the period of six months. The matter involve

> in the said case is that accused Advocate had filed a fictitious compromise in the Court of Consolidation Officer. Present complaint is also about farzy vakalatnama and fictitious compromise.

7. The Disciplinary Committee, BCUP having regard to the respondent's previous professional misconduct and the finding that he was involved in a very serious professional misconduct by filing vakalatnamas without any authority and later on filing fictitious compromises, passed an order dated 28.5.2002 debarring him from practice for a period of seven years from the date of the judgment.

8. The respondent-advocate, challenged the order of the Disciplinary Committee, BCUP in appeal under Section 37 of the 1961 Act before the Disciplinary Committee of the Bar Council of India (BCI). The Disciplinary Committee, BCI heard the parties and held that respondent herein (appellant therein) had acted negligently in the matters before the Chakbandi Officer. However, the Disciplinary Committee, BCI did not agree with the finding of the Disciplinary Committee, BCUP that the advocate had forged the signatures. The Disciplinary Committee, BCI, accordingly, modified the order of punishment and reprimanded him and also imposed a cost of Rs. 1,000/- to be paid by him to the BCI towards the Advocates Welfare Fund and if the amount was not paid within one month from the date of the receipt of the order he would be suspended from practicing for a period of six months. The order passed by the Disciplinary Committee, BCI on 20.6.2004 is the subject matter of appeal.

9. The consideration of the matter by the Disciplinary Committee, BCI is clearly flawed. It overlooked the most vital aspect that seven witnesses tendered in evidence by the complainant had stated clearly and unequivocally that the respondent-advocate had filed forged and fabricated vakalatnamas on their behalf and they had not filed any compromise in Consolidation Court. The respondent-advocate

had not at all cross-examined these witnesses on the above aspect although they were cross-examined on other aspects. There was ample documentary evidence as well which proved the allegations made in the complaint that the respondent-advocate had filed forged and fabricated vakalatnamas as well as compromises in diverse proceedings before the Consolidation Court. The Disciplinary Committee, BCI accepted the oral submission of the respondent-advocate (appellant therein) without realizing that the respondent even did not offer himself for cross-examination in respect of the affidavit that he filed in support of his reply. As a matter of fact, the respondent-advocate did not tender any evidence whatsoever in rebuttal. Mere oral submission unsupported by oral or documentary evidence on behalf of the respondent-advocate did not justify reversal of thorough and well-considered finding by the Disciplinary Committee, BCUP on analysis of the oral and documentary evidence let in by the complainant in support of the complaint. It is true that the complainant and the respondent-advocate are uncle and nephew and some dispute regarding the property amongst the family members of the appellant and the respondent was going on but on that basis the well-reasoned and carefully written finding recorded by the Disciplinary Committee, BCUP was not liable to be reversed by the Disciplinary Committee, BCI.

10. The finding recorded by the Disciplinary Committee, BCI, "this Committee on perusal of the allegations made in the complaint does not agree with the findings of appearing on behalf of both the sides and forging the signatures arrived at by the Disciplinary Committee of the State Bar Council of Uttar Pradesh and the order wherein the appellant is debarred from practice for seven years" cannot be sustained.

11. On careful consideration of the entire material placed on record, we are of the considered view that the findings recorded by the Disciplinary Committee, BCUP that the respondent-advocate was involved in a very serious

professional misconduct by filing vakalatnamas without any authority and later on filing fictitious compromises which adversely affected the interest of the parties concerned deserve to be restored and we order accordingly.

12. The question now is of award of just and proper punishment. As noted above, the Disciplinary Committee, BCUP debarred the respondent from practice for a period of seven years. The Disciplinary Committee, BCI in the impugned order while holding that the respondent should have been careful in dealing with the matters before the Chakbandi Officer and that he had acted negligently modified the order of punishment awarded by the Disciplinary Committee, BCUP and reprimanded the respondent-advocate (appellant therein) and also imposed cost and default punishment, as noted above.

13. The award of punishment for a professional misconduct is a delicate and sensitive exercise. The Bar Council of India Rules, as amended from time to time, have been made by the BCI in exercise of its rule making powers under the 1961 Act. Chapter II, Part VI deals with standards of professional conduct and etiquette. Its preamble reads as under :

> "An advocate shall, at all times, comport himself in a manner befitting his status as an officer of the Court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity may still be improper for an Advocate. Without prejudice to the generality of the foregoing obligation, an Advocate shall fearlessly uphold the interests of his client, and in his conduct conform to the rules hereinafter mentioned both in letter and in spirit. The rules hereinafter mentioned contain canons of conduct and etiquette adopted as general guides; yet the specific mention thereof shall not be construed as a denial of the existence of other equally imperative though not specifically mentioned."

14. The matters relating to professional misconduct of advocates under the 1961 Act have reached this Court from time to time. It is not necessary to deal with all such cases; reference to some of the cases shall suffice. In *Bar Council of Maharashtra v. M.V. Dabholkar and others,*[1] a seven-Judge Bench of this Court was concerned with an appeal filed under Section 38 of the 1961 Act by the Bar Council of Maharashtra and the main controversy therein centered around the meaning of the expression "person aggrieved". While dealing with the said controversy, V.R. Krishna Iyer, J. in his concurring opinion made the following weighty observations with regard to the Bar and its members:

> "52. The Bar is not a private guild, like that of 'barbers, butchers and candlestick-makers' but, by bold contrast, a public institution committed to public justice and pro bono publico service. The grant of a monopoly licence to practice law is based on three assumptions: (1) There is a socially useful function for the lawyer to perform, (2) The lawyer is a professional person who will perform that function, and (3) His performance as a professional person is regulated by himself not more formally, by the profession as a whole. The central function that the legal profession must perform is nothing less than the administration of justice (*'The Practice of Law is a Public Utility' — 'The Lawyer, The Public and Professional Responsibility'* by F. Raymond Marks *et al* — Chicago American Bar Foundation, 1972, p. 288-289). A glance at the functions of the Bar Council, and it will be apparent that a rainbow of public utility duties, including legal aid to the poor, is cast on these bodies in the national hope that the members of this monopoly will serve society and keep to canons of ethics befitting an honourable order. If pathological cases of member misbehaviour occur, the reputation and credibility of the Bar suffer a mayhem and who, but the Bar Council, is more concerned with and sensitive to this

1. (1975) 2 SCC 702.

> potential disrepute the few black sheep bring about? The official heads of the Bar i.e. the Attorney-General and the Advocates-General too are distressed if a lawyer "stoops to conquer" by resort to soliciting, touting and other corrupt practices."

15. In *V.C. Rangadurai v. D. Gopalan and Others*[2], a majority judgment in an appeal filed under Section 38 of the 1961 Act speaking through V.R. Krishna Iyer, J. observed as follows:

> "4. Law is a noble profession, true; but it is also an elitist profession. Its ethics, in practice, (not in theory, though) leave much to be desired, if viewed as a profession *for the people*. When the Constitution under Article 19 enables professional expertise to enjoy a privilege and the Advocates Act confers a monopoly, the goal is not assured income but commitment to the people — the common people whose hunger, privation and hamstrung human rights need the advocacy of the profession to change the existing order into a Human Tomorrow. This desideratum gives the clue to the direction of the penance of a deviant geared to correction. Serve the people free and expiate your sin, is the hint.
>
> 5. Law's nobility as a profession lasts only so long as the members maintain their commitment to integrity and service to the community. Indeed, the monopoly conferred on the legal profession by Parliament is coupled with a responsibility — a responsibility towards the people, especially the poor. Viewed from this angle, every delinquent who deceives his common client deserves to be frowned upon. This approach makes it a reproach to reduce the punishment, as pleaded by learned counsel for the appellant.

2. (1979) 1 SCC 308.

6. But, as we have explained at the start, every punishment, however has a functional duality — deterrence and correction. Punishment for professional misconduct is no exception to this "social justice" test. In the present case, therefore, from the punitive angle, the deterrent component persuades us not to interfere with the suspension from practice reduced "benignly" at the appellate level to one year. From the correctional angle, a gesture from the Court may encourage the appellant to turn a new page. He is not too old to mend his ways. He has suffered a litigative ordeal, but more importantly he has a career ahead. To give him an opportunity to rehabilitate himself by changing his ways, resisting temptations and atoning for the serious delinquency, by a more zealous devotion to people's causes like legal aid to the poor, may be a step in the correctional direction.

xxx xxx xxx

11. Wide as the power may be, the order must be germane to the Act and its purposes, and latitude cannot transcend those limits. Judicial 'Legisputation' to borrow a telling phrase of J. Cohen [Dickerson : The Interpretation and Application of Statutes, p. 238], is not legislation but application of a given legislation to new or unforeseen needs and situations broadly falling within the statutory provision. In that sense, 'interpretation is inescapably a kind of legislation'. This is not legislation *stricto sensu* but application, and is within the court's province.

12. We have therefore sought to adapt the punishment of suspension to serve two purposes — injury and expiation. We think the ends of justice will be served best in this case by directing suspension plus a provision for reduction on an undertaking to this court to serve the poor for a year. Both are orders within this Court's power."

16. In *M. Veerabhadra Rao v. Tek Chand*[3], a three-Judge Bench of this Court considered the relevant provisions contained in Bar Council of India Rules with reference to standards of professional conduct and etiquette and also sub-section (3) of Section 35 of 1961 Act. In paragraph 28 (Pg. 586) of the Report, this Court observed thus:

> "28. Adjudging the adequate punishment is a ticklish job and it has become all the more ticklish in view of the miserable failure of the peers of the appellant on whom jurisdiction was conferred to adequately punish a derelict member. To perform this task may be an unpalatable and onerous duty. We, however, do not propose to abdicate our function howsoever disturbing it may be."

16.1. Then in paragraph 30 (Pg. 587), this Court observed that the legal profession was monopolistic in character and this monopoly itself inheres certain high traditions which its members are expected to upkeep and uphold. The Court then referred to the decision of this Court in *M.V. Dabholkar*[1] and observed as follows:

> "If these are the high expectations of what is described as a noble profession, its members must set an example of conduct worthy of emulation. If any of them falls from that high expectation, the punishment has to be commensurate with the degree and gravity of the misconduct……..".

16.2. Then in paragraph 31 of the Report (Pgs. 588-589) this Court held as under:

> "31**.** Having given the matter our anxious consideration, looking to the gravity of the misconduct and keeping in view the motto that the punishment must be commensurate with the gravity of the misconduct, we direct that the appellant M. Veerabhadra Rao shall be suspended from practice for a period of five years that is up to and inclusive

3. 1984 (Supp) SCC 571.

of October 31, 1989. To that extent we vary the order both of the Disciplinary Committee of the State Bar Council as well as the Disciplinary Committee of the Bar Council of India."

17. In a recent decision of this Court in *Dhanraj Singh Choudhary v. Nathulal Vishwakarma*[4], this Court speaking through one of us (R.M. Lodha, J.) in paragraph 23 of the Report (Pg. 747) observed as follows:

"23. The legal profession is a noble profession. It is not a business or a trade. A person practising law has to practise in the spirit of honesty and not in the spirit of mischief-making or money-getting. An advocate's attitude towards and dealings with his client have to be scrupulously honest and fair."

17.1. In paragraph 24 (Pg. 747), the observations made in *V.C. Rangadurai*[2] were quoted and then in paragraph 25 of the Report (Pg. 747), the Court held as under :

"25. Any compromise with the law's nobility as a profession is bound to affect the faith of the people in the rule of law and, therefore, unprofessional conduct by an advocate has to be viewed seriously. A person practising law has an obligation to maintain probity and high standard of professional ethics and morality."

17.2. The Court in para 32 (Pg. 748) observed that the punishment for professional misconduct has twin objectives – deterrence and correction.

18. In light of the above legal position, we now consider the question of punishment. We have restored the finding of the Disciplinary Committee, BCUP viz., that the respondent-advocate was involved in a very serious professional misconduct by filing vakalatnamas without any authority and later

4. (2012) 1 SCC 741.

on filing fictitious compromises. The professional misconduct committed by the respondent is extremely grave and serious. He has indulged in mischief-making. An advocate found guilty of having filed vakalatnamas without authority and then filing fictitious compromises without any authority deserves punishment commensurate with the degree of misconduct that meets the twin objectives – deterrence and correction. Fraudulent conduct of a lawyer cannot be viewed leniently lest the interest of the administration of justice and the highest traditions of the Bar may become casualty. By showing undue sympathy and leniency in a matter such as this where the advocate has been found guilty of grave and serious professional misconduct, the purity and dignity of the legal profession will be compromised. Any compromise with the purity, dignity and nobility of the legal profession is surely bound to affect the faith and respect of the people in the rule of law. Moreover, the respondent-advocate had been previously found to be involved in a professional misconduct and he was reprimanded. Having regard to all these aspects, in our view, it would be just and proper if the respondent-advocate is suspended from practice for a period of three years from today. We order accordingly.

19. The order passed by the Disciplinary Committee, BCI is modified and the respondent-advocate is awarded punishment for his professional misconduct, as indicated above. Civil Appeal is allowed to that extent with no order as to costs.

20. The Registrar shall send copies of the order to the Secretary, State Bar Council, Uttar Pradesh and the Secretary, Bar Council of India immediately.

R.P. Appeal partly allowed.

BHASKAR LAXMAN JADHAV & ORS.
v.
KARAMVEER KAKASAHEB WAGH EDUCATION SOCIETY & ORS.
(Petition for Special Leave To Appeal No. 30469 of 2009)

DECEMBER 11, 2012

[SWATANTER KUMAR AND MADAN B. LOKUR, JJ.]

Bombay Public Trust Act, 1950:

s.36 – Agricultural land belonging to a public trust – Alienation of by inviting bids – Transaction in favour of petitioners (highest bidders of first bid) not finalized – Fresh offers invited – Respondent no. 1 turned to be highest bidder in second bid – Petitioners and trustees entering into compromise and obtaining orders from High Court without impleading respondent no. 1 in the proceedings – Meanwhile another offer higher than that of respondent no. 1 also received – High Court directing to implead all the bidders of second bid in the proceedings before Charity Commissioner – Held: Keeping in view the language of s.36, the interest of the trust would be in getting the maximum for its immovable property – Charity Commissioner is directed to have a fresh look at the sale of the subject land of the Trust in accordance with the directions of the High Court – However, it would be open to the Charity Commissioner to permit all the parties before it to submit fresh offers for the Trust land and if deemed necessary, a fresh public notice for sale of the Trust land may be issued, keeping the price offered by respondent no. 1 as the reserve price.

Constitution of india, 1950:

Art. 136 – Petition for special leave to appeal – Conduct of petitioners – Held: It is the obligation of a litigant to disclose

all the facts of a case and leave the decision making to the court – In the instant case, petitioners have not come up-front and clear with material facts – The Court declines to grant special leave to appeal to the petitioners for suppression of a material fact.

In response to the offers for sale of 9 acres of agricultural land belonging to a public trust, the petitioners' bid being the highest (Rs. 22.5 lakh) was accepted and an agreement for sale/purchase was entered into on 18.2.1995. Since the transaction could not be finalized, the trustees moved an application before the Joint Charity Commissioner on 13.9.2001 to extend the time for completing the transaction, and in January 2002 they moved another application for revised permission. The JCC, by order dated 2.5.2003, rejected both the applications. On 15.8.2004 the petitioners and the trustees entered into a fresh agreement increasing the sale price of the subject land to Rs. 1 cr. 25 lakhs. The trustees moved a second application for extension of time, which was rejected by JCC by his order dated 24.7.2006. On 19.2.2007, the trustees issued a public notice for sale of the subject land and respondent no. 1 offered the highest bid of Rs.43 lakhs per acre. Thereafter, the petitioners filed a writ petition (without impleading respondent no. 1) in the High Court challenging the order dated 24.7.2006 passed by the JCC. On 28.8.2008, the petitioners and the trustees entered into a compromise that the order dated 24.7.2006 be set aside and the second application for extension of time be remanded to JCC for hearing on merits impleading the petitioners also as parties to the proceedings. The High Court passed an order in terms of the compromise. When respondent no. 1 came to know of the proceeding before JCC, he applied for his impleadment and so also the other interested purchasers. JCC, by order dated 29.11.2008 rejected the applications. Respondent no. 1 filed a writ petition challenging the

order of JCC with an alternate prayer for a direction to the JCC to consider his bid. The High Court noticed that another offer higher than that of respondent no. 1 had been received. It, therefore, remanded the entire matter for consideration by the Charity Commissioner with a direction to consider all the bids received pursuant to public notice dated 19.2.2007 including those of the petitioners and respondent no. 1.

In the instant petition for special leave, the petitioners contended that the issue before the High Court pertained to impleadment of respondent no.1 in the second application for extension of time, but the High Court over-stepped its jurisdiction in directing consideration of all bids received pursuant to public notice dated 29.2.2007 and effectively rejected the second application itself, virtually setting aside the order of the co-ordinate Bench directing the JCC to hear the second application for extension of time. On behalf of respondent no. 1, it was submitted that the petitioners were guilty of suppression of material facts in as much as they did not bring to the notice of the Court that JCC had earlier on 2.5.2003 rejected their first application for extension of time, which had attained finality.

