BHUPENDRA NATH HAZARIKA AND ANOTHER
v.
STATE OF ASSAM AND ORS.
(Civil Appeal Nos.8514-8515 of 2012)

NOVEMBER 30, 2012

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

Service Law – Seniority – Inter se seniority – Of "regular batch"/"direct recruits" vis-à-vis "special batch"/"promotional recruits" – Determination – Held: On facts, appointment of special recruits though prior to appointment of regular direct recruits was totally de hors the statutory rules – The special recruits encroached into the quota of the direct recruits – A maladroit effort was made to appoint the special recruits first despite the recommendation of the direct recruits pending before the State Government and though the Cabinet had not approved the proposal for special drive to appoint from another source – Also, no decision was taken to relax the seniority rules in favour of the special recruits – Concept of deemed relaxation not attracted for conferring any privilege to the special recruits – Thus, their seniority vis-à-vis the direct recruits has to be pushed down – However, regard being had to the delayed challenge to the selection of special recruits and their long rendering of service in the posts and further promotions having been effected, it would be inapposite to quash their appointments – Assam Police Service Rules, 1966 – rr.5, 18 and 23.

Service Law – Recruitment – Illegal recruitment – Effect – Held: When there is violation of the recruitment rules, the recruitment is unsustainable – Whether any active part is played by a selectee or not, has nothing to do with the appointment made in contravention of the rules.

Service Law – Duty of the State – Held: State is a model

employer and it is required to act fairly giving due regard and respect to the rules framed by it – Legitimate aspirations of the employees not to be guillotined.

The Assam Public Service Commission issued advertisement inviting applications for filling up 30 vacancies in the Assam Police Service (APS) in the compartment of "regular batch" or "direct recruitment". Subsequently, the Commission published another advertisement inviting applications for filling up of 20 posts in the APS by way of special drive, in the category of "special batch" or "promotional recruits". One week after examination for the regular batch was held, examination for the special batch too was held. The Commission declared the result in respect of regular batch and recommended 30 candidates for appointment in order of merit. Despite such recommendation, no appointment was made in respect of the regular batch. At this juncture, the Government requested the Commission to furnish the select list of special recruits. The Commission sent its recommendations on basis of which, 19 persons were appointed for the special batch. Thereafter, the Competent Authority appointed 28 persons from the regular batch. As the recruits of the special batch were appointed earlier, they were treated senior to the recruits belonging to the regular batch.

Aggrieved, the direct recruits (i.e. recruits belonging to the regular batch) invoked the jurisdiction of the tribunal claiming to be senior to the special recruits and praying for apposite determination of inter se seniority vis-a-vis the special recruits. The tribunal directed re-fixation of the seniority list. The order was upheld by the High Court.

In the instant appeals, the fundamental questions that emanated for consideration were, namely, whether

the appointments of special batch recruits had been made in violation of the rules; and if yes, whether such appointments could be treated to be de hors the rules; and whether the concept of relaxation was extended to them or was extendable to them and further whether they could avail the benefit under the second proviso to Rule 18 of the Rules and whether the tribunal as well as the High Court was justified in re-fixing the seniority without quashing the appointment of the special batch recruits.

Dismissing the appeals, the Court

HELD: 1.1. Where recruitment of service is regulated by the statutory rules, the recruitment must be made in accordance with those rules and if any appointment is made in breach of the rules, the same would be illegal and the persons so appointed have to be put in a different class and they cannot claim seniority. [Para 26] [609-G-H]

1.2. In the case at hand, the special batch was selected under Rule 5(1)(c) of the Assam Police Service