Disposing of the petition, the Court

HELD: 1.1. It is true that the question before the High Court was very limited, namely, whether respondent No.1 ought to have been impleaded by the JCC in the second application for extension of time. However, on an overall consideration of the facts and circumstances of the case, the High Court was perhaps left with no option but to pass the order that it did and accept the alternative prayer of respondent No. 1, as the trustees and the petitioners were colluding and it was not possible to entirely rule out the possibility that they would enter into yet another mutual

arrangement to wipe out whatever interest respondent No.1 had in the Trust land. Therefore, impleading respondent No.1 before the JCC could have been rendered into a mere formality. Additionally, the lack of *bona fides* of the trustees and the petitioners could not be overlooked by the High Court. Therefore, the safest course of action for the High Court was to require sale of the Trust land through auction. [para 50] [786-F-H; 787-A-B]

1.2. The facts of the case show that the trustees and the petitioners have been indulging in a flip-flop and in a sense taking advantage of the absence of any clear-cut statutory measures to prevent an abuse of the process of law. The trustees and the petitioners entered into a total of three agreements from time to time. The trustees moved two applications for extension of time to complete the sale transaction with the petitioners. The trustees even sought to withdraw their first application for extension of time and to seek a revised sanction from the JCC to sell the Trust land to a third party apparently because they fell out with the petitioners. The JCC, therefore, rightly rejected the first application for extension of time on 2.5.2003. He gave two significant reasons for doing so, namely, that the trustees were not voluntarily selling the Trust land and secondly, given the circumstances, the sale transaction was not for the benefit and in the interest of the Trust. This order has attained finality, not having been challenged by anybody. It is this order that has been suppressed by the petitioners from this Court. [para 35-37] [782-F-H; 783-A-C]

1.3. While considering the second application for extension of time on 24.7.2006 the JCC observed that the trustees were "changing track from time to time and for the reasons best known to them are bowing before the proposed purchasers". The JCC doubted the *bona fides*

of the trustees and accordingly rejected their second application for extension of time. [para 38] [783-D]

1.4. After the second application for extension of time was rejected, the trustees issued a public notice on 19.2.2007 for sale of the Trust land. When the trustees received offers including the highest bid by respondent No.1, the petitioners filed a writ petition in the High Court challenging the order rejecting the second application for extension of time. But respondent No.1 was not impleaded in the writ petition either by the petitioners or at the instance of the trustees. The fact that third party interests were in existence was definitely known to the trustees, if not to the petitioners, and this should have been brought to the notice of the High Court. In this background, the compromise effected between the trustees and the petitioners in the High Court on 28.8.2008 appears rather suspicious. To this extent, it may be correct to say that the order dated 28.8.2008 passed by the High Court was collusively obtained by the parties. These facts clearly indicate that all through, the conduct of the trustees and the petitioners leaves much to be desired. [para 39-42] [783-E-H; 784-A-B]

1.5. In the facts and circumstances of the case, the Court is of the view that the petitioners and the trustees were trying to take advantage of, if not exploit, the situation and the absence of any adverse consequences under the Act for not complying with the terms of the sanction originally granted. [para 43] [784-C-D]

1.7. Another factor that weighed with the High Court in this regard was the submission of the Assistant Government Pleader that the Charity Commissioner had received an offer higher than that given by respondent No.1. Therefore, it is quite clear that due to the passage of time, mainly because of the flip-flop of the trustees and the petitioners, the value of the Trust land had increased

considerably. In these circumstances, it would be in the best interest of the trust if the maximum price is available for the Trust land from the open market. While this may or may not have been a consideration before the High Court, it is certainly one of the considerations before this Court for not interfering with the order passed by the High Court, even though it may have, over-stepped its jurisdiction. [para 51] [787-C-E]

1.8. Section 36 of the Act clearly provides that the trustees may be allowed by the Charity Commissioner to dispose of immoveable property of the trust, regard being had to the "interest, benefit or protection" of the trust. It cannot be doubted that the interest of the trust would be in getting the maximum for its immoveable property. Following the consistent view taken by this Court as well as the language of s.36 of the Act, this Court holds that the only course available to the High Court was to mould the relief and direct the Charity Commissioner to have a re-look at all bids received pursuant to the public notice dated 10.2.2007. [para 52 and 56] [787-F; 790-A-B]

Chenchu Rami Reddy v. Government of Andhra Pradesh, **1986 (1) SCR 989 = 1986 (3) SCC 391;** *R. Venugopala Naidu v. Venkatarayulu Naidu Charities*, **1989 (1) Suppl. SCR 760 = 1989 Suppl. (2) SCC 356 and** *Mehrwan Homi Irani v. Charity Commissioner Bombay*, **2001 (5) SCC 305 - relied on.**

2. It cannot be said that by the impugned order, the High Court has effectively set aside its earlier order dated 28.8.2008 passed by a coordinate Bench. The circumstances under which the earlier order was passed and the significant developments that took place thereafter and made it necessary for the High Court to pass a different order. It is not as if both orders were passed by the High Court under similar circumstances.

The circumstances had changed and the view of the High Court on the changed circumstances could also be different. [para 58] [790-F-G]

3.1. The facts regarding rejection, on 2.5.2003, of the first application for extension of time filed by the trustees and the finality attached to it, have not been clearly disclosed to this Court by the petitioners. It is the obligation of a litigant to disclose all the facts of a case and leave the decision making to the court. The petitioners have not clearly disclosed the facts and circumstances in which the order dated 2.5.2003 was passed or that it has attained finality. A mere reference to the order dated 2.5.2003, *en passant*, **in the order dated 24.7.2006 does not serve the requirement of disclosure. Unfortunately, the petitioners have not come up-front and clean with all material facts.[para 44, 46 and 49] [784-E-F, H; 785-A-B; 786-C-D]**

Hari Narain v. Badri Das **1964 SCR 203 = AIR 1963 SC 1558;** *Ramjas Foundation v. Union of India,* **2010 (15) SCR 364 = (2010) 14 SCC 38 – relied on.**

3.2. Therefore, this Court declines to grant special leave to appeal to the petitioners for suppression of a material fact. The Charity Commissioner is directed to have a fresh look at the sale of the subject land of the Trust in accordance with the directions of the High Court. However, it would be open to the Charity Commissioner to permit all the parties before it to submit fresh offers for the Trust land and if deemed necessary, a fresh public notice for sale of the Trust land may be issued. On the basis of the bid given by respondent No.1 as disclosed in Court, it is made clear that the price for the sale of the Trust land shall not be less than Rs.3.87 crore. [para 59] [790-H; 791-A-C]

Case Law Reference:

1986 (1) SCR 989	**relied on**	**para 32**
1989 (1) Suppl. SCR 760	**relied on**	**para 32**
2001 (5) SCC 305	**relied on**	**para 32**
1964 SCR 203	**relied on**	**para 46**
2010 (15) SCR 364	**relied on**	**para 48**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 30469 of 2009.

From the Judgment & Order dated 24.04.2009 of the High Court of Judicature of Bombay in Writ Petition No. 7863 of 2008.

C.A. Sundram, Jayant Bhushan, Anish R. Shah, Rishi Jain, Brij Kihor Sah, Shivaji M. Jadhav for the Petitioners.

V.A. Mohta, R.K. Odhekar, Aniruddha P. Mayee, Nilkanth, Charudatta, Sanjay V. Kharde, Asha Gopalan Nair, Kumar Parimal, Praveena Gautam for the Respondents.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. The facts of this case are a little elaborate, spanning as they do more than a decade and a half. However, the issue raised is somewhat narrow and is, in a sense, limited to the question whether the High Court over-stepped its jurisdiction in issuing the directions that it did.

2. The issue before the High Court was whether respondent No.1 should be impleaded as a party in the proceedings before the Charity Commissioner in an application filed by a trust for sanction to sell off some land belonging to it. The High Court obliquely decided the issue by directing the Charity Commissioner to go ahead with the advertised auction

of the trust land in which respondent No. 1 was the highest bidder.

3. While upholding the decision of the High Court, we feel that it may have over-stepped in giving the direction that it did. But, we are of the opinion that the learned judges had no option but to mould the relief and give the direction that it did in the best interest of the trust, in keeping with the provisions of Section 36 of the Bombay Public Trust Act, 1950. Consequently, there is no reason to interfere with the direction of the High Court.

4. We are also of the opinion that the petitioners have suppressed a material fact from us and, therefore, special leave to appeal ought not to be granted to the petitioners.

Facts:

5. On 29th November, 1994 the trustees of the Shri Vyankatesh Mandir Trust at Panchavati, Nasik resolved to sell 9 (nine) acres of agricultural land belonging to the Trust in Survey No. 275 situated at Aurangabad Road, Panchavati, Nasik by calling tenders from the public at large. For convenience the land resolved to be sold is hereinafter referred to as the 'Trust land'.

6. Pursuant to the resolution, the trustees issued a public notice in the newspaper "Rambhoomi" inviting offers for purchase of the Trust land. In response, they received four offers, the highest being that of the petitioners for Rs.2.5 lakhs per acre totaling Rs.22.5 lakhs.

7. The petitioners' offer was accepted by the trustees and on 18th February 1995 they entered into an agreement for the sale/purchase of the Trust land for a total consideration of Rs.22.5 lakhs.

8. As required by Section 36 of the Bombay Public Trust Act, 1950 (for short the Act) the trustees moved an application

on 5th February 1996 before the Charity Commissioner for sanction to sell the Trust land in terms of the agreement dated 18th February 1995. Section 36 of the Act reads as follows:

"**36. Alienation of immovable property of public trust** :(1) Notwithstanding anything contained in the instrument of trust –

(a) no sale, exchange or gift of any immovable property, and

(b) no lease for a period exceeding ten years in the case of agricultural land or for a period exceeding three years in the case of non-agricultural land or a building, belonging to a public trust, shall be valid without the previous sanction of the Charity Commissioner. Sanction may be accorded subject to such condition as the Charity Commissioner may think fit to impose, regard being had to the interest, benefit or protection of the trust;

(c) if the Charity Commissioner is satisfied that in the interest of any public trust any immovable property thereof should be disposed of, he may, on application, authorise any trustee to dispose of such property subject to such conditions as he may think fit to impose, regard being had to the interest or benefit or protection of the trust.

(2) The Charity Commissioner may revoke the sanction given under clause (a) or clause (b) of sub-section (1) on the ground that such sanction was obtained by fraud or misrepresentation made to him or by concealing from the Charity Commissioner, facts material for the purpose of giving sanction; and direct the trustee to take such steps within a period of one hundred and eighty days from the date of revocation (or such further period not exceeding in the aggregate one year as the Charity Commissioner may from time to time determine) as may be specified in the direction for the recovery of the property.

(3) No sanction shall be revoked under this section unless the person in whose favour such sanction has been made has been given a reasonable opportunity to show cause why the sanction should not be revoked.

(4) If, in the opinion of the Charity Commissioner, the trustee has failed to take effective steps within the period specified in sub-section (2), or it is not possible to recover the property with reasonable effort or expense, the Charity Commissioner may assess any advantage received by the trustee and direct him to pay compensation to the trust equivalent to the advantage so assessed."

9. On 6th February 1998 the Joint Charity Commissioner (for short 'the JCC') Mumbai granted the sanction prayed for by the trustees, subject to all laws applicable to the transaction and on terms and conditions that were to follow.

10. On 19th June 1998 the sanction granted by the JCC was partially modified and a condition imposed that the sale shall be executed within a period of one year from the date of the order that is 19th June 1998. However, for one reason or another, the petitioners and the trustees were unable to complete the sale transaction within this time.

11. Much later, on 30th June 2001 the trustees and the petitioners mutually agreed to extend the time for completing formalities for execution of the transaction. They also agreed that the sale price of the Trust land would now be increased to Rs.75 lakhs. This was the second agreement between the parties. Consequent upon this, the trustees moved an application before the JCC on 13th September 2001 to extend the time for completing the transaction.

12. Although it is not very clear, but it appears that thereafter something seems to have gone wrong between the parties because in January 2002 the trustees moved an application before the JCC for revised permission since the

petitioners had not complied with the terms of the agreement. The trustees therefore planned to sell the Trust land as per the sanction but apparently to persons other than the petitioners. This application was contested by the petitioners.

13. During the pendency of the application for extension of time moved by the trustees on 13th September 2001 and the application for revised permission moved by the trustees in January 2002 the differences between the trustees and the petitioners could not to be resolved with the result that on 16th April 2002 the trustees sought to withdraw the application dated 13th September 2001 for extension of time since the petitioners had not complied with the terms and conditions of the agreement entered into between the parties.

14. Eventually, both the applications (for extension of time and for revised sanction) were heard by the JCC who passed an order on 2nd May 2003 rejecting them. This order was not challenged by any of the parties and it has attained finality.

15. At this stage, it may be noted that according to respondent No. 1 the order dated 2nd May 2003 is an important order and it has been suppressed by the petitioners in this petition.

16. Even after the order dated 2nd May 2003 it seems that the trustees and the petitioners continued to have discussions and eventually on 15th August 2004 they entered into a third agreement. By the third agreement, they agreed to extend the time for completing formalities for executing the transaction originally entered into between them. They also mutually agreed to increase the sale price of the Trust land to Rs. 125 lakhs.

17. Pursuant to the third agreement the trustees once again decided to seek extension of time from the JCC for executing the transaction with the petitioners. Accordingly, they moved an application on 20th July 2005 for extension of time. This was the second application for extension of time. The petitioners

were not parties before the JCC in this application nor were they heard on this application.

18. By an order dated 24th July 2006 the JCC rejected the second application filed by the trustees for extension of time.

19. Pursuant to the rejection, the trustees issued a public notice in "Day View" on 19th February 2007 for sale of the Trust land. In response to the public notice, respondent No.1 gave the highest bid on 23rd February 2007 at Rs.43 lakhs per acre.

20. Significantly, on 26th February 2007 the petitioners filed W.P. No.1502 of 2007 in the High Court challenging the order dated 24th July 2006 passed by the JCC rejecting the second application for extension of time. In this Writ Petition, respondent No.1 was not made a party by the petitioners nor did the trustees bring it to the notice of the High Court that respondent No.1 had given the highest bid for purchase of the Trust land pursuant to the public notice issued in "Day View".

21. On 28th August 2008 the petitioners and the trustees entered into a compromise as a result of which it was agreed that the order dated 24th July 2006 be set aside and the second application for extension of time be remanded to the JCC for a fresh hearing on merits. It was also agreed that the petitioners would be joined as parties in the proceedings before the JCC and that the application be decided as expeditiously as possible but not later than three months beyond the date of presentation of the order of the High Court. On the basis of this compromise between the parties (and without the knowledge of respondent No.1), minutes of order were drawn up and the High Court passed an order taking the minutes on record. An order was then passed by the High Court in terms of the minutes.

22. Pursuant to the compromise order dated 28th August 2008 the JCC impleaded the petitioners as parties to the second application for extension of time.

23. When respondent No.1 learnt of the pendency of the proceedings before the JCC, it moved an application before the JCC for impleadment. In fact, other interested purchasers also moved applications for impleadment. The JCC heard all the applications and by an order dated 29th November 2008 rejected them.

24. Feeling aggrieved by the rejection of its impleadment application, respondent No.1 preferred W.P. No.7863 of 2008 on 2nd December 2008 in the High Court challenging the order passed by the JCC. The trustees as well as the petitioners were arrayed as respondents. It was prayed that the order dated 29th November 2008 passed by the JCC be quashed and respondent No.1 be impleaded as a necessary party in the proceedings before the JCC. The alternative prayer was that the JCC be directed to consider the bid of respondent No.1 for sale of the Trust land.

25. After hearing all the parties, the High Court passed the impugned order on 24th April 2009 in which it was noted, *inter alia*, that the Charity Commissioner had received another offer for the Trust land higher than the offer of respondent No.1. The Assistant Government Pleader accordingly submitted that the matter be remanded to the Charity Commissioner to decide in whose favour the Trust land should be sold, depending on the highest bid.

26. On deliberations of the submissions made by the parties, the High Court remanded the entire matter for consideration by the Charity Commissioner to decide who should be the purchaser for the Trust land. The Charity Commissioner was directed to consider all bids received pursuant to the public notice dated 19th February 2007 including the bids given by the petitioners and respondent No.1.

27. It is under these circumstances that the petitioners are now before us.

Submissions:

28. The broad submission of learned counsel for the petitioners was that the High Court had effectively over-stepped its jurisdiction while deciding W.P. No.7863 of 2008. It was submitted that the issue before the High Court was rather limited, namely, whether respondent No.1 should be impleaded before the JCC in the second application for extension of time. Apart from adjudicating on the correctness or otherwise of the decision rendered by the JCC rejecting the impleadment application, the High Court effectively rejected the second application for extension of time.

29. It was submitted that the High Court went much further than necessary in requiring the JCC to consider all bids received by the trustees pursuant to the public notice dated 19th February 2007. The right of the petitioners to seek specific performance of the third agreement entered into between them and the trustees on 15th August 2004 was thereby scuttled. To make matters worse, the High Court virtually set aside an order passed by the co-ordinate Bench in W.P. No.1502 of 2007 directing the JCC to hear the second application for extension of time. It was submitted that this was clearly impermissible.

30. It was finally submitted that under these circumstances the impugned order could not be sustained and the only relief that could have been granted by the High Court to respondent No.1 was to implead it in the second application for extension of time and to direct the JCC to decide the application at the earliest.

31. Contesting these submissions, learned counsel for respondent No.1 submitted that the petitioners were guilty of suppression of material facts inasmuch as it was not brought to the notice of this Court that the JCC had earlier rejected the first application for extension of time on 2nd May 2003 which had attained finality. Since this fact is not disclosed, this Court will not grant special leave to appeal.

32. It was also submitted that since Shri Vyankatesh Mandir Trust is a charitable trust, it was expected of the High Court (as also this Court) to subserve the larger interest of the charitable trust. In achieving this, necessary and appropriate orders can be passed for the ultimate benefit of the trust. In support of this submission learned counsel for respondent No.1 relied on *Chenchu Rami Reddy v. Government of Andhra Pradesh,* 1986 (3) SCC 391, *R. Venugopala Naidu v. Venkatarayulu Naidu Charities,* 1989 Suppl. (2) SCC 356 and *Mehrwan Homi Irani v. Charity Commissioner Bombay,* 2001 (5) SCC 305.

33. Finally it was submitted by learned counsel for respondent No.1 that the Charity Commissioner had received an offer higher than given by respondent No.1 and therefore the High Court was right in directing that appropriate steps be taken to receive the highest amount possible by sale of the Trust land. In this regard, the High Court had acted in the best interest of the charitable trust (and that is how it should be) and therefore we should not interfere with the impugned order.

34. Learned counsel for the trustees only submitted that the trust expects the highest amount possible for the sale of its land and that appropriate orders may be passed in this regard.

Conduct of the petitioners and trustees:

35. The facts of the case show that the trustees and the petitioners have been indulging in a flip-flop and in a sense taking advantage of the absence of any clear-cut statutory measures to prevent an abuse of the process of law.

36. The trustees and the petitioners entered into a total of three agreements from time to time. The trustees moved two applications for extension of time to complete the sale transaction with the petitioners. The trustees even sought to withdraw their first application for extension of time and to seek

a revised sanction from the JCC to sell the Trust land to a third party apparently because they fell out with the petitioners.

37. Given this flip-flop, the JCC rightly rejected the first application for extension of time on 2nd May 2003. He gave two significant reasons for doing so, namely, that the trustees were not voluntarily selling the Trust land and secondly, given the circumstances, the sale transaction was not for the benefit and in the interest of the Trust. This order has attained finality, not having been challenged by anybody. It is this order that has been suppressed by the petitioners from this Court. We propose to refer to this a little later.

38. While considering the second application for extension of time on 24th July 2006 the JCC observed that the trustees are "changing track from time to time and for the reasons best known to them are bowing before the proposed purchasers". The JCC doubted the *bona fides* of the trustees and in fact observed that there is obviously something fishy and suspicious in the matter. Accordingly, the JCC rejected their second application for extension of time.

39. After the second application for extension of time was rejected, the trustees issued a public notice on 19th February, 2007 for sale of the Trust land.

40. Soon after the trustees received offers including the highest bid by respondent No.1 the petitioners filed a writ petition in the High Court challenging the order rejecting the second application for extension of time. It seems rather odd that respondent No.1 was not impleaded in the writ petition either by the petitioners or at the instance of the trustees. The fact that third party interests were in existence was definitely known to the trustees, if not to the petitioners, and this should have been brought to the notice of the High Court.

41. In this background, the compromise effected between the trustees and the petitioners in the High Court on 28th August

2008 appears rather suspicious. To this extent, learned counsel for respondent No.1 may be correct in his submission that the order dated 28th August 2008 passed by the High Court was collusively obtained by the parties.

42. These facts clearly indicate to us that all through, the conduct of the trustees and the petitioners leaves much to be desired.

43. While it may be that no time limit is prescribed for seeking extension of time to complete the transaction for sale of the Trust land, yet the conduct of the parties certainly requires consideration. While so considering, we are of the view that the petitioners and the trustees were trying to take advantage of, if not exploit, the situation and the absence of any adverse consequences under the Act for not complying with the terms of the sanction originally granted.

Suppression of fact:

44. While dealing with the conduct of the parties, we may also notice the submission of learned counsel for respondent No.1 to the effect that the petitioners are guilty of suppression of a material fact from this Court, namely, the rejection on 2nd May 2003 of the first application for extension of time filed by the trustees and the finality attached to it. These facts have not been clearly disclosed to this Court by the petitioners. It was submitted that in view of the suppression, special leave to appeal should not be granted to the petitioners.

45. Learned counsel for the petitioners submitted that no material facts have been withheld from this Court. It was submitted that while the order dated 2nd May 2003 was undoubtedly not filed, its existence was not material in view of subsequent developments that had taken place. We cannot agree.

46. It is not for a litigant to decide what fact is material for adjudicating a case and what is not material. It is the obligation

of a litigant to disclose all the facts of a case and leave the decision making to the Court. True, there is a mention of the order dated 2nd May 2003 in the order dated 24th July 2006 passed by the JCC, but that is not enough disclosure. The petitioners have not clearly disclosed the facts and circumstances in which the order dated 2nd May 2003 was passed or that it has attained finality.

47. We may only refer to two cases on this subject. In *Hari Narain v. Badri Das,* AIR 1963 SC 1558 stress was laid on litigants eschewing inaccurate, untrue or misleading statements, otherwise leave granted to an appellant may be revoked. It was observed as follows:

> "It is of utmost importance that in making material statements and setting forth grounds in applications for special leave, care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. That is why we have come to the conclusion that in the present case, special leave granted to the appellant ought to be revoked. Accordingly, special leave is revoked and the appeal is dismissed. The appellant will pay the costs of the respondent."

48. More recently, in *Ramjas Foundation v. Union of India,* (2010) 14 SCC 38 the case law on the subject was discussed. It was held that if a litigant does not come to the Court with clean hands, he is not entitled to be heard and indeed, such a person is not entitled to any relief from any judicial forum. It was said:

> "The principle that a person who does not come to the court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have a bearing on adjudication of the issue(s) arising in the case."

49. A mere reference to the order dated 2nd May 2003, *en passant*, in the order dated 24th July 2006 does not serve the requirement of disclosure. It is not for the Court to look into every word of the pleadings, documents and annexures to fish out a fact. It is for the litigant to come up-front and clean with all material facts and then, on the basis of the submissions made by learned counsel, leave it to the Court to determine whether or not a particular fact is relevant for arriving at a decision. Unfortunately, the petitioners have not done this and must suffer the consequence thereof.

Validity of the High Court order:

50. The next submission of learned counsel for the petitioners was that the High Court had over-stepped its jurisdiction in requiring the JCC to virtually go in for a fresh auction. While we agree that the question before the High Court was very limited, namely, whether respondent No.1 ought to have been impleaded by the JCC in the second application for extension of time, we are of the view that on an overall consideration of the facts and circumstances of the case, the High Court was perhaps left with no option but to pass the order that it did and accept the alternative prayer of respondent No. 1. We say this because, as noticed above, the trustees and the petitioners were colluding and it was not possible to entirely rule out the possibility that they would enter into yet another mutual

arrangement to wipe out whatever interest respondent No.1 had in the Trust land. Therefore, impleading respondent No.1 before the JCC could have been rendered into a mere formality. Additionally, the lack of *bona fides* of the trustees and the petitioners could not be overlooked by the High Court. Therefore, the safest course of action for the High Court was to require sale of the Trust land through auction.

51. It appears to us that another factor that weighed with the High Court in this regard was the submission of the learned Assistant Government Pleader that the Charity Commissioner had received an offer higher than that given by respondent No.1. Therefore, it is quite clear that due to the passage of time, mainly because of the flip-flop of the trustees and the petitioners, the value of the Trust land had increased considerably. In these circumstances, it would be in the best interest of the trust if the maximum price is available for the Trust land from the open market. While this may or may not have been a consideration before the High Court, it is certainly one of the considerations before us for not interfering with the order passed by the High Court, even though it may have, in a loose sense, over-stepped its jurisdiction.

52. Section 36 of the Act clearly provides that the trustees may be allowed by the Charity Commissioner to dispose of immoveable property of the trust with regard being had to the "interest, benefit or protection" of the trust. It cannot be doubted that the interest of the trust would be in getting the maximum for its immoveable property.

53. In *Chenchu Rami Reddy* this Court frowned upon private negotiations for the alienation of trust property and encouraged public auction in such a case. It was held as follows:-

> "We cannot conclude without observing that property of such institutions [religious or charitable institutions] or endowments must be jealously protected. It must be

> protected, for, a large segment of the community has beneficial interest in it (that is the raison d'etre of the [Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments] Act itself). The authorities exercising the powers under the Act must not only be most alert and vigilant in such matters but also show awareness of the ways of the present day world as also the ugly realities of the world of today. They cannot afford to take things at their face value or make a less than the closest-and-best-attention approach to guard against all pitfalls. The approving authority must be aware that in such matters the trustees, or persons authorised to sell by private negotiations, can, in a given case, enter into a secret or invisible underhand deal or understanding with the purchasers at the cost of the concerned institution. Those who are willing to purchase by private negotiations can also bid at a public auction. Why would they feel shy or be deterred from bidding at a public auction? Why then permit sale by private negotiations which will not be visible to the public eye and may even give rise to public suspicion unless there are special reasons to justify doing so? And care must be taken to fix a reserve price after ascertaining the market value for the sake of safeguarding the interest of the endowment."

54. Similarly, in *R. Venugopala Naidu* this Court followed the law laid down in *Chenchu Rami Reddy* and actually went a bit further and gave a direction for sale of the trust property by public auction. It was held as follows:-

> "The subordinate court and the High Court did not go into the merits of the case as the petitioners were non-suited on the ground of locus standi. We would have normally remanded the case for decision on merits but in the facts and circumstances of this case we are satisfied that the value of the property which the trust got was not the market value…..

> …….. We direct that the properties in question may be sold by public auction by giving wide publicity regarding the date, time and place of public auction. The offer of Rs 10 lakhs made in this Court will be treated as minimum bid of the person who has given the offer and deposited 10 per cent of the amount in this Court. It will also be open to the respondents/purchasers to participate in the auction and compete with others for purchasing the properties."

55. In *Mehrwan Homi Irani* it was categorically held that the Charity Commissioner, while granting sanction under Section 36 of the Act, must explore the possibility of getting the best price for the trust properties. In keeping with this, the Charity Commissioner was directed to issue a fresh advertisement for leasing out the trust property and "formulate and impose just and proper conditions so that it may serve the best interests of the Trust." The observations of this Court and directions given are as follows :-

> "In the best interests of the Trust and its objects, we feel it appropriate that Respondents 2 to 4 should explore the further possibility of having agreements with better terms. The objects of the Trust should be accomplished in the best of its interests. Leasing out of a major portion of the land for other purposes may not be in the best interests of the Trust. The Charity Commissioner while granting permission under Section 36 of the Bombay Public Trusts Act could have explored these possibilities. Therefore, we are constrained to remit the matter to the Charity Commissioner to take a fresh decision in the matter. There could be fresh advertisements inviting fresh proposals and the proposal of the 5th respondent could also be considered. The Charity Commissioner may himself formulate and impose just and proper conditions so that it may serve the best interests of the Trust. We direct that the Charity Commissioner shall take a decision at the earliest."

56. Following the consistent view taken by this Court as well as the language of Section 36 of the Act, we have no hesitation in concluding that the only course available to the High Court was to mould the relief and direct the Charity Commissioner to have a re-look at all bids received pursuant to the public notice dated 10th February 2007.

Remaining contentions:

57. We are not impressed with the submission of learned counsel for the petitioners that the right of the petitioners to obtain specific performance of the agreements with the trustees has now been obliterated. As far as the first agreement is concerned, permission was granted to the petitioners to purchase the Trust land subject to certain conditions and within a certain time frame. Those conditions were not met. As far as the other two agreements are concerned, the JCC did not grant sanction to the trustees to act on them. It seems to us, prima facie, that the petitioners could not have sought specific performance of any of these agreements, but we do not express any final opinion on this since the issue is not directly before us.

58. We are also not impressed by the contention of learned counsel for the petitioners that by the impugned order, the High Court has effectively set aside its earlier order dated 28th August 2008 passed by a coordinate Bench. The circumstances under which the earlier order was passed and the significant developments that took place thereafter changed the circumstances and made it necessary for the High Court to pass a different order. It is not as if both orders were passed by the High Court under similar circumstances. The circumstances had changed and the view of the High Court on the changed circumstances could also be different.

Conclusion:

59. For the reasons mentioned above, we decline to grant

special leave to appeal to the petitioners for suppression of a material fact and direct the Charity Commissioner to have a fresh look at the sale of the Trust land, subject matter of this petition, in accordance with the directions of the High Court. However, we leave it open to the Charity Commissioner to permit all the parties before it to submit fresh offers for the Trust land and if deemed necessary, a fresh public notice for sale of the Trust land may be issued. On the basis of the bid given by respondent No.1 as disclosed to us in Court, we make it clear that the price for the sale of the Trust land shall not be less than Rs.3.87 crore.

60. The petitioners will pay costs of Rs.15,000/- to the Charity Commissioner within six weeks from today.

61. The petition is disposed of accordingly.

R.P. SLP Disposed of.

KUMARI SHAIMA JAFARI

v.

IRPHAN @ GULFAM AND ORS.

(Criminal Appeal No. 2093-2094 of 2012)

DECEMBER 11, 2012

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

Constitution of India, 1950:

Art. 136 – Petition for special leave to appeal, by complainant challenging order of High Court dismissing Government Appeal by a cryptic order – Held: Regard being had to the essential constitutional concept of jurisdiction under Art. 136, the application for permission to file the special leave petition is allowed and the applicant is permitted to prosecute the same.

Appeal:

Criminal appeal – Government Appeal dismissed by High Court without ascribing reasons – Held: The deliberation by High Court while exercising criminal appellate jurisdiction has to be reflective of due cogitation and requisite rumination – The judgment passed by High Court does not show any contemplation or independent application of mind as required of an appellate court – Reference to the trial court judgment in such a manner would not clothe the judgment to be reflective of reasons or indicative of any analysis – Judgment passed by High Court is set aside and the appeal remitted to it for re-hearing.

The instant appeal by special leave was filed by the complainant with an application for permission to file the same. The appellant challenged the order of the High Court declining to entertain the Government Appeal

against judgment of the trial court acquitting the accused persons of the offences punishable u/ss. 363, 366, 328, 323, 506, 368 and 376(2)(g) IPC. It was contended for the appellant that it was obligatory on the part of the High Court to ascribe reasons and not to dismiss the appeal in a cryptic manner by referring to certain paragraphs of the trial court judgment.

Allowing the appeal, the Court

HELD: 1. The appellant was the complainant and the real aggrieved party. Regard being had to the essential constitutional concept of jurisdiction under Art. 136 of the Constitution of India, the application for permission to file the special leave petition is allowed and the applicant is permitted to prosecute the same. [Para 2] [795-E-G]

Arunachalam v. P.S.R. Sadhanantham **1979 (3) SCR 482 = (1979) 2 SCC 297 and** P.S.R. Sadhanantha*m v. A*runachalam **(1980) 3 SCC 141 – relied on.**

2.1 The deliberation by the High Court while exercising criminal appellate jurisdiction has to be reflective of due cogitation and requisite rumination. It must reflect application of mind, consideration of facts in proper perspective and appropriate ratiocination either for affirmation or reversal of the judgment. The reasons ascribed may not be lengthy but it should be cogent, germane and reflective. It is dangerous to forget that reason is the essential foundation on which a conclusion can be based. Giving reasons for an order is the sacrosanct requirement of law. The reasons in criminal jurisprudence must flow from the material on record. [Para 13-14] [799-D-E, G; 800-A]

State of Uttar Pradesh v. Jagdish Singh and Others **1990 (Supp) SCC 150*;*** *State of U.P. v. Haripal Singh and Another* **(1998) 8 SCC 747;** *Narendra Nath Khaware v. Parasnath*

Khavare and Others **2003 (3) SCR 683 = (2003) 5 SCC 488;** *Raj Kishore Jha v. State of Bihar and others* **2003 (4) Suppl. SCR 208 =JT (2003) Supp 2 SCC 354 and** *State of Orissa v. Dhaniram Luhar* **2004 (2) SCR 68=JT (2004) 2 SC 172 – relied on.**

Bossuet; and Nyaya Shastras – referred to.

2.2 The judgment passed by the High Court does not show any contemplation or independent application of mind as required of an appellate court. Reference to the trial court judgment in such a manner would not clothe the judgment to be reflective of reasons or indicative of any analysis. The judgment passed by the High Court is set aside and the appeal is remitted to it for re-hearing. [Paras 19 and 20] [801-C-D, E]

Case Law Reference:

1979 (3) SCR 482	**relied on**	**Para 2**
(1980) 3 SCC 141	**relied on**	**Para 2**
1990 (Supp) SCC 150	**relied on**	**Para 9**
(1998) 8 SCC 747	**relied on**	**Para 10**
2003 (3) SCR 683	**relied on**	**Para 11**
2003 (4) Suppl. SCR 208	**relied on**	**Para 14**
2004 (2) SCR 68	**relied on**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2093-2094 of 2012.

From the Judgment & Order dated 04.07.2012 and 12.09.2012 of the High Court of Judicature, at Allahabad in Government Appeal No. 3432 of 2011 in Criminal Appeal No. 1674 of 2011.

Shakil Ahmed Syed, S.A. Saud, Shuaib-uddion, Mohd. Parvez Dabas for the Appellant.

The Judgment of the Court was delivered by

DIPAK MISRA, J.

[CRL.M.P. NO. 24427 OF 2012]

1. This is an application for grant of permission to file Special Leave Petition under Article 136 of the Constitution of India for assailing the judgment and order dated 4.7.2012 passed in Government Appeal No. 3432 of 2011 by the Division Bench of the High Court of Judicature at Allahabad, whereby the Bench declined to entertain the appeal directed against the judgment of acquittal rendered by the learned Additional Sessions Judge, Kanpur Nagar in S.T. No. 944 of 2007 wherein the accused persons faced trial for the offences punishable under Sections 363, 366, 328, 323, 506, 368 and 376(2)(g) of the Indian Penal Code (for short "the IPC").

2. On a perusal of the material on record, there cannot be any dispute that the appellant was the complainant and the real aggrieved party. Being aggrieved by the decision of the High Court, she has sought permission to prefer the special leave petition. Regard being had to the essential constitutional concept of jurisdiction under Article 136 of the Constitution of India as has been stated in *Arunachalam v. P.S.R. Sadhanantham*[1] and the pronouncement by the Constitution Bench in *P.S.R. Sadhanantham v. Arunachalam*[2] where the assail was to the decision in *Arunachalam* (supra) under Article 32, we allow the application and permit the applicant to prosecute the Special Leave Petition. The Crl.M.P. No. 24427 of 2012 is accordingly disposed of.

3. Leave granted.

1. (1979) 2 SCC 297.
2. (1980) 3 SCC 141.

4. The spinal issue that has spiralled to this Court is whether the appeal preferred by the Government questioning the legal substantiality of the judgment of acquittal could have been dismissed by the High Court in such a manner as it has been done.

5. At this juncture, it is apposite to state that the complainant had filed Appeal No. 1674 of 2011 which has also been dismissed by another Division Bench on the foundation that when the Government Appeal had already met its fate of dismissal, there was no justification to entertain the said appeal. No fault can be found in the order passed by the Division Bench dealing with the appeal preferred by the complainant as that cannot survive after the Coordinate Bench had given the stamp of imprimatur to the judgment of acquittal passed by the learned trial Judge in the Government Appeal. Hence, the prayer has been restricted and, rightly so, by the learned counsel for the appellant to the assail of the judgment passed in the Government Appeal.

6. To dwell upon the seminal issue, it is seemly to reproduce the judgment passed by the High Court in appeal. It reads thus: -

> "The learned trial Judge has discussed elaborately the evidence of PW1, the prosecutrix, which appears at pages 12 to 20 of the judgment in the light of submissions of the defence and we are satisfied that it could not be a case under any of the sections for which the accused had been charged and tried. The judgment herein suffers from no perversity and, as such, the appeal is dismissed."

7. It is urged by Mr. Shakil Ahmed Syed, learned counsel for the complainant-appellant, that it is obligatory on the part of the High Court while dealing with an appeal to ascribe reasons and not to dismiss it in a cryptic manner. He would further submit that reference to certain paragraphs of the judgment of the trial Court would not clothe the decision of the High Court

to be reflective of appreciation and reason but, on the contrary, it would still be an apology for reason which the law does not countenance.

8. The issue that emerges for consideration is whether the aforesaid delineation by the High Court in appeal can be treated to be informed with reason. At this stage, we think it apt to refer to certain authorities of this Court where there has been illumined enunciation of law as regards the duty of the High Court while dealing with criminal appeals, whether it may be an appeal preferred by the Government or an application for leave to appeal by the complainant against the judgment of acquittal.

9. In *State of Uttar Pradesh v. Jagdish Singh and Others*[3], a three-Judge Bench, while dealing with the role of the High Court at the time of disposal of a criminal appeal, stated thus:-

> "This Court has observed before, in more than one case, that when the High Court disposes of a criminal appeal it should set forth the reasons, even though briefly, in its order. That is a requirement necessitated by the plainest considerations of justice. We are constrained to remark that the repeated observations of this Court have not received the attention which they deserve. The impugned order before us does not disclose the reasons for making it. We trust that it will not be necessary for us to make these observations in any future case."

10. In *State of U.P. v. Haripal Singh and Another*[4] while laying emphasis on ascribing of reasons while disposing a criminal appeal, a two-Judge Bench has opined thus: -

> "It appears that the appeal was preferred by the State of Uttar Pradesh against the order of acquittal dated 24-5-1989 passed by the Special Sessions Judge, Pilibhit in

3. 1990 (Supp) SCC 150.

4. (1998) 8 SCC 747

> Case No. 153 of 1986. The said sessions case was filed against the respondent-accused under Section 302 read with Sections 307 and 34 IPC. The leave application was dismissed summarily without indicating any reason and the consequential order of dismissal of appeal was also passed without indicating any reason. It is really unfortunate that the appeal was disposed of without giving any reason whatsoever. On 26-4-1988, against a similar order of dismissal in limine passed by the Allahabad High Court in *State of U.P.* v. *Jagdish Singh*[1] (an appeal) was moved before this Court and a three Judges' Bench of this Court deprecated such order disposing of the appeal without giving any reason. Unfortunately, a similar improper order has been passed in this case. To say the least, it is a sorry state of affairs. We, therefore, allow this appeal, set aside the order of dismissal of the appeal in limine and send the matter back to the High Court with a direction to dispose of the matter within a period of four months from the date of receipt of this order."

11. Yet again, in *Narendra Nath Khaware v. Parasnath Khavare and Others*[5], this Court had the occasion to deal with such a situation. In that context, the Court observed thus: -

> "We are constrained to observe a growing tendency with the High Courts in disposing of Criminal Appeals involving vexed questions of law and fact in cursory manner without going into the facts and the questions of law involved in the cases. May be this approach is gaining ground on account of huge pendency of cases. But such a summary disposal is no solution to the problem of arrears of cases in courts. Disposal of appeals where the High Court is the first court of appeal in such a manner results in denial of right of appeal to the parties. So long as the statute provides a right of appeal, in our view the court will be failing in its duty if the appeal is disposed of in such a

5. (2003) 5 SCC 488.

casual and cavalier manner as the High Court has done in the present case."

12. Be it noted, in the above-referred case, an appeal against acquittal was preferred by the State of Bihar and the High Court had dismissed the appeal by stating that it was clear from the perusal of the record that the witnesses named in the fardbayan had not been examined by the prosecution and also the witnesses examined in Court were examined by the police after eight months after the date of occurrence. The High Court had also stated that the investigating officer had not been examined. The said deliberation was treated to be unsatisfactory and, if fact, not appreciated by this Court.

13. From the aforesaid pronouncements, it is graphically clear that the deliberation by the High Court while exercising criminal appellate jurisdiction has to be reflective of due cogitation and requisite rumination. It must reflect application of mind, consideration of facts in proper perspective and appropriate ratiocination either for affirmation or reversal of the judgment. The reasons ascribed may not be lengthy but it should be cogent, germane and reflective. It is to be borne in mind, to quote from Wharton's Law Lexicon: -

"The very life of law, for when the reason of a law once ceases, the law itself generally ceases, because reason is the foundation of all our laws."

14. This Court, in *Raj Kishore Jha v. State of Bihar and others*[6] and *State of Orissa v. Dhaniram Luhar*[7], had held that "reason" is the heartbeat of every conclusion and without the same, it becomes lifeless. It is dangerous to forget that reason is the essential foundation on which a conclusion can be based. Giving reasons for an order is the sacrosanct requirement of law which is the aim of every civilized society. And intellect

6. JT (2003) Supp 2 SCC 354.

7. JT (2004) 2 SC 172.

respects it. It would not be out of place to state here that the reasons in criminal jurisprudence must flow from the material on record and in this regard, a line from Bossuet is worth reproducing: -

"The heart has reasons that reason does not understand."

We have said so as a Judge should not be guided by any kind of emotion, prejudice or passion while giving his reasons.

15. At this juncture, it may be instructive to sit in a Time Machine and have a look at what our "Shastras" have stated about the role of an adjudicator. While describing the role of a Judge, it has been stated thus:-

"Vivaade pruchhati pprasnam pratiprasnam tathaiva cha

Nyayapurvancha vadati pradvivaaka iti smrutah."

The free English translation of the same would be that he who puts questions and counter questions (to petitioner and respondent) in a dispute and gives his concluding observations is called 'Praadvivaakah' or a Judge.

16. In certain ancient texts while describing a Judge, it has been laid down that a Judge is also called a 'vivaakah' i.e. he who considers the matter from legal spectrum after applying his mind. Be it noted 'vivek' means conscience. In another place in *smritis* it has been said that adjudicator has to decide the dispute with great care and caution after patient hearing.

17. A Judge in the times of yore in this country was wedded to Dharma. We are not going to delve into the connotative expanse of the term "Dharma". In one context, it has been stated that Dharma is not a thing that can be determined by any person as per his whim. Thus, personal whim or for that matter any individual notion has no place while doing an act of justice which is a facet of Dharma. In Nyaya Shastras, there is reference to the methodology of inference which involves a

combination and inductive and deductive logic. The logic, as is understood, means :-

> "The science of right reasoning or the science of discussion."

18. We have referred to the aforesaid concepts solely for the purpose that even the ancient wisdom commanded that the decision has to be founded on reasons.

19. Coming to the judgment passed by the High Court, it is clear as a cloudless sky that it does not show any contemplation or independent application of mind as required of an appellate Court. Reference to the trial Court judgment in such a manner would not clothe the judgment to be reflective of reasons or indicative of any analysis. It does not require Solomon's wisdom to state that it is absolutely sans reasons, bereft of analysis and shorn of appreciation. Thus viewed, this Court has no other option but to overturn the same and send the appeal for re-hearing to the High Court and we so do.

20. Resultantly, the appeal is allowed and the judgment passed by the High Court in Government Appeal No. 3432 of 2011 is set aside and the appeal is remitted for re-hearing by the High Court.

R.P. Appeal allowed.

KASHMIR KAUR & ANR.
v.
STATE OF PUNJAB
(Criminal Appeal Nos. 915-916 of 2008)

DECEMBER 12, 2012

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

Penal Code, 1860 – s.304B – Dowry death – Applicability of s.304B – Main ingredient of the offence to be established – Held: Is that soon before the death of the deceased, she was subjected to cruelty and harassment in connection with demand of dowry – Expression "soon before" – Meaning – It is a relative term and it would depend upon circumstances of each case – Proximity test – There must be existence of a proximate or life link between the effect of cruelty based on dowry demand and the concerned death – Words and Phrases – "soon before" – Meaning of.

Penal Code, 1860 – s.304B – Dowry death – Exception to the cardinal principles of criminal jurisprudence – Concept of deeming fiction – Held: s.304B is an exception to the cardinal principles of criminal jurisprudence that a suspect in the Indian Law is entitled to protection of Article 20 of the Constitution, as well as, presumption of innocence in his favour – Concept of deeming fiction applied by Legislature to the provisions of s.304B – Once the ingredients of s.304B are satisfied it will be called dowry death and by deemed fiction of law the husband or the relatives will be deemed to have committed that offence – Such deeming fiction, however, is a rebuttable presumption and the husband and his relatives, can, by leading their defence prove that the ingredients of s.304B were not satisfied – Constitution of India, 1950 – Article 20 – Evidence Act, 1872 – s.113B.

Penal Code, 1860 – s.304B r/w s.34 and s.498A – Dowry death – Death of married woman 11 months after marriage – Complaint against the in-laws – Conviction of accused-appellants – Justification – Held: Justified – The death was not normal as evidenced by the version of PW1 postmortem doctor, the post mortem certificate and also the report of Chemical Examiner – Ante mortem injuries and other abnormalities found on the body of the deceased – Possibility of death due to poisoning – Evidence of PW2 (deceased's father) and PW3 read alongwith the letters written by the deceased to PW2 disclosed that the accused were demanding Rs.30,000/- in cash apart from a stereo set and a scooter – According to PW2, few days prior to the death, deceased came to his house and expressed her dire need for payment of Rs.30,000/- as demanded by her in-laws and that she was being harassed on that score – Evidence of PW3 to the effect that on the date of the death, he witnessed the torture meted out to the deceased at the hands of her in-laws – In facts and circumstances of the case, legal requirements for offence falling u/ss.304B and 498A IPC with the aid of s.113B of the Evidence Act conclusively proved – Evidence Act, 1972 – s.113B.

The daughter of PW.2 died about 11 months after her marriage. There were ante-mortem injuries and other abnormalities on the body of the deceased. The prosecution case was that the deceased was being repeatedly harassed and tortured by her mother-in-law, brother-in-law (appellant no.2) and his wife (appellant no.1) for cash, scooter and other articles, as they were not satisfied with the amount of dowry given in the marriage. The mother-in-law of the deceased passed away in the meantime.

The trial Court convicted the two appellants under Section 304B read alongwith 34 IPC as well as under Section 498A IPC and sentenced them to seven years rigorous imprisonment under Section 304B IPC and two years rigorous imprisonment under Section 498A IPC. The sentences were directed to run concurrently. The order was affirmed by the High Court and therefore the instant appeals.

Meanwhile appellant no.1 died and therefore, the SLP filed on his behalf became infructuous. However, appellant no.1 made a prayer to substitute her as the legal representative of appellant no.2 and pursue his appeal as well in order to enable her to get the monetary benefits from the employer of appellant no.2.

Dismissing the appeals, the Court

HELD: 1.1. The following principles can be culled out in regard to Sections 304B and 498A IPC and Section 113B of the Evidence Act:

(a) To attract the provisions of Section 304B IPC the main ingredient of the offence to be established is that soon before the death of the deceased she was subjected to cruelty and harassment in connection with the demand of dowry.

(b) The death of the deceased woman was caused by any burn or bodily injury or some other circumstance which was not normal.

(c) Such death occurs within seven years from the date of her marriage.

(d) That the victim was subjected to cruelty or harassment by her husband or any relative of her husband.

(e) Such cruelty or harassment should be for or in connection with demand of dowry.

(f) It should be established that such cruelty and harassment was made soon before her death.

(g) The expression (soon before) is a relative term and it would depend upon circumstances of each case and no straightjacket formula can be laid down as to what would constitute a period of soon before the occurrence.

(h) It would be hazardous to indicate any fixed period and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113B of the Evidence Act.

(i) Therefore, the expression "soon before" would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate or life link between the effect of cruelty based on dowry demand and the concerned death. In other words, it should not be remote in point of time and thereby make it a stale one.

(j) However, the expression "soon before" should not be given a narrow meaning which would otherwise defeat the very purpose of the provisions of the Act and should not lead to absurd results.

(k) Section 304B is an exception to the cardinal principles of criminal jurisprudence that a suspect in the Indian Law is entitled to the protection of Article 20 of the Constitution, as well as, a presumption of innocence in his favour. The concept of deeming fiction is

hardly applicable to criminal jurisprudence but in contradistinction to this aspect of criminal law, the legislature applied the concept of deeming fiction to the provisions of Section 304B.

(l) Such deeming fiction resulting in a presumption is, however, a rebuttable presumption and the husband and his relatives, can, by leading their defence prove that the ingredients of Section 304B were not satisfied.

(m) The specific significance to be attached is to the time of the alleged cruelty and harassment to which the victim was subjected to, the time of her death and whether the alleged demand of dowry was in connection with the marriage. Once the said ingredients were satisfied it will be called dowry death and by deemed fiction of law the husband or the relatives will be deemed to have committed that offence. [Para 16] [819-E-H; 820-A-H; 821-A-E]

1.2. In the case on hand, the following facts were uncontroverted:

(i) The death of the deceased occurred 11 months after her marriage thereby the main condition prescribed under Section 304B, namely, within seven years of the marriage was fulfilled.

(ii) The death of the deceased was not normal as evidenced by the version of PW.1 postmortem doctor, the postmortem certificate and also Exhibit 'PG', the report of Chemical Examiner.

(iii) The evidence of PWs.2 and 3 read along with

Exhibit 'PH' to 'PK' disclose that there was a demand for payment of cash of Rs.30,000/- apart from a stereo set and a scooter.

(iv) According to PW.2, father of the deceased 3 to 4 days prior to the unfortunate death of the deceased his daughter came to his house and expressed her dire need for payment of Rs.30,000/- as demanded by her in-laws and that she was being harassed on that score.

(v) The evidence of PW.3 was to the effect that on the date of the death of the deceased, namely, 03.11.1987 he happened to witness the torture meted out to the deceased at the hands of her in-laws.

(vi) Though on behalf of the appellant and other accused certain witnesses were examined by way of defence, both the trial Court as well as the Appellate Court have noted that nothing concrete was brought out to show that the evidence led on the side by the prosecution through PWs.1 to 3 were in any way contradicted. [Para 17] [821-F-H; 822-A-E]

1.3. On behalf of the appellant, it was contended that Exhibit 'PK' which was stated to have been recovered by PW.5, Sub-Inspector of Police, from the brassier of the deceased was not proved to the satisfaction of the Court. For the sake of argument even if such a contention can be accepted and the said Exhibit 'PK' is eschewed from consideration there were other exhibits such as Exhibits 'PH' to 'PK' which were all letters written by the deceased addressed to PW.2 her father which were written prior to her death and were sent by post. It is not in dispute and as noted by the trial Court, those exhibits bore the postal stamp impressions with relevant dates mentioned

therein. Though DW.3 a document expert was examined to show that there was a variation in the hand-writing of the deceased as between the admitted one and those found in Exhibits 'PH', 'PK' and 'PJ', he himself admitted in the cross-examination that some variation in the hand-writing can occur with the passage of time after the learning stage and also at the old age or due to clinical or any disease or accident which affect the muscular control of the person while writing a letter. To yet another question, he also admitted that it was correct that the portion of the disputed signatures 'Q1' to 'Q3' which may read as Darshana (name of the deceased) is similar to the corresponding words of standard signature 'A1'. Therefore, it will be highly unsafe to rely upon the evidence of DW.3 in order to exclude the letters said to have been written by the deceased to her father. [Para 18] [822-F-H; 823-A-C]

1.4. The trial Court having examined Exhibits 'PH' to 'PJ' found that the alleged harassment at the hands of the in-laws of the deceased immediately before her death was true. Nothing was pointed out before this Court to hold that the said conclusion was perverse or was there any illegality or irregularity. PW.1, who conducted the postmortem, stated in his evidence that as per his report Exhibit 'PA' antemortem injuries and other abnormalities were found on the body of the deceased. In the cross-examination, PW.3 stated that the mouth of the deceased girl was swollen and there were other injuries on other parts of her body. Along with Exhibit 'PF' the Chemical Examiner covering letter Exhibit 'PG' made it clear that although no poison was found in the viscera, there were causes or reasons for non-detection of poison such as the poison having been excreted from the body, detoxicated, metabolised by the system or the poison being such a test for the same does not exist in view of countless number of poisons. He also opined "the

circumstantial evidence goes a long way to prove the facts of the case regardless of the report indicating that the no poison was found". "From postmortem findings and police history it appears that death has occurred due to some poison". [Paras 19, 20] [823-D-E-H; 824-A-B]

1.5. In Exhibits 'PH' and 'PJ' it was clearly mentioned that the deceased was harassed from last night (prior to the incident) and her miserable condition was created at the instance of her mother-in-law, wife of her husband's brother, the appellant and the brother himself, namely, second accused, who is no more. In Exhibit 'PJ' she while referring to such harassment meted out to her by her mother-in-law, brother-in-law and his wife also mentioned about the demands made by them, namely, cash, scooter and other articles. [Para 21] [824-C-D]

1.6. All the above factors clearly established the legal requirements for an offence falling under Sections 304B and 498A IPC with the aid of Section 113B were conclusively proved and the conviction and sentence imposed, therefore, do not call for interference. [Para 22] [824-E]

K. Prema S. Rao and another v. Yadla Srinivasa Rao and others **(2003) 1 SCC 217: 2002 (3) Suppl. SCR 339;** *Kaliyaperumal and another v. State of Tamil Nadu* **(2004) 9 SCC 157: 2003 (3) Suppl. SCR 1;** *Devilal v. State of Rajasthan* **(2007) 14 SCC 176: 2007 (11) SCR 219;** *Ashok Kumar v. State of Haryana* **(2010) 12 SCC 350: 2010 (7) SCR 1119;** *Harjit Singh v. State of Punjab* **(2006) 1 SCC 463: 2005 (5) Suppl. SCR 629;** *Ram Badan Sharma v. State of Bihar* **(2006) 10 SCC 115: 2006 (4) Suppl. SCR 795 and** *Pathan Hussain Basha v. State of A.P.* **JT 2012 (7) SC 432 – relied on.**

2. The appeal so far as appellant No.1 stands dismissed. He is on bail. The bail bond stands cancelled

and she shall be taken into custody forthwith to serve out the remaining part of sentence, if any. The appeal so far as appellant No.2 too stands dismissed as having become infructuous even at the time it came to be filed. Accordingly, the application for substitution also stands dismissed. [Paras 23, 24] [824-F-G]

Case Law Reference:

2002 (3) Suppl. SCR 339	**relied on**	**Para 10, 11**
2003 (3) Suppl. SCR 1	**relied on**	**Para 10, 12**
2007 (11) SCR 219	**relied on**	**Para 10, 13**
2010 (7) SCR 1119	**relied on**	**Para 10, 14, 15**
2005 (5) Suppl. SCR 629	**relied on**	**Para 13**
2006 (4) Suppl. SCR 795	**relied on**	**Para 13**
JT 2012 (7) SC 432	**relied on**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 915-916 of 2008.

From the Judgment & Order dated 06.04.2006 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 502-SB of 1994 and dated 24.08.2005 in Criminal Misc. No. 36383 of 2005 in Criminal Appeal No. 502-SB of 1994.

R.K. Kapoor, Shweta Kapoor, Alka Sharma, Anis Ahmed Khan for the Appellant.

Kuldip Singh, Mohit Mudgil for the Respondent.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. The appellants are aggrieved of the judgment of the Single Judge of the High Court of Punjab and Haryana dated 06.04.2005. At the very outset it is relevant to mention that the second

appellant, namely, Lakha Singh also known as Lakhiwinder Singh s/o Gian Singh stated to have died on 03.12.2005 as per the death certificate enclosed along with the special leave petition papers and the application filed on 25.07.2006 in this Court. Therefore, the special leave petition itself, which was stated to have been filed on 25.07.2006 on behalf of Lakha Singh alias Lakhiwinder Singh, has become infructuous. However, in the criminal miscellaneous petition for substitution application, also filed on 25.07.2006, the first appellant has made a prayer to substitute her as the legal representative of the deceased Lakha Singh and pursue his appeal as well in order to enable her to get the monitory benefits from the employer of the deceased Lakha Singh who was stated to have been employed in the Punjab State Electricity Board. In the above-stated background we heard learned counsel for the appellant as well as counsel for the State in these appeals.

2. The brief facts which are required to be stated are that the deceased Darshana alias Darshan Kaur d/o Joginder Singh - PW.2 was married to one Ravail Singh about 11 months prior to the date of occurrence. According to PW.2 at the time of marriage he gave sufficient dowry but Jagir Kaur, the mother-in-law of the deceased, and the accused were not satisfied with the amount of dowry given in marriage. According to the prosecution, there was a demand for cash amount of Rs.30,000/- apart from a stereo set and scooter by way of dowry which the deceased Darshana was compelled to ask and get from her parental house.

3. Three days prior to the occurrence, the deceased was stated to have gone to her parental house, met PW.2 and requested him to arrange for the cash amount of Rs.30,000/- in order to fulfill the demand, when she stated to have also told PW.2 that she was being repeatedly tortured at the instance of the accused in her matrimonial home. PW.2 stated to have promised his daughter that he would arrange for the money in three to four days time after harvesting the crops and that she can return back to her matrimonial home.

4. On 03.11.1987, PW.3 Jagir Singh stated to have witnessed the torture meted out to the deceased Darshana at the hands of the accused in the morning and in the evening he came to know about the death of the deceased whose body was lying in the Civil Hospital at Taran Taran. PW.3 stated to have met Joginder Singh (PW.2) at his village called Nandpur and informed him about the torture meted out to his daughter in the morning and the subsequent death in the evening. Thereafter, PW.2 went to the hospital along with PW.3 and after identifying the body of his daughter he lodged a complaint with the Police Station Jhabal which came to be registered as FIR No.246/87 Exhibit PE/2 for offences under Section 304B read with 34 IPC as well as under Section 498A IPC.

5. The complaint was registered as against the appellant, her husband Lakha Singh s/o of Gian Singh as well as Jagir Kaur alias Jagire, mother-in-law of the deceased, who in the meantime passed away. PW.1 was the doctor who conducted the postmortem issued Exhibit 'PA' the postmortem certificate under Exhibit PA/1 PW.1 stated to have prepared a pictorial diagram showing the seat of injuries. He also stated that stomach and its contents along with a portion of small intestine with its contents, a portion of large intestine with its contents, a portion of liver, spleen and kidney were handed over to police along with letter dated 04.11.1987 addressed to Chemical Examiner, Patiala in five Jars sealed with the seal bearing impression 'KS' for its report. The Chemical Examiner Reports were marked as Exhibit 'PF' to Exhibit 'PG'.

6. PW.5, the Sub-Inspector of Police stated to have recovered a letter from the brassier of the deceased which was marked as Exhibit 'PH'. There were other letters produced by PW.2 said to have been written by the deceased addressed to him which were marked as Exhibit 'PH' to 'PK'.

7. The trial Court after detailed consideration of the evidence placed before it, both oral as well as documentary, found the appellant as well as her husband Lakha Singh guilty

of the offences falling under Section 304B read along with 34 IPC as well as under Section 498A IPC. The trial Court after reaching the said finding convicted them for the abovesaid offences and imposed the sentence of seven years rigorous imprisonment each for the offence under Section 304B IPC and two years rigorous imprisonment for the offence under Section 498A IPC apart from a fine of Rs.1000/- each and in default to undergo further rigorous imprisonment for three months. The sentences were directed to run concurrently.

8. On the appeal preferred by the appellant as well as her husband having been rejected and the conviction and sentence having been confirmed, the present appeals have been preferred before us.

9. We heard Mr. R.K. Kapoor, learned counsel for the appellant and Mr. Kuldip Singh, learned counsel for the respondent-State. We also perused the judgment of the trial Court, as well as, the High Court and the material records placed before us. Before dealing with the facts involved in these appeals, we feel it appropriate to state the requirement of law in regard to offences falling under Sections 304B and 498A of IPC while convicting the accused for the said offences. In this respect, it will be worthwhile to deal with some of the earlier decisions of this Court where the legal principles in regard to the abovesaid provisions have been dealt with and the principles of law laid down therein. As we are concerned with Sections 304B and 498A IPC, the said provisions along with Section 113B of the Evidence Act are relevant. The same are extracted hereinunder:

> **"304B. Dowry death.-** (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.
>
> Explanation.-For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).
>
> (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.
>
> **498A. Husband or relative of husband of a woman subjecting her to cruelty.-** Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.
>
> Explanation.-For the purpose of this section, "cruelty" means-
>
> (a) any willful conduct which is of such a nature as is likely to derive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
>
> (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.
>
> **113B. Presumption as to dowry death.-**When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any

demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation.- For the purposes of this section, "dowry death" shall have the same meaning as in section 304B of the Indian Penal Code (45 of 1860)."

10. As regards the principles concerning the above referred to provisions we wish to refer to the decisions reported in *K. Prema S. Rao and another V. Yadla Srinivasa Rao and others* - (2003) 1 SCC 217, *Kaliyaperumal and another V. State of Tamil Nadu* – (2004) 9 SCC 157, *Devilal V. State of Rajasthan* – (2007) 14 SCC 176, and *Ashok Kumar V. State of Haryana* – (2010) 12 SCC 350.

11. In *K. Prema S. Rao* (supra) it has been held as under in paragraph 16:

"……To attract the provisions of Section 304-B IPC, one of the main ingredients of the offence which is required to be established is that "soon before her death" she was subjected to cruelty and harassment "in connection with the demand for dowry"."……

12. In *Kaliyaperumal* (supra) paragraph 5 is relevant for our purpose which reads as under:

5. A conjoint reading of Section 113-B of the Evidence Act and Section 304-B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. The prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the "death occurring otherwise than in normal circumstances". The expression "soon before" is very relevant where Section 113-B of the Evidence Act and Section 304-B IPC are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and

only in that case presumption operates. Evidence in that regard has to be led in by the prosecution. "Soon before" is a relative term and it would depend upon the circumstances of each case and no straitjacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113-B of the Evidence Act. The expression "soon before her death" used in the substantive Section 304-B IPC and Section 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression "soon before" is not defined. A reference to the expression "soon before" used in Section 114 Illustration (a) of the Evidence Act is relevant. It lays down that a court may presume that a man who is in the possession of goods soon after the theft, is either the thief who has received the goods knowing them to be stolen, unless he can account for his possession. The determination of the period which can come within the term "soon before" is left to be determined by the courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and life link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence."

13. In *Devilal* (supra) the ingredients of the provisions of Section 304B as laid down in *Harjit Singh V. State of Punjab* – (2006) 1 SCC 463 and *Ram Badan Sharma V. State of*

Bihar – (2006) 10 SCC 115 have been clearly set out in paragraph 20 which reads as under:

> "The question, as to what are the ingredients of the provisions of Section 304-B of the Penal Code is no longer res integra. They are: (1) that the death of the woman was caused by any burns or bodily injury or in some circumstances which were not normal; (2) such death occurs within 7 years from the date of her marriage; (3) that the victim was subjected to cruelty or harassment by her husband or any relative of her husband; (4) such cruelty or harassment should be for or in connection with the demand of dowry; and (5) it is established that such cruelty and harassment was made soon before her death. (See *Harjit Singh v. State of Punjab and Ram Badan Sharma v. State of Bihar*)."

14. In *Ashok Kumar,* to which one of us was a party (Hon'ble Dr. Justice B.S. Chauhan), paragraphs 19, 20, 21 and 23 are relevant for our purpose which read as under:

> **"19.** We have already referred to the provisions of Section 304-B of the Code and the most significant expression used in the section is "soon before her death". In our view, the expression "soon before her death" cannot be given a restricted or a narrower meaning. They must be understood in their plain language and with reference to their meaning in common parlance. These are the provisions relating to human behaviour and, therefore, cannot be given such a narrower meaning, which would defeat the very purpose of the provisions of the Act. Of course, these are penal provisions and must receive strict construction. But, even the rule of strict construction requires that the provisions have to be read in conjunction with other relevant provisions and scheme of the Act. Further, the interpretation given should be one which would avoid absurd results on the one hand and would further the object and cause of the law so enacted on the other.

> **20.** We are of the considered view that the concept of reasonable time is the best criteria to be applied for appreciation and examination of such cases. This Court in Tarsem Singh v. State of Punjab, held that the legislative object in providing such a radius of time by employing the words "soon before her death" is to emphasise the idea that her death should, in all probabilities, has been the aftermath of such cruelty or harassment. In other words, there should be a reasonable, if not direct, nexus between her death and the dowry-related cruelty or harassment inflicted on her.
>
> **21.** Similar view was expressed by this Court in *Yashoda v. State of M.P.,* where this Court stated that determination of the period would depend on the facts and circumstances of a given case. However, the expression would normally imply that there has to be reasonable time gap between the cruelty inflicted and the death in question. If this is so, the legislature in its wisdom would have specified any period which would attract the provisions of this section. However, there must be existence of proximate link between the acts of cruelty along with the demand of dowry and the death of the victim. For want of any specific period, the concept of reasonable period would be applicable. Thus, the cruelty, harassment and demand of dowry should not be so ancient, whereafter, the couple and the family members have lived happily and that it would result in abuse of the said protection. Such demand or harassment may not strictly and squarely fall within the scope of these provisions unless definite evidence was led to show to the contrary. These matters, of course, will have to be examined on the facts and circumstances of a given case.
>
> **23.** The Court cannot ignore one of the cardinal principles of criminal jurisprudence that a suspect in the Indian law is entitled to the protection of Article 20 of the Constitution of India as well as has a presumption of innocence in his

favour. In other words, the rule of law requires a person to be innocent till proved guilty. The concept of deeming fiction is hardly applicable to the criminal jurisprudence. In contradistinction to this aspect, the legislature has applied the concept of deeming fiction to the provisions of Section 304-B. Where other ingredients of Section 304-B are satisfied, in that event, the husband or all relatives shall be deemed to have caused her death. In other words, the offence shall be deemed to have been committed by fiction of law. Once the prosecution proves its case with regard to the basic ingredients of Section 304-B, the Court will presume by deemed fiction of law that the husband or the relatives complained of, has caused her death. Such a presumption can be drawn by the Court keeping in view the evidence produced by the prosecution in support of the substantive charge under Section 304-B of the Code.

15. The decision in *Ashok Kumar* (supra) was subsequently followed in *Pathan Hussain Basha V. State of A.P.* - JT 2012 (7) SC 432, to which again one of us was a party (Hon'ble Mr. Justice Fakkir Mohamed Ibrahim Kalifulla).

16. From the above decisions the following principles can be culled out:

(a) To attract the provisions of Section 304B IPC the main ingredient of the offence to be established is that soon before the death of the deceased she was subjected to cruelty and harassment in connection with the demand of dowry.

(b) The death of the deceased woman was caused by any burn or bodily injury or some other circumstance which was not normal.

(c) Such death occurs within seven years from the date of her marriage.

(d) That the victim was subjected to cruelty or harassment by her husband or any relative of her husband.

(e) Such cruelty or harassment should be for or in connection with demand of dowry.

(f) It should be established that such cruelty and harassment was made soon before her death.

(g) The expression (soon before) is a relative term and it would depend upon circumstances of each case and no straightjacket formula can be laid down as to what would constitute a period of soon before the occurrence.

(h) It would be hazardous to indicate any fixed period and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113B of the Evidence Act.

(i) Therefore, the expression "soon before" would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate or life link between the effect of cruelty based on dowry demand and the concerned death. In other words, it should not be remote in point of time and thereby make it a stale one.

(j) However, the expression "soon before" should not be given a narrow meaning which would otherwise defeat the very purpose of the provisions of the Act and should not lead to absurd results.

(k) Section 304B is an exception to the cardinal principles of criminal jurisprudence that a suspect in the Indian Law is entitled to the protection of

Article 20 of the Constitution, as well as, a presumption of innocence in his favour. The concept of deeming fiction is hardly applicable to criminal jurisprudence but in contradistinction to this aspect of criminal law, the legislature applied the concept of deeming fiction to the provisions of Section 304B.

(l) Such deeming fiction resulting in a presumption is, however, a rebuttable presumption and the husband and his relatives, can, by leading their defence prove that the ingredients of Section 304B were not satisfied.

(m) The specific significance to be attached is to the time of the alleged cruelty and harassment to which the victim was subjected to, the time of her death and whether the alleged demand of dowry was in connection with the marriage. Once the said ingredients were satisfied it will be called dowry death and by deemed fiction of law the husband or the relatives will be deemed to have committed that offence.

17. Keeping the above principles in mind, when we examine the case on hand, we find the following uncontroverted facts:

(i) The death of the deceased occurred 11 months after her marriage thereby the main condition prescribed under Section 304B, namely, within seven years of the marriage was fulfilled.

(ii) The death of the deceased was not normal as evidenced by the version of PW.1 postmortem doctor, the postmortem certificate and also Exhibit 'PG', the report of Chemical Examiner.

(iii) The evidence of PWs.2 and 3 read along with

Exhibit 'PH' to 'PK' disclose that there was a demand for payment of cash of Rs.30,000/- apart from a stereo set and a scooter.

(iv) According to PW.2, father of the deceased 3 to 4 days prior to the unfortunate death of the deceased his daughter came to his house and expressed her dire need for payment of Rs.30,000/- as demanded by her in-laws and that she was being harassed on that score.

(v) The evidence of PW.3 was to the effect that on the date of the death of the deceased, namely, 03.11.1987 he happened to witness the torture meted out to the deceased at the hands of her in-laws.

(vi) Though on behalf of the appellant and other accused certain witnesses were examined by way of defence, both the trial Court as well as the Appellate Court have noted that nothing concrete was brought out to show that the evidence led on the side by the prosecution through PWs.1 to 3 were in any way contradicted.

18. On behalf of the appellant, it was contended that Exhibit 'PK' which was stated to have been recovered by PW.5, Sub-Inspector of Police, from the brassier of the deceased was not proved to the satisfaction of the Court. For the sake of argument even if such a contention can be accepted and the said Exhibit 'PK' is eschewed from consideration there were other exhibits such as Exhibits 'PH' to 'PK' which were all letters written by the deceased addressed to PW.2 her father which were written prior to her death and were sent by post. It is not in dispute and as noted by the trial Court, those exhibits bore the postal stamp impressions with relevant dates mentioned therein. Though DW.3 a document expert was examined to show that there was a variation in the hand-writing of the deceased as between the

admitted one and those found in Exhibits 'PH', 'PK' and 'PJ', he himself admitted in the cross-examination that some variation in the hand-writing can occur with the passage of time after the learning stage and also at the old age or due to clinical or any disease or accident which affect the muscular control of the person while writing a letter. To yet another question, he also admitted that it was correct that the portion of the disputed signatures 'Q1' to 'Q3' which may read as Darshana is similar to the corresponding words of standard signature 'A1'. Therefore, it will be highly unsafe to rely upon the evidence of DW.3 in order to exclude the letters said to have been written by the deceased to her father.

19. The trial Court having examined Exhibits 'PH' to 'PJ' found that the alleged harassment at the hands of the in-laws of the deceased immediately before her death was true. Before us nothing was pointed out to hold that the said conclusion was perverse or was there any illegality or irregularity. The evidence of PW.1 doctor, who conducted the postmortem, has stated in his evidence that as per his report Exhibit 'PA' the following antemortem injuries and other abnormalities were found on the body of the deceased:

> "Six abrasions varying from 0.5 cm to 1 cm were present on the left side of the cheek, 2 cm away from the angle of the mouth. Larynx and trachea showed congestion and blood stained froth was present. Right and left lungs were congested and frothy material was coming out of lung after squeezing. Blood from the heart was sent for chemical examination. Mouth pharynx and essofigus did not show any abnormality. But blood stained froth was present. Stomach and its contents were sent to the C/Examiner for the Chemical Examination"

20. In the cross-examination, PW.3 stated that the mouth of the deceased girl was swollen and there were other injuries on other parts of her body. Along with Exhibit 'PF' the Chemical Examiner covering letter Exhibit 'PG' made it clear that

although no poison was found in the viscera, there were causes or reasons for non-detection of poison such as the poison having been excreted from the body, detoxicated, matabolised by the system or the poison being such as test for the same do not exist in view of countless number of poisons. He also opined "the circumstantial evidence goes a long way to prove the facts of the case regardless of the report indicating that the no poison was found". "From postmortem findings and police history it appears that death has occurred due to some poison".

21. In Exhibits 'PH' and 'PJ' it was clearly mentioned that the deceased was harassed from last night, namely, 02.11.1987 and her miserable condition was created at the instance of her mother-in-law, wife of her husband's brother, the appellant herein and the brother himself, namely, second accused, who is no more. In Exhibit 'PJ' she while referring to such harassment meted out to her by her mother-in-law, brother-in-law and his wife also mentioned about the demands made by them, namely, cash, scooter and other articles.

22. All the above factors clearly established the legal requirements for an offence falling under Sections 304B and 498A IPC with the aid of Section 113B were conclusively proved and the conviction and sentence imposed, therefore, do not call for interference.

23. The appellant Kashmir Kaur is on bail. The bail bond stands cancelled and she shall be taken into custody forthwith to serve out the remaining part of sentence, if any. The appeal so far as appellant No.1 is concerned stands dismissed.

24. The appeal so far as appellant No.2 i.e. accused Lakha Singh @ Lakhiwinder Singh is concerned, as held by us in the opening part of this judgment stands dismissed as having become infructuous even at the time it came to be filed. Accordingly, the application for substitution also stands dismissed.

B.B.B. Appeals dismissed.

DEOKI PANJHIYARA

v.

SHASHI BHUSHAN NARAYAN AZAD & ANR.

(Criminal Appeal Nos. 2032-2033 of 2012)

DECEMBER 12, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Protection of Women from Domestic Violence Act, 2005: s. 12 – Proceedings before trial court –Interim maintenance granted by trial court – Set aside by High Court on production of marriage certificate showing the first marriage of appellant with another man – Held: If according to respondent, the marriage between him and the appellant was void on account of the previous marriage of the appellant, he ought to have obtained the necessary declaration from competent court in view of the highly contentious questions raised by appellant on the said score – In the absence of any valid decree of nullity or the necessary declaration, court will have to proceed on the footing that the relationship between the parties is one of marriage and not in the nature of marriage, and appellant would be entitled to claim maintenance and other benefits under the D.V. Act, 2005 – Mere production of a marriage certificate issued u/s 13 of the Special Marriage Act in support of the claimed first marriage of the appellant was not sufficient for High Court, to render a complete and effective decision with regard to the marital status of the parties and that too in a collateral proceeding for maintenance – Impugned order of High Court set aside.

The respondent-husband filed a writ petition before the High Court challenging the order dated 13.2.2008 of the trial court granting interim maintenance to the appellant-wife in her petition u/s 12 of the Protection of Women from Domestic Violence Act, 2005(DV Act, 2005). Meanwhile, the respondent filed an application before the

trial court for recall of the order dated 13.2.2008 on the ground that subsequently he came to know that the appellant was already married to one 'RKM', and placed before trail court the first marriage certificate dated 18.4.2003. The trial court rejected the said application. The respondent filed a revision petition before the High Court, which allowed both the writ petition and revision of the respondent-husband holding that the marriage certificate dated 18.4.2003 issued u/s 13 of the Special Marriage Act, 1954, was conclusive proof of the first marriage of the appellant and, as such, she was not entitled to maintenance.

Allowing the appeals, the Court

HELD: 1.1 Admittedly, both the appellant and the respondent are governed by the provisions of the Hindu Marriage Act, 1955, s. 11 whereof makes it clear that a marriage solemnised after the commencement of the Act "shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions so specified in clauses (i), (iv) and (v) of s.5." [para 14] [835-E-F]

1.2 In the instant case, the appellant in her pleadings had clearly, categorically and consistently denied that she was married to any person known as 'RKM'. The legitimacy, authenticity and genuineness of the marriage certificate dated 18.4.2003 has also been questioned by the appellant. Though s.11 of the 1955 Act gives an option to either of the parties to a void marriage to seek a declaration of invalidity/nullity of such marriage, the exercise of such option cannot be understood to be in all situations voluntarily. Situations may arise when recourse to a court for a declaration regarding the nullity of a marriage claimed by one of the spouses to be a void

marriage, will have to be insisted upon in departure to the normal rule. [para 18] [836-G; 837-A-B]

A. Subash Babu v. State of Andhra Pradesh & Anr. **2011 (9) SCR 453 = 2011 (7) SCC 616 – relied on**

Yamunabai v. Anantrao **AIR 1988 SC 645; and** *M.M. Malhotra v. Union of India* **2005 (3) Suppl. SCR 1026 = 2005 (8) SCC 351 - referred to.**

1.3 If according to the respondent, the marriage between him and the appellant was void on account of the previous marriage between the appellant and 'RKM', he ought to have obtained the necessary declaration from the competent court in view of the highly contentious questions raised by the appellant on the said score. It is only upon a declaration of nullity or annulment of the marriage between the parties by a competent court that any consideration of the question whether the parties had lived in a "relationship in the nature of marriage" would be justified. In the absence of any valid decree of nullity or the necessary declaration, the court will have to proceed on the footing that the relationship between the parties is one of marriage and not in the nature of marriage. It may also be emphasised that any determination of the validity of the marriage between the parties could have been made only by a competent court in an appropriate proceeding by and between the parties and in compliance with all other requirements of law. Mere production of a marriage certificate issued u/s 13 of the Special Marriage Act, 1954 in support of the claimed first marriage of the appellant was not sufficient for any of the courts, including the High Court, to render a complete and effective decision with regard to the marital status of the parties and that too in a collateral proceeding for maintenance. [para 19] [837-G-H; 838-A-E]

1.4 Consequently, this Court holds that until the invalidation of the marriage between the appellant and the respondent is made by a competent court it would only be corre-ct to proceed on the basis that the appellant continues to be the wife of the respondent so as to entitle her to claim all benefits and protection available under the DV Act, 2005. Accordingly, the interference made by the High Court with the grant of maintenance in favour of the appellant was not at all justified. The order dated 09.04.2010 passed by the High Court is set aside. [para 19 and 21] [838-E-F-G-H]

D. Velusamy vs. D.Patchaimmal **2010 (13) SCR 706 = (2010) 10 SCC 469; and** *S.P. Changalvaraya Naidu vs. Jagannath and others* **1993 (3) Suppl. SCR 422 =AIR 1994 SC 853 – cited.**

Case Law Reference:

2010 (13) SCR 706	**cited**	**para 9**
1993 (3) Suppl. SCR 422	**cited**	**para 11**
AIR 1988 SC 645	**referred to**	**para 15**
2005 (3) Suppl. SCR 1026	**referred to**	**para 16**
2011 (9) SCR 453	**relied on**	**para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2032-2033 of 2012.

From the Judgment & Order dated 09.04.2010 of the High Court of Jharkhand at Ranchi in W.P. (Crl.) No. 205 of 2008 and Cr. Rev. No. 819 of 2009.

Gaurav Agrawal, Shankar Narayanan for the Appellant.

Mahesh Tiwari, Bishnu Tiwari, Dr. Kailash Chand, Ratan Kumar Choudhuri for the Respondents.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

2. The appellant, who was married to the respondent in the year 2006, had filed a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the DV Act') seeking certain reliefs including damages and maintenance. During the pendency of the aforesaid application the appellant filed an application for interim maintenance which was granted by the learned trial court on 13.02.2008 at the rate of Rs.2000/- per month. The order of the learned trial court was affirmed by the learned Sessions Judge on 09.07.2008. As against the aforesaid order, the respondent (husband) filed a Writ Petition before the High Court of Jharkhand.

3. While the Writ Petition was pending, the respondent sought a recall of the order dated 13.02.2008 on the ground that he could subsequently come to know that his marriage with the appellant was void on the ground that at the time of the said marriage the appellant was already married to one Rohit Kumar Mishra. In support, the respondent – husband had placed before the learned trial court the certificate of marriage dated 18.04.2003 between the appellant and the said Rohit Kumar Mishra issued by the competent authority under Section 13 of the Special Marriage Act, 1954 (hereinafter referred to as 'the Act of 1954').

4. The learned trial court by order dated 7.8.2009 rejected the aforesaid application on the ground that notwithstanding the certificate issued under Section 13 of the Act of 1954, proof of existence of the conditions enumerated in Section 15 of the Act would still required to be adduced and only thereafter the certificate issued under Section 13 of the Act can be held to be valid.

5. The aforesaid order dated 07.08.2009 was challenged by the respondent-husband in a revision application before the High Court which was heard alongwith the writ petition filed

earlier. Both the cases were disposed of by the impugned common order dated 09.04.2010 holding that the marriage certificate dated 18.04.2003 issued under Section 13 of the Act of 1954 was conclusive proof of the first marriage of the appellant with one Rohit Kumar Mishra which had the effect of rendering the marriage between the appellant and the respondent null and void. Accordingly, it was held that as the appellant was not the legally wedded wife of the respondent she was not entitled to maintenance granted by the learned courts below. It is against the aforesaid order of the High Court that the present appeals have been filed by the appellant – wife.

6. We have heard Shri Gaurav Agarwal, learned counsel for the appellant and Shri Mahesh Tiwari, learned counsel for the respondent.

7. Learned counsel for the appellant has strenuously urged that the allegation of the earlier marriage between the appellant and Rohit Kumar Mishra had been denied by the appellant at all stages and the said fact is not substantiated only by the Marriage Certificate dated 18.04.2003. Even assuming the marriage between the appellant and the respondent to be void, the parties having lived together, a relationship in the nature of marriage had existed which will entitle the appellant to claim and receive maintenance under the DV Act, 2005. Placing the legislative history leading to the aforesaid enactment, it is urged that in the Bill placed before the Parliament i.e. Protection from Domestic Violence Bill, 2002 an "aggrieved person" and "relative" was, initially, defined in the following terms :

"Section 2…….

(a) "aggrieved person" means any woman who is or has been relative of the respondent and who alleges to have been subjected to act of domestic violence by the respondent;

(b)…

(c)…

(d)….

(e)….

(f)…

(g)…

(h)….

(i)"relative" includes any person related by blood, marriage or adoption and living with the respondent."

Thereafter, the different clauses of the Bill were considered by a Parliamentary Standing Committee and recommendations were made that having regard to the object sought to be achieved by the proposed legislation, namely, to protect women from domestic violence and exploitation, clause (2)(i) defining "relative" may be suitably amended to include women who have been living in relationship akin to marriages as well as in marriages considered invalid by law. Pursuant to the aforesaid recommendation made by the Standing Committee, in place of the expression "relative" appearing in clause 2(i) of the Bill, the expression "domestic relationship" came be included in clause (f) of Section 2 of the Act. Learned counsel by referring to the definition of "aggrieved person" and "domestic relationship" as appearing in the DV Act, 2005 has urged that the legislative intent to include women, living in marriages subsequently found to be illegal or even in relationships resembling a marriage, within the protective umbrella of the DV Act is absolutely clear and the same must be given its full effect. It is submitted that having regard to the above even if the marriage of the appellant and the respondent was void on account of the previous marriage of the appellant, the said fact, by itself, will not disentitle the appellant to seek maintenance and other reliefs under the DV Act, 2005.

8. Before proceeding further it will be appropriate to notice, at this stage, the definition of the expressions "aggrieved person" and "domestic relationship" appearing in Section 2(a) and (f) of the DV Act, 2005.

"Section 2…..

(a) "aggrieved person" means any women who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;

(b) ……

(c) ……

(d) ……

(e) ……

(f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family."

9. Learned counsel, in all fairness, has also drawn the attention of the court to a decision rendered by a coordinate Bench in *D. Velusamy vs. D.Patchaimmal*[1] wherein this court had occasion to consider the provisions of Section 2(f) of the DV Act to come to the conclusion that a "relationship in the nature of marriage" is akin to a common law marriage which requires, in addition to proof of the fact that parties had lived together in a shared household as defined in Section 2(s) of the DV Act, the following conditions to be satisfied:

(a) The couple must hold themselves out to society as

1. (2010) 10 SCC 469.

being akin to spouses.

(b) They must be of legal age to marry.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time……."

[Para 33]

10. Learned counsel has, however, pointed out that in *Velusamy* (supra) the issue was with regard to the meaning of expression "wife" as appearing in Section 125 Cr.P.C. and therefore reference to the provisions of Section 2(f) of the DV Act, 2005 and the conclusions recorded were not required for a decision of the issues arising in the case. Additionally, it has been pointed out that while rendering its opinion in the aforesaid case this Court had no occasion to take into account the deliberations of the Parliamentary Standing Committee on the different clauses of Protection of Women from Domestic Violence Bill, 2002. It is also urged that the equation of the expression "relationship in the nature of marriage" with a common law marriage and the stipulation of the four requirements noticed above is not based on any known or acceptable authority or source of law. Accordingly, it is submitted that the scope and expanse of the expression "relationship in the nature of marriage" is open for consideration by us and, at any rate, a reference of the said question to a larger bench would be justified.

11. Opposing the contentions advanced on behalf of the appellant learned counsel for the respondent – husband has submitted that the object behind insertion of the expression "relationship in the nature of marriage" in Section 2(f) of the DV Act is to protect women who have been misled into marriages

by the male spouse by concealment of the factum of the earlier marriage of the husband. The Act is a beneficial piece of legislation which confers protection of different kinds to women who have been exploited or misled into a marriage. Learned counsel has pointed out that in the present case the situation is, however, otherwise. From the marriage certificate dated 18.04.2003 it is clear that the appellant was already married to one Rohit Kumar Mishra which fact was known to her but not to the respondent. The second marriage which is void and also gives rise to a bigamous relationship was voluntarily entered into by the appellant without the knowledge of the husband. Therefore, the appellant is not entitled to any of the benefits under the DV Act. In fact, grant of maintenance in the present case would amount to conferment of benefit and protection to the wrong doer which would go against the avowed object of the Act. Learned counsel has also submitted that the conduct of the appellant makes it clear that she had approached the court by suppressing material facts and with unclean hands which disentitles her to any relief either in law or in equity. In this regard the decision of this court in *S.P. Changalvaraya Naidu vs. Jagannath and others*[2] has been placed before us.

12. Having considered the submissions advanced by the learned counsels for the contesting parties, we are of the view that the questions raised, namely, whether the appellant and the respondent have/had lived together in a shared household after their marriage on 4.12.2006; if the parties have/had lived together whether the same gives rise to relationship in the nature of marriage within the meaning of Section 2(f) of the DV Act, 2005; whether the decision of this Court in *Velusamy (supra)* is an authoritative pronouncement on the expression "relationship in the nature of marriage" and if so whether the same would require reference to a larger Bench, may all be premature and the same need not be answered for the present. Instead, in the first instance, the matter may be viewed from the perspective indicated below.

2. AIR 1994 SC 853.

13. The Respondent before us had claimed (before the trial court as well as the High Court) that the marriage between him and the appellant solemnised on 4.12.2006, by performance of rituals in accordance with Hindu Law, was void on account of the previous marriage between the appellant with one Rohit Kumar Mishra. In support thereof, the respondent relied on a marriage certificate dated 18.4.2003 issued under Section 13 of the Special Marriage Act, 1954. Acting solely on the basis of the aforesaid marriage certificate the learned trial court as well as the High Court had proceeded to determine the validity of the marriage between the parties though both the courts were exercising jurisdiction in a proceeding for maintenance. However, till date, the marriage between the parties is yet to be annulled by a competent court. What would be the effect of the above has to be determined first inasmuch as if, under the law, the marriage between the parties still subsists the appellant would continue to be the legally married wife of the respondent so as to be entitled to claim maintenance and other benefits under the DV Act, 2005. Infact, in such a situation there will be no occasion for the Court to consider whether the relationship between the parties is in the nature of a marriage.

14. Admittedly, both the appellant and the respondent are governed by the provisions of the Hindu Marriage Act, 1955. Section 11 of the Hindu Marriage Act makes it clear that a marriage solemnised after the commencement of the Act "shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions so specified in clauses (i), (iv) and (v) of Section 5."

15. While considering the provisions of Section 11 of the Hindu Marriage Act, 1955 this Court in *Yamunabai v. Anantrao*[3] has taken the view that a marriage covered by Section 11 is void-ipso-jure, that is, void from the very inception. Such a marriage has to be ignored as not existing in law at all. It was further held by this Court that a formal declaration of the

3. AIR 1988 SC 645.

nullity of such a marriage is not a mandatory requirement though such an option is available to either of the parties to a marriage.

It must, however, be noticed that in *Yamunabai (supra)* there was no dispute between the parties either as regards the existence or the validity of the first marriage on the basis of which the second marriage was held to be ipso jure void.

16. A similar view has been expressed by this Court in a later decision in *M.M. Malhotra v. Union of India*[4] wherein the view expressed in *Yamunabai (supra)* was also noticed and reiterated.

17. However, the facts in which the decision in *M.M. Malhotra (supra)* was rendered would require to be noticed in some detail:

The appellant M.M. Malhotra was, inter alia, charged in a departmental proceeding for contracting a plural marriage. In reply to the charge sheet issued it was pointed out that the allegation of plural marriage was not at all tenable inasmuch as in a suit filed by the appellant (M.M. Malhotra) for a declaration that the respondent (wife) was not his wife on account of her previous marriage to one D.J. Basu the said fact i.e. previous marriage was admitted by the wife leading to a declaration of the invalidity of the marriage between the parties. The opinion of this court in *M.M. Malhotra (supra)* was, therefore, once again rendered in the situation where there was no dispute with regard to the factum of the earlier marriage of one of the spouses.

18. In the present case, however, the appellant in her pleadings had clearly, categorically and consistently denied that she was married to any person known as Rohit Kumar Mishra. The legitimacy, authenticity and genuineness of the marriage certificate dated 18.4.2003 has also been questioned by the appellant. Though Section 11 of the aforesaid Act gives an

4. 2005 (8) SCC 351.

option to either of the parties to a void marriage to seek a declaration of invalidity/nullity of such marriage, the exercise of such option cannot be understood to be in all situations voluntarily. Situations may arise when recourse to a court for a declaration regarding the nullity of a marriage claimed by one of the spouses to be a void marriage, will have to be insisted upon in departure to the normal rule. This, in our view, is the correct ratio of the decision of this Court in *Yamunabai (supra) and M.M. Malhotra (supra).* In this regard, we may take note of a recent decision rendered by this Court in *A. Subash Babu v. State of Andhra Pradesh & Anr*[5]. while dealing with the question whether the wife of a second marriage contracted during the validity of the first marriage of the husband would be a "person aggrieved" under Section 198 (1)(c) of the Code of Criminal Procedure to maintain a complaint alleging commission of offences under section 494 and 495 IPC by the husband. The passage extracted below effectively illuminates the issue:

> "Though the law specifically does not cast obligation on either party to seek declaration of nullity of marriage and it may be open to the parties even without recourse to the Court to treat the marriage as a nullity, such a course is neither prudent nor intended and a declaration in terms of Section 11 of the Hindu Marriage Act will have to be asked for, for the purpose of precaution and/or record. Therefore, until the declaration contemplated by Section 11 of the Hindu Marriage Act is made by a competent Court, the woman with whom second marriage is solemnized continues to be the wife within the meaning of Section 494 IPC and would be entitled to maintain a complaint against her husband."

19. In the present case, if according to the respondent, the marriage between him and the appellant was void on account of the previous marriage between the appellant and Rohit Kumar Mishra the respondent ought to have obtained the

5. 2011 (7) SCC 616.

necessary declaration from the competent court in view of the highly contentious questions raised by the appellant on the aforesaid score. It is only upon a declaration of nullity or annulment of the marriage between the parties by a competent court that any consideration of the question whether the parties had lived in a "relationship in the nature of marriage" would be justified. In the absence of any valid decree of nullity or the necessary declaration the court will have to proceed on the footing that the relationship between the parties is one of marriage and not in the nature of marriage. We would also like to emphasise that any determination of the validity of the marriage between the parties could have been made only by a competent court in an appropriate proceeding by and between the parties and in compliance with all other requirements of law. Mere production of a marriage certificate issued under Section 13 of the Special Marriage Act, 1954 in support of the claimed first marriage of the appellant with Rohit Kumar Mishra was not sufficient for any of the courts, including the High Court, to render a complete and effective decision with regard to the marital status of the parties and that too in a collateral proceeding for maintenance. Consequently, we hold that in the present case until the invalidation of the marriage between the appellant and the respondent is made by a competent court it would only be correct to proceed on the basis that the appellant continues to be the wife of the respondent so as to entitle her to claim all benefits and protection available under the DV Act, 2005.

20. Our above conclusion would render consideration of any of the other issues raised wholly unnecessary and academic. Such an exercise must surely be avoided.

21. We, accordingly, hold that the interference made by the High Court with the grant of maintenance in favour of the appellant was not at all justified. Accordingly, the order dated 09.04.2010 passed by the High Court is set aside and the present appeals, are allowed.

R.P. Appeals allowed.

STATE OF MADHYA PRADESH & ORS.
v.
KU. SANDHYA TOMAR & ANR.
(Civil Appeal No. 9028 of 2012)

DECEMBER 13, 2012

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

Service Law – Appointment – Temporary appointment – In a project – Through Employment Exchange – The appointee joining another department – Later repatriated to parent department – Not permitted to join parent department – Subsequent advertisement for appointment to the post – Challenged by the appointee – Advertisement quashed by Single Judge as well as Division Bench of High Court – On appeal, held: The initial appointment was in violation of Articles 14 and 16 of the Constitution – As the appointment was temporary, the appointee cannot claim any lien in respect of the said post – The appointee has no right to challenge the advertisement – Constitution of India, 1950 – Articles 14 and 16.

Words and Phrases – 'Lien' – Meaning of, in the context of service law.

Respondent No. 1 was appointed to the post of Project Director in the Child Labour Elimination and Rehabilitation Society, through the Employment Exchange on a temporary basis. Thereafter, she joined a post in the Department of the State Government. After eight months, she was repatriated to her parent Department. But, she was not permitted to join the duty in her parent Department. The post of Project Director was thereafter advertised.

Respondent No. 1 filed Writ Petition challenging the advertisement. Single Judge of High Court quashed the advertisement. The Division Bench of High Court, in writ appeal affirmed the judgment of Single Judge. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. Initial appointment of respondent No.1 was not made on the basis of any advertisement in any newspaper whatsoever. Hence, applications for the post were not invited. It is a settled legal proposition that considering the candidature of persons by mere calling of names from the Employment Exchange does not meet the requirement of Articles 14 and 16 of the Constitution of India. Thus, respondent No.1 was not appointed following the procedure mandatorily required by law, and that such appointment was admittedly in violation of Articles 14 and 16 of the Constitution of India, as several other eligible candidates have been deprived of their right to be considered for the post. [Para 7] [845-C-D-E-F]

Excise Superintendent Malkapatnam, Krishna District, A.P. **(1996) 6SCC 216: 1996 (5) Suppl. SCR 73 ;** *Veer Kunwar Singh UniversityAd Hoc Teachers Association and Ors. v. Bihar State University (C.C.) Service Commission and Ors.,* **(2009) 17 SCC 184: 2007 (7) SCR 396;** *Union of India and Ors. v. Miss. Pritilata Nanda* **AIR 2010 SC 2821: 2010 (8) SCR 733;** *State of Orissa and Anr. v. Mamata Mohanty* **(2011) 3 SCC 436: 2011 (2) SCR 704 – relied on.**

2. It is a settled legal proposition that in the event that a person is not appointed on a regular basis, and if his service is not governed by any Statutory Rules, he shall be bound by the terms and conditions that have been incorporated in his appointment letter. In such an eventuality, there can be no reason with respect to why

the terms and conditions incorporated in the appointment letter should not be enforced against such an employee. In the instant case, respondent No.1 was temporarily appointed in a project, and, thus she had at no point of time been appointed on a regular basis, owing to which she cannot claim any lien with respect to the said post. [Para 8] [845-G-H; 846-A-B]

State of Punjab and Ors. v. Surinder Kumar and Ors., **AIR 1992 SC 1593: 1991 (3) Suppl. SCR 553 – relied on.**

3. "Lien" connotes the civil right of a Government servant to hold the post "to which he is appointed substantively." The necessary corollary to the aforesaid right is that such appointment must be in accordance with law. A person can be said to have acquired lien as regards a particular post only when his appointment has been confirmed and when he has been made permanent to the said post. "The word `lien' is a generic term and, standing alone, it includes lien acquired by way of contract, or by operation of law."Whether a person has lien, depends upon whether he has been appointed in accordance with law, in a substantive capacity, and whether he has been made permanent or has been confirmed to the said post. [Para 9] [846-B-E]

Parshotam Lal Dhingra v. Union of India **AIR 1958 SC 36: 1958 SCR 828;** *S. Pratap Singh v. State of Punjab* **AIR 1964 SC 72: 1964 SCR 733;** *T.R. Sharma v. Prithvi Singh and Ors.* **AIR 1976 SC 367: 1976 (2) SCR 716 ;** *Ramlal Khurana v. State of Punjab and Ors.* **AIR 1989 SC 1985: 1989 (3) SCR 680;** *Triveni Shankar Saxena v. State of U.P.* and *Ors.* **AIR 1992 SC 496: 1991 (3) Suppl. SCR 534 ;** *Dr. S.K. Kacker v. All India Institute of Medical Sciences and Ors.***(1996) 10 SCC 734: 1996 (5) Suppl. SCR 540;** *S. Narayana vs. Md. Ahmedulla Khan and Ors.* **AIR 2006 SC 2224: 2006 (2) Suppl. SCR 69;** *State of Rajasthan and Anr. v. S.N. Tiwari and Ors.* **AIR 2009 SC 2104 – relied on.**

4. Respondent No.1 voluntarily abandoned her job in the Society and joined another post in another department. Therefore, her temporary employment in the Society came to an end automatically. The Society was not bound to permit respondent No.1 to join the post of Project Director. As a consequence thereof, she has no right to challenge the advertisement dated 16.5.2005. At the most, if respondent No.1 was eligible for appointment as per the said advertisement, she could apply for fresh appointment. [Para 10] [846-H; 847-A-B-C]

Case Law Reference:

1996 (5) Suppl. SCR 73	**Relied on**	**Para 7**
2007 (7) SCR 396	**Relied on**	**Para 7**
2010 (8) SCR 733	**Relied on**	**Para 7**
2011 (2) SCR 704	**Relied on**	**Para 7**
1991 (3) Suppl. SCR 553	**Relied on**	**Para 7**
1958 SCR 828	**Relied on**	**Para 9**
1964 SCR 733	**Relied on**	**Para 9**
1976 (2) SCR 716	**Relied on**	**Para 9**
1989 (3) SCR 680	**Relied on**	**Para 9**
1991 (3) Suppl. SCR 534	**Relied on**	**Para 9**
1996 (5) Suppl. SCR 540	**Relied on**	**Para 9**
2006 (2) Suppl. SCR 69	**Relied on**	**Para 9**
AIR 2009 SC 2104	**Relied on**	**Para 9**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (Civil) No. 18983 of 2009.

From the Judgment & Order dated 05.11.2008 of the High Court of M.P. at Indore in W.A. No. 86 of 2007.

B.S. Banthia for the petitioners.

Niraj Sharma and Sumit Kumar Sharma for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Leave granted.

2. This appeal has been preferred against the judgment and order dated 5.11.2008, passed by the High Court of Madhya Pradesh (Indore Bench) in Writ Appeal No.86 of 2007, by which it has affirmed the judgment and order of the learned Single Judge dated 17.7.2006, passed in Writ Petition No.1007 of 2006, by which the learned Single Judge quashed the advertisement dated 16.5.2005, inviting the applications for appointment on the post of Project Director.

3. Facts and circumstances giving rise to this appeal are:-

A. That the Central Government introduced a scheme for elimination of child labour with respect to which, the Director General of Employment and Training wrote a letter dated 15.7.1995, to the Collector, Khargone (West Nimar) to implement the aforesaid Scheme. In order to give effect, i.e., to implement the said Scheme, a society, namely, the Child Labour Elimination & Rehabilitation Society (hereinafter referred to as the, "Society"), was formed on 12.4.1996 and the Collector became the ex-officio Chairman of the said Society. It appears that in order to appoint the Project Director, certain names requisitioned from the Employment Exchange, were considered and respondent no.1 was selected and appointed temporarily, vide letter dated 8.11.1996 on a fixed salary of Rs.4,000/- per month. Salary of respondent no.1 was increased from Rs.4,000/- to Rs.8,000/- per month vide Order dated 16.7.1999.

B. Respondent no.1 joined a post in the Panchayat & Rural Development Department in Zila Panchayat, Indore in pursuance of the order dated 29.7.2003, passed by the Government of Madhya Pradesh. Her services in the Panchayat & Rural Development Department were not required, and she was repatriated vide order dated 29.3.2004 to her parent department. However, respondent no.1 was not permitted to join the Society. The post of Project Director was advertised on 16.5.2005. Thus, respondent no.1 filed a writ petition on 26.5.2005, challenging the advertisement dated 16.5.2005, claiming her right to join the said post.

C. The appellants contested the writ petition on various grounds, however, the writ petition was allowed by the learned Single Judge vide order dated 17.7.2006. Aggrieved, the appellants filed a writ appeal, which stood dismissed vide impugned judgment and order dated 5.11.2005. Hence, this appeal.

4. Shri B.S. Banthia, learned counsel for the appellants has submitted that the High Court committed an error in allowing the said writ petition as respondent no.1 was merely a temporary employee, and had joined another post under the alleged order of deputation, and had worked there for a period of 9-10 months. She could not join as a Project Director in the Society as she had no lien therein. She had also left the Society without obtaining any previous sanction from the appointing Authority, i.e., the District Collector. She had further, voluntarily abandoned the services of the Society on 29.7.2003 and thereafter, she filed the said writ petition on 26.5.2005, only challenging advertisement dated 16.5.2005. Hence, even though her services in the Panchayat & Rural Development Department were terminated on 29.3.2004, she approached the High Court only after lapse of a period of one year and two months. Thus, the High Court ought not to have entertained the writ petition at all. The appeal deserves to be allowed.

5. Per contra, Shri Niraj Sharma, learned counsel

appearing for respondent no.1 has strived to defend the impugned order passed by the High Court, contending that she had been sent on deputation by the Government, and over this, she had no control. Therefore, she had a right to join the said Society. Thus, the appeal is liable to be dismissed.

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

7. Initial appointment of respondent no.1 was not made on the basis of any advertisement in any newspaper whatsoever. Hence, applications for the post were not invited. It is a settled legal proposition that considering the candidature of persons by mere calling of names from the Employment Exchange does not meet the requirement of Articles 14 and 16 of the Constitution of India. (Vide: *Excise Superintendent Malkapatnam, Krishna District, A.P.,* (1996) 6 SCC 216; *Veer Kunwar Singh University Ad Hoc Teachers Association & Ors. v. Bihar State University (C.C.) Service Commission & Ors.,* (2009) 17 SCC 184; *Union of India & Ors. v. Miss. Pritilata Nanda,* AIR 2010 SC 2821; and *State of Orissa & Anr. V. Mamata Mohanty,* (2011) 3 SCC 436).

Thus, in view of the above, we are of the considered opinion that respondent no.1 was not appointed following the procedure mandatorily required by law, and that such appointment was admittedly in violation of Articles 14 and 16 of the Constitution of India, as several other eligible candidates have been deprived of their right to be considered for the post.

8. There can be no dispute with respect to the settled legal proposition that in the event that a person is not appointed on a regular basis, and if his service is not governed by any Statutory Rules, he shall be bound by the terms and conditions that have been incorporated in his appointment letter. (Vide: *State of Punjab & Ors. v. Surinder Kumar & Ors.,* AIR 1992 SC 1593). In such an eventuality, there can be no reason with respect to why the terms and conditions incorporated in the

appointment letter should not be enforced against such an employee. In the instant case, respondent no.1 was **temporarily appointed in a project** and thus, she had at no point of time, been appointed on a regular basis, owing to which, she cannot claim any **lien** with respect to the said post.

9. "Lien" connotes the civil right of a Government servant to hold the post "to which he is appointed substantively." The necessary corollary to the aforesaid right, is that such appointment must be in accordance with law. A person can be said to have acquired lien as regards a particular post only when his appointment has been confirmed, and when he has been made permanent to the said post.

"The word `lien' is a generic term and, standing alone, it includes lien acquired by way of contract, or by operation of law."

Whether a person has lien, depends upon whether he has been appointed in accordance with law, in substantive capacity and whether he has been made permanent or has been confirmed to the said post. (Vide: *Parshotam Lal Dhingra v. Union of India,* AIR 1958 SC 36; *S. Pratap Singh v. State of Punjab,* AIR 1964 SC 72; *T.R. Sharma v. Prithvi Singh & Ors.,* AIR 1976 SC 367; *Ramlal Khurana v. State of Punjab & Ors.,* AIR 1989 SC 1985; *Triveni Shankar Saxena v. State of U.P. & Ors.,* AIR 1992 SC 496; *Dr. S.K. Kacker v. All India Institute of Medical Sciences & Ors.,* (1996) 10 SCC 734; *S. Narayana Vs. Md. Ahmedulla Khan & Ors.,* AIR 2006 SC 2224; and *State of Rajasthan & Anr. v. S.N. Tiwari & Ors.,* AIR 2009 SC 2104).

10. It is not the case of the learned counsel for respondent no.1 that she had any lien with respect to the post.

Respondent no.1 voluntarily abandoned her job in the Society and joined another post, in another department on 29.7.2003. Therefore, her temporary employment in the Society

came to an end automatically. She had chosen better employment under the Government of Madhya Pradesh, as opposed to continuing her employment in the Society on a project. Her employment in the Government of Madhya Pradesh was terminated after serving therein for a period of eight months, vide order dated 29.3.2004. In such a fact-situation, the Society was not bound to permit respondent no.1 to join the post of Project Director. As a consequence thereof, she has no right to challenge the advertisement dated 16.5.2005. At the most, if respondent no.1 was eligible for appointment as per the said advertisement, she can apply for fresh appointment. In case respondent no.1 felt that she had a right to join the services of the Government of Madhya Pradesh and that her service from there was wrongly terminated, she could have challenged the said order dated 29.3.2004, which has in fact, never been challenged by her, for reasons best known to her.

11. In view of the above, the learned Single Judge, as well as the Division Bench have misdirected themselves with respect to the actual issues involved in the case, and have decided the case upon totally irrelevant issues. The appeal therefore, succeeds, and is allowed. The judgment and order of the learned Single Judge, as well as that of the Division Bench, are hereby set aside. No costs.

K.K.T. Appeal allowed.

BUDHI SINGH

v.

STATE OF H.P.

(Criminal Appeal No. 1801 of 2009)

DECEMBER 13, 2012

[SWATANTER KUMAR AND MADAN B. LOKUR, JJ.]

PENAL CODE, 1860.

s.300, Exception 1 and s. 304 (Part-I)—Death caused under grave and sudden provocation – Tests to be applied – Explained – Held: In the instant case, keeping in view that the deceased and the accused were real brothers, and the factum of the deceased being in a drunken state abusing and assaulting his father, it can be reasonably held that there was sudden and grave provocation to the accused, who gave a 'tobru' blow on the head of the deceased which proved to be fatal —There was no previous animosity between the parties – Further, there was neither any premeditation nor an intention to kill the deceased – This brings the offence within Exception- 1 to s. 300—Accordingly, the accused is convicted u./s 304 (Part-I) and sentenced to 10 years RI and to pay a fine of Rs.5000/-.

ss. 302 and 304 – Distinction between – Explained.

The appellant was prosecuted for committing the murder of his brother. The prosecution case was that on the day of incident, the deceased came to the house after getting drunk and started abusing and assaulting his father, who called his other son, the appellant, for help. On hearing the shouts, the appellant came out of the house with a 'tobru' (small axe) in his hands and gave a 'tobru' blow on the skull of the deceased who subsequently succumbed to his injuries. The trial court

convicted the appellant-accused u/s 302 IPC and sentenced him to imprisonment for life. The High Court affirmed the conviction and the sentence.

In the instant appeal filed by the accused, the question for consideration before the Court was: whether the offence fell within the purview of s. 302 or 304 IPC.

Disposing of the appeal, the Court

HELD: 1.1. Section 299 IPC covers classes of cases where an act is done with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that the accused is likely by such act to cause death of the other person. In all these situations, it will amount to a culpable homicide. A culpable homicide would be murder, unless it falls in any of the general Exceptions 1 to 5 to s. 300 which would bring the offence outside the purview of s. 300 and make it culpable homicide not amounting to murder. Once it falls in that class of cases, then it is permissible for the court to impose milder punishment in terms of s. 304 or as the case may be. Punishment u/s 302 on the one hand, and s. 304 on the other, is divided by a fine line of distinction as to when a culpable homicide would or would not be murder. The provisions of s.304 itself form a kind of exception to the applicability of s. 302, IPC. Thus, provisions of s. 304 apply only if it is not a murder. [Para 10] [857-F-H; 858-A-B]

State of Andhra Pradesh v. Rayavarapu Punnayya and Another **1977 (1) SCR 601 = (1976) 4 SCC 382 and** *Thangaiya v. State of Tamil Nadu* **1962 Suppl. SCR 567 = (2005) 9 SCC 650 – referred to.**

1.2. The doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of universal application. This will always have

to depend on the facts of a given case. While applying this principle, the primary obligation of the court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury. [Para 13] [862-C-E]

1.3. Another test that is applied more often than not is that the behaviour of the assailant was that of a reasonable person. A fine distinction has to be kept in mind between sudden and grave provocation resulting in sudden and temporary loss of self-control and the one which inspires an actual intention to kill. Such act should have been done during the continuation of the state of mind and the time for such person to kill and reasons to regain the dominion over the mind. Once there is pre-meditated act with the intention to kill, it will obviously fall beyond the scope of culpable homicide not amounting to murder. [para 14] [862-F-H]

1.4. In the instant case, if one examines the cumulative effect of the prosecution evidence while keeping in view that the deceased and the accused were real brothers and the factum of the deceased being in a drunken state abusing and assaulting his father, it can reasonably be inferred that the provocation was sudden and apparently of grave nature. It has been pointed out that the deceased used to often come drunk to the house and used to quarrel. Even on the date of the fatal incident,

he had come drunk, and abused and even assaulted his father. In turn, the father had struck him with a *danda* and shouted for help from his other son. Seeing his father being abused and assaulted and the misbehaviour of the deceased, that too in a drunken condition, became the cause for the accused to hit the deceased. In that moment of anger, he came out of the house with a *tobru* and hit the deceased on his head. It may merely be a matter of chance that he hit the deceased from the sharper side of *tobru* rather than blunt side. The injury proved to be fatal. Of course, the weapon in crime was used with the knowledge that it could cause a grievous hurt endangering the life or even cause death of the deceased but, such weapon is most easily available in houses in the hills. Besides, premeditation and intention to kill are two vital circumstances and amongst others which are to be considered by the court before holding the accused guilty of an offence punishable u/s 302 or 304 IPC. In the instant case, there is no prosecution evidence to show that there was animosity between the deceased and the accused or there was any other motive much less a pre-meditation to kill the accused. From the entire prosecution evidence, it is very difficult to gather that the accused had the intention to murder his brother and had gone out with that intention. [Para 12,14 and 19] [861-F-H; 862-A-B; 863-A-B-D-F; 871-F]

Bonda Devesu v. State of A.P. **(1996) 7 SCC 115*;*** *Devku Bhikha v. State of Gujarat* **(1996) 11 SCC 641 – relied on.**

K.M. Nanavati v. State of Maharashtra **AIR 1962 SC 605*;*** *Mangesh v. State of Maharashtra* **(2011) 2 SCC 123;** *Rampal Singh v. State of Uttar Pradesh* **(2012) 8 SCC 289 – referred to**

1.5. Thus, in the facts of the case, a sudden and grave provocation took place which would bring the offence within the ambit of Exception 1 to s. 300 IPC and,

therefore, u/s 304 (Part-1) IPC, as the accused had caused such bodily injury to the deceased which, to his knowledge, was likely to cause death as he had inflicted injuries on the head of the deceased. The accused is held guilty of an offence punishable u/s 304 (Part-1) IPC, and sentenced to 10 years rigorous imprisonment and to a fine of Rs.5,000/-. [Para 20] [872-B-D]

Case Law Reference:

1977 (1) SCR 601	**referred to**	**Para 10**
2004 (6) Suppl. SCR 786	**referred to**	**Para 11**
1962 Suppl. SCR 567	**referred to**	**Para 15**
(1996) 7 SCC 115	**relied on**	**Para 16**
(1996) 11 SCC 641	**relied on**	**Para 16**
(2011) 2 SCC 123	**referred to**	**Para 17**
(2012) 8 SCC 289	**referred to**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1801 of 2009.

From the Judgment & Order dated 23.8.2004 of the High Court of Himachal Pradesh at Shimla in Criminal Appeal No. 124 of 2002.

Brijender Chahar, K.R. Anand, Rajiv Mehta for the Appellant.

Himinder Lal for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment dated 23rd August, 2004 vide which the appeal preferred by the accused, against the judgment of conviction and order of sentence for life was

dismissed and the same was affirmed by the High Court of Himachal Pradesh at Shimla. The facts giving rise to the present appeal in brief can be usefully noticed. Ganga Ram and Budhi Singh were sons of Bala Ram. Ganga Ram along with two minor sons Ramnath, aged about 11 years and Mohan Lal was living in a room in a house owned by Bala Ram in Village Chowki, District Kullu. Budhi Singh was living with his parents in a separate room of the same building. Ganga Ram was married, but his wife Smt. Indra Devi had deserted him - had settled with one Dolu Ram as his wife.

2. On 9th November, 2000, Bala Ram, who was examined as DW1 was grazing sheep and goats in the field adjoining his house. Ramnath, who was examined as PW9, was washing clothes in the courtyard of the house. At about 4 p.m., Ganga Ram came to the house under the influence of liquor. As he entered the house, he started pelting stones on the roof of the house and abused his father, DW-1. A quarrel took place between Ganga Ram and his father. During the fight between the father and the son, DW1 struck a *danda* blow to Ganga Ram, then he shouted for help and called his son Budhi Singh who was inside the house. On hearing the shouts of his father, Budhi Singh came to the spot armed with a *tobru* (small axe) in his hands. Budhi Singh inflicted *tobru* blow on the skull of Ganga Ram as a result of which Ganga Ram suffered injuries on his head and fell down in the field. The wounds of Ganga Ram were profusely bleeding. Budhi Singh, accused and his father, DW1 went to their house leaving Ganga Ram in the injured condition in the field. After some time they came back to the field and carried Ganga Ram to the *verandah* of their house, but by that time, Ganga Ram had died due to injuries inflicted upon him. This incident occurred at about 4 p.m. After some time, PW9 son of the deceased went to the nearby house of PW1, Surat Ram and narrated the incident of killing of his father by his uncle namely Budhi Singh. PW1 and some other residents of the village gathered in the house of Bala Ram and found the dead body of the deceased lying there. In the night,

some of the persons who had come to the house of Bala Ram also informed Khimi Ram, Member Zila Parishad, who was examined as PW2, of the occurrence. He telephonically passed the information of murder of Ganga Ram to the Police Post, Bhunter. The information was recorded by PW6, Head Constable, Ram Swarup in the *Roznamcha*, Ext. PW6/A at Police Chowki, Bhunter. PW6 also informed the SHO Roshan Lal of Police Station, Kullu in regard to the occurrence. Upon receiving directions from PW6 investigation was started and police officials were deputed at the place of occurrence. When the Investigating Officer, PW10 reached the place of occurrence, DW1 disclosed to him that Ganga Ram was murdered by him with *Danda* blow though PW9, the minor son of the deceased, informed PW10 that his father, Ganga Ram, was murdered by the accused with *tobru* blows. PW10 recorded the statement, Ext. PW9/A, of PW9 under Section 154 of the Code of Criminal Procedure, 1973 (for short "the CrPC") and sent the same to the police station. On the basis of this, the First Information Report (FIR), Ext. PW7/B, was recorded at about 2.45 p.m. on 10th November, 2000 by Muharrar Head Constable Bhagat Ram, PW7. PW10 inspected the spot, took blood stained earth and bunch of hair of the deceased from the spot vide Ext. PB prepared in the presence of PW1. PW10 prepared the inquest report, Ext. PA and took the photographs of the dead body of Ganga Ram. Then the body of Ganga Ram was sent to District Hospital for post mortem. The post mortem of the body was performed by Dr. Bhupender Chauhan, PW5 and he prepared his report Ext. PW5A. According to the post mortem report, injuries found on the body of the deceased and the cause of death as declared by the PW5 reads as follows:-

> "First wound was sharp edged wound extending from tragus of right ear to the centre of head to the junction of frontal and parietal bone. Underlying bone was also cut. The wound was 17 cm long and brain was also visible.
>
> The second wound was also sharp edged wound on right

side of parietal nature 4 cm long. Underlying bone was also cut and brain was visible. Rest of the body was normal.

The probable cause of death was head injury, leading to cardio respiratory arrest and death."

3. The accused was arrested, put to trial and vide judgment dated 1st January, 2002, the trial court convicted the accused Budhi Singh for committing an offence under Section 302 of the Indian Penal Code, 1860 (IPC) and as a sequel to the finding recorded on merits, also passed an order of sentence, awarding life imprisonment and a fine of Rs. 2,000. In default of fine, the accused was directed to suffer further imprisonment for six months. This judgment of the trial court was appealed by the accused as already noticed. The appeal came to be dismissed by the judgment of the High Court dated 23rd August, 2004 affirming the judgment of the Trial Court giving rise to the filing of the present appeal by way of special leave.

4. The counsel appearing for the accused has not challenged the conviction of the accused on merits, but has contended that even if it is argued that prosecution has been able to establish its case beyond reasonable doubt, then also on the basis of the prosecution evidence, an offence under Section 302 IPC is not made out and the accused can, at best, be punished only for an offence under Section 304 Part II, IPC. The contention is that the accused had no intention to kill the deceased. It was not a case of pre-meditated murder. The incident took place at the spur of the moment and there was sudden and grave provocation by the deceased which resulted in inflictment of the injuries on the body of the deceased. Therefore, the case would be covered under Exception I to Section 300 and there being no intention to kill would be a case of culpable homicide not amounting to murder falling under Part II of Section 304 IPC. In support of its contention, he has relied upon *State of Andhra Pradesh v. Rayavarapu Punnayya and Another* [(1976) 4 SCC 382], *Mangesh v. State of Gujarat*

[(2011) 2 SCC 123], *Devku Bhikha v. State of Maharashtra* [(1996) 11 SCC 641], *Bonda Devesu v. State of A.P.* [(1996) 7 SCC 115].

5. While refuting the contention of the appellant, it is contended on behalf of the State that there was a clear intention on the part of the accused to kill the deceased. The accused inflicted two injuries on the head of the deceased by *tobru* (small axe), thus it is clear from the prosecution evidence that the accused had inflicted injurieson a vital part of the body and with a sharp edged weapon, which was bound to result in his death and, therefore, the accused could not be absolved of the liabilities and consequences of committing culpable homicide amounting to murder.

6. In order to examine the merit or otherwise of this sole contention, raised before the court, let us examine the evidence that has come on record. As already noticed, there is no dispute as to the occurrence and the death of the deceased as a result of inflictment of injuries by the accused. All that has to be examined by this court is whether the offence falls within the purview of Section 302 or Section 304 Part II IPC. In light of this, we have to refer to the evidence from that limited point of view.

7. Ext. PW7/B is the FIR recorded in relation to the occurrence in question. As per the FIR which was recorded on the basis of the statement of PW9, the deceased had come from outside after getting drunk. He threw stones and started abusing Bala Ram who was just a 100 feet away in the field, grazing animals. Bala Ram told the deceased that he was a thief and used to steal his money. Then they started quarrelling with each other. Then the deceased started beating him *(Mara Peeta Karna Shuru Kar Diya)* upon which Bala Ram called out to his son Budhi Singh. Upon this, Budhi Singh had come and he was carrying *tobru* in his hands and hit it on the head of the deceased which started bleeding. PW9 when examined as a

witness in the court said the same thing and also that Bala Ram had demanded money from the deceased which he had taken from Bala Ram earlier. In regard to inflicting of the injury, PW9 stated "my uncle brought *tobru* and inflicted injury on the head of my father."

8. PW5, Dr. Bhupender Choudhary when examined in the court stated that there were two wounds on the side of the head of the deceased. First wound was sharp edged wound extending from tragus of right ear to the centre of head to the junction of the frontal and parietal bone. Second wound was also sharp edged wound on right side of parietal bone, 4 cm long. Underlying bone was also cut and brain was visible. Rest of the body was normal.

9. There is little ambiguity in the FIR Ext.PW7/B. The contention is that PW9 has improved upon his statement as only one injury had been inflicted by the deceased and two injuries were stated by PW9 in the court. This does not help the accused much inasmuch as the statement of PW9 in court is fully supported by the statement of PW5 who has stated that both injuries were caused by sharp edged weapon and were sufficient to cause death in the normal course.

10. Now, we may discuss the legal aspect of this submission. Section 299, IPC defines a culpable homicide. Section 299 covers classes of cases where an act is done with the intention of causing death an or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death of the other person. In all these situations, it will amount to a culpable homicide. A culpable homicide would be murder, unless it falls in any of the general exceptions (i) to (v) to Section 300 which would bring the offence outside the purview of Section 300 and make it culpable homicide not amounting to murder. Once it falls in that class of cases, then it is permissible for the Court to impose milder punishment in terms of Section 304 Part I or

Part II, as the case may be. Punishment under Section 302 on the one hand, and Section 304 on the other is divided by a fine line of distinction as to when a culpable homicide would or would not be murder. The provisions of Section 304 itself form a kind of exception to the applicability of Section 302, IPC, in other words, provisions of Section 304 Part II only if it is not a murder. This scheme and distinction has been most appropriately stated by a judgment of this Court in *State of Andhra Pradesh v. Rayavarapu Punnayya and Another* [(1976) 4 SCC 382], where the Court upon noticing the distinction between these provisions also stated the factors which are to be considered by the court before applying those principles.

> "17. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. *Rajwant* v. *State of Kerala* is an apt illustration of this point.
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> 18. In *Virsa Singh* v. *State of Punjab* Vivian Bose, J. speaking for this Court, explained the meaning and scope of clause (3), thus (at p. 1500):
>
> "The prosecution must prove the following facts before it can bring a case under Section 300, 'thirdly'. First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the

offender."

19. Thus according to the rule laid down in *Virsa Singh case* of even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be "murder". Illustration (*c*) appended to Section 300 clearly brings out this point.

20. Clause (*c*) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general — as distinguished from a particular person or persons — being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached.

This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the *first* or the *second* part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code.

22. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages."

11. A Bench of this Court in the case of *Thangaiya v. State of Tamil Nadu* [(2005) 9 SCC 650] pointed out the distinction between the two sections and observed as under:-

"9. This brings us to the crucial question as to which was the appropriate provision to be applied. In the scheme of IPC culpable homicide is the genus and "murder" its specie. All "murder" is "culpable homicide" but not vice versa. Speaking generally, "culpable homicide" sans "special characteristics of murder is culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of the generic offence, IPC practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the gravest

form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

10. The academic distinction between "murder" and "culpable homicide not amounting to murder" has always vexed the courts. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300....."

12. Having stated the basic distinction between these offences, now we have to examine whether there was such grave and sudden provocation that would bring the case of the appellant within the ambit of exception I to Section 300. The deceased and the accused were real brothers. There was no previous animosity between the parties. It has been pointed out that the deceased used to often come drunk to the house and used to quarrel. Even on the date of the fatal incident, he had come drunk, and abused and even assaulted his father. In turn, the father had struck him with a *danda* and shouted for help from his other son. Seeing his father being abused, assaulted and the misbehaviour of the deceased, that too in a drunken condition, became the cause for the accused to hit the deceased. In that moment of anger, he came out of the house with a *tobru* which is the most commonly available weapon in houses in the hills and hit the deceased on his head. It may merely be a matter of chance that he hit the deceased from the

sharper side of *tobru* (small axe) rather than blunt side. The injury was so severe that it fractured his skull and he fell on the ground. From the entire prosecution evidence, it is very difficult to gather that the accused had the intention to murder his brother and had gone out with the intention to kill him. The injury inflicted was the result of the impact of the weapon used rather than the force applied. Had there been excessive use of force, it would have inevitably resulted in breaking of the skull into two parts.

13. The doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of universal application. This will always have to depend on the facts of a given case. While applying this principle, the primary obligation of the Court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury.

14. Another test that is applied more often than not is that the behaviour of the assailant was that of a reasonable person. A fine distinction has to be kept in mind between sudden and grave provocation resulting in sudden and temporary loss of self-control and the one which inspires an actual intention to kill. Such act should have been done during the continuation of the state of mind and the time for such person to kill and reasons to regain the dominion over the mind. Once there is pre-meditated act with the intention to kill, it will obviously fall beyond the scope of culpable homicide not amounting to murder. When we consider the facts of the case in hand, it is obvious and, as

already noticed, *tobru* (small axe) is a commonly available weapon in the houses in the hills which is used for cutting and collecting the firewood. It is also a matter of common knowledge that the cooking gas was not available in interior parts of hills 12 years back. The provocation was sudden and apparently of grave nature. It is the case of prosecution itself that the deceased was abusing and even assaulting his father and father had shouted for help and called the accused who was already in the house. The deceased was in a drunken state. As it appears that *tobru* was easily available which the accused picked up and went straight out and assaulted his brother, the deceased. The injuries proved fatal. There is no prosecution evidence to show that there was animosity between the deceased and the accused or there was any other motive much less a pre-meditation to kill the accused. They had been living in the same house for years. No unpleasant incident or physical fight was stated to have been reported to the Police in the past. If one examines the cumulative effect of the prosecution evidence while keeping the relationship of the parties in mind and the factum of the deceased being in a drunken state abusing and assaulting his father, it can reasonably be inferred that there was sudden and grave provocation to the accused. In our society, a son normally would not tolerate that his father is insulted, much less assaulted. Of course, the weapon used in crime was used with the knowledge that it could cause a grievous hurt endangering the life or even cause death of the deceased but, as indicated supra, such weapon is most easily available in houses.

15. *K.M. Nanavati* v. *State of Maharashtra* [AIR 1962 SC 605] is an illustrious judgment of this Court, which dealt with and explained the concept and doctrine of grave and sudden provocation within its legal dimensions. In that case, the accused had killed a businessman having come to know from his wife of the intimacy between them. While denying the plea of culpable homicide not amounting to murder, the Court discussed the law as under :

> "78. The first question raised is whether Ahuja gave provocation to Nanavati within the meaning of the exception and whether the provocation, if given by him, was grave and sudden.
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> xxx xxx xxx xxx
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> 81. The question that the Court has to consider is whether a reasonable person placed in the same position as the accused was, would have reacted to the confession of adultery by his wife in the manner in which the accused did. In *Mancini* v. *Director of Public Prosecutions* Viscount Simon, L.C., states the scope of the doctrine of provocation thus:
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> > "It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death... The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in *Rex* v. *Lesbini* so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance to (*a*) consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (*b*) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter."

Viscount Simon again in *Holmes v. Director of Public Prosecutions* elaborates further on this theme. There, the appellant had entertained some suspicions of his wife's conduct with regard to other men in the village. On a Saturday night there was a quarrel between them when she said, "Well, if it will ease your mind, I have been untrue to you", and she went on, "I know I have done wrong, but I have no proof that you haven't — at Mrs X's". With this the appellant lost his temper and picked up the hammerhead and struck her with the same on the side of the head. As he did not like to see her lie there and suffer, he just put both hands round her neck until she stopped breathing. The question arose in that case whether there was such provocation as to reduce the offence of murder to manslaughter. Viscount Simon, after referring to *Mancini case* proceeded to state thus:

> "The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control, whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies."

XXX XXX XXX

84. Is there any standard of a reasonable man for the application of the doctrine of "grave and sudden" provocation? No abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values etc.; in short, the cultural, social and emotional background of the society to which an accused belongs. In our vast country there are social

groups ranging from the lowest to the highest state of civilization. It is neither possible nor desirable to lay down any standard with precision: it is for the court to decide in each case, having regard to the relevant circumstances. It is not necessary in this case to ascertain whether a reasonable man placed in the position of the accused would have lost his self-control momentarily or even temporarily when his wife confessed to him of her illicit intimacy with another, for we are satisfied on the evidence that the accused regained his self-control and killed Ahuja deliberately.

85. The Indian law, relevant to the present enquiry, may be stated thus: (*1*) The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. (*2*) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the First Exception to Section 300 of the Indian Penal Code. (*3*) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. (*4*) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation."

16. In the case of *Bonda Devesu* v. *State of A.P.* [(1996) 7 SCC115], the accused belonged to a tribal community and the deceased had behaved in an obscene way with wife of the accused. Having regard to the socio-economic background of the accused, the Court held it to be an offence punishable under Section 304 Part I and not Section 302 IPC. Again in the case of *Devku Bhikha* v. *State of Gujarat* [1996) 11 SCC 641] where

the deceased, Head Master of a school, had asked the accused to make his wife available for immoral purposes in return to give job to the accused in the school as well as charged him of impotency and the accused killed the Head Master with repeated knife injuries, the Court accepted it as an offence punishable under Section 304 Part I, holding as under :

> "… Thus, from this analysis it becomes abundantly clear that the appellant was driven to the crime which was not premeditated and the occasion had sprung up at the moment, gradually leading to the point when the appellant lost his self-control, and due to grave and sudden provocation, inflicted the injuries on the deceased, successively within seconds. We think, therefore, that the offence made out against the appellant is under Section 304 Part I IPC. Accordingly, the offence is scaled down from one punishable under Section 302 IPC to one under Section 304 Part I IPC for which we impose sentence of seven years' RI on the appellant."

17. This Court, in the case of *Mangesh* v. *State of Maharashtra* [(2011) 2 SCC 123], stated the circumstances from which it may be gathered as to whether there was intention to cause death. It included circumstances like; nature of the weapon; on what part of the body the blow was given; the amount of force; was it a result of a sudden fight or quarrel; whether the incident occurred by chance or was pre-meditated; prior animosity; grave and sudden provocation; heat of passion; did the accused take any undue advantage; did he act cruelly; number of blows given, etc..

18. In light of the circumstances which would help the Court to gather the intention of the accused, the Court also has to take into consideration the attendant circumstances. One of the very vital factors is pre-meditation and intention to kill. These are the important factors which will weigh in the mind of the Court while determining such an issue in light of the attendant circumstances. In the case of *Rampal Singh* v. *State of Uttar*

Pradesh [(2012) 8 SCC 289], where the accused being related to the deceased, had shot him over a dispute in regard to construction of a *ladauri* this Court held as under :

> "**27.** We have already noticed that both the accused and the deceased were related to each other. Both were serving in the Indian Army. They had come on leave to their home and it was when the deceased was about to return to the place of his posting that the unfortunate incident occurred. The whole dispute was with regard to construction of ladauri by the deceased to prevent garbage from being thrown on his open land. However, the appellant had broken the ladauri and thrown garbage on the vacant land of the deceased. Rather than having a pleasant parting from their respective families and between themselves, they raised a dispute which led to death of one of them. When asked by the deceased as to why he had done so, the appellant entered into a heated exchange of words. They, in fact, grappled with each other and the deceased had thrown the appellant on the ground. It was with the intervention of DW 1, Ram Saran and Amar Singh that they were separated and were required to maintain their cool. However, the appellant went to his house and climbed to the roof of Muneshwar with a rifle in his hands when others, including the deceased, were talking to each other. Before shooting at the deceased, the appellant had asked his brother to keep away from him. On this, the deceased provoked the appellant by asking him to shoot if he had the courage. Upon this, the appellant fired one shot which hit the deceased in his stomach. This version of the prosecution case is completely established by the eyewitnesses, medical evidence and the recovery of the weapon of crime. The learned counsel appearing for the appellant has, thus, rightly confined his submissions with regard to alteration of the offence from that under Section 302 to the one under Section 304 Part II of the Code.

28. At this stage, it would be relevant to refer to the statement of one of the most material witnesses which will aid the Court in arriving at a definite conclusion. Smt Sneh Lata, who was examined as PW 1, is the wife of the deceased. After giving the introductory facts leading to the incident, she stated as under:

> "In the meantime, Amar Singh, my uncle-in-law (Chachiya Sasur) came there and one man from Dhaniapur also came there. My husband started talking with them and by that time the accused who is present in the Court, came there. My husband told him that why's you have started using as your Goora in our land why you have demolished our ladauri which was constructed by us. On this issue, there was heated discussion in between my husband and Rampal Singh and my husband had thrown the accused on the ground. By that time, his son Ram Saran came there and thereafter he and Amar Singh separated both of them. Ram Saran made the accused understand and he started talking with him. My husband got down from the thatch and stood up by the help of pillar and he started talking with these people and in the meantime, Rampal had left for his house. Then one of the people saw that the accused present in the Court, had climbed on the roof of Muneshwar and stood towards wall which is situated towards the southern side of my house and he further told that our land which is vacant land, in the munder of the wall situated east side of the same, where he was standing, he told his brother to go aside, I will fire bullet. On this, his brother said that are you going mad. On this, my husband said that have you courage to shoot at me. On this the accused said that see his courage and saying this, the accused fired bullet which hit my husband. On the said bullet

> hit, my husband fell down and then the accused climbed down from the stairs and fled away. Thereafter, Ram Saran, etc. helped my husband and they called the compounder from village. The compounder had made wet Aata and sealed/filled the wound of my husband and he advised to immediately take him to some big hospital and thereafter, we took my husband to Bewar. My husband said the report will be lodged on some other day, first you take me to Army Hospital, Fatehgarh. On the very same day at about quarter to nine, we had taken him to Fatehgarh Hospital where after four-five days, he died."

29. From the above statement of this witness, it is clear that there was heated exchange of words between the deceased and the appellant. The deceased had thrown the appellant on the ground. They were separated by Amar Singh and Ram Saran. She also admits that her husband had told the appellant that he could shoot at him if he had the courage. It was upon this provocation that the appellant fired the shot which hit the deceased in his stomach and ultimately resulted in his death.

30. Another very important aspect is that it is not a case of previous animosity. There is nothing on record to show that the relation between the families of the deceased and the appellant was not cordial. On the contrary, there is evidence that the relations between them were cordial, as deposed by PW 1. The dispute between the parties arose with a specific reference to the ladauri. It is clear that the appellant had not committed the crime with any premeditation. There was no intention on his part to kill. The entire incident happened within a very short span of time. The deceased and the appellant had had an altercation and the appellant was thrown on the ground by the deceased, his own relation. It was in that state of anger

that the appellant went to his house, took out the rifle and from a distance i.e. from the roof of Muneshwar, he shot at the deceased. But before shooting, he expressed his intention to shoot by warning his brother to keep away. He actually fired in response to the challenge that was thrown at him by the deceased. It is true that there was knowledge on the part of the appellant that if he used the rifle and shot at the deceased, the possibility of the deceased being killed could not be ruled out. He was a person from the armed forces and was fully aware of the consequences of use of firearms. But this is not necessarily conclusive of the fact that there was intention on the part of the appellant to kill his brother, the deceased. The intention probably was to merely cause bodily injury. However, the Court cannot overlook the fact that the appellant had the knowledge that such injury could result in the death of the deceased. He only fired one shot at the deceased and ran away. That shot was aimed at the lower part of the body i.e. the stomach of the deceased. As per the statement of PW 2, Dr A.K. Rastogi, there was a stitched wound obliquely placed on the right iliac tossa which shows the part of the body the appellant aimed at."

19. As we have discussed above, premeditation and intention to kill are two vital circumstances amongst others which are to be considered by the Court before holding the accused guilty of an offence under Section 302 or 304 IPC. At the cost of repetition, we may notice that from the prosecution evidence, it is not established that the accused had the intention to kill the deceased or it was a premeditated crime. The learned counsel appearing for the State has contended that the very fact that the accused had come out with a *tobru* completely establishes the intention to kill and, thus, the offence would fall under Section 302 IPC. It cannot be disputed that the accused came out with a *tobru* but, at the same time, it is also clear that this is the most easily available weapon in that part of the hills and is used regularly by the communities. Beyond this factor,

there is no evidence of animosity, premeditation or intention to kill. The accused did give a blow by *tobru* on the head of the deceased which proved fatal. This was result of the grave and sudden provocation where father of both the deceased and the accused was being abused, assaulted and ill-treated by the deceased, who was in a drunken state.

20. Thus, in the facts of the present case, a sudden and grave provocation took place which would bring the offence within the ambit of exception 1 of Section 300 IPC and hence under Section 304 Part I IPC as the accused had caused such bodily injury to the deceased which, to his knowledge, was likely to cause death as he had inflicted injuries on the head of the deceased. Having held the accused guilty of an offence under Section 304 Part I IPC, we award the sentence of 10 years rigorous imprisonment and to a fine of Rs.5,000/- in default thereto to undergo further imprisonment of six months.

21. The appeal is disposed of accordingly.

R.P. Appeal disposed of.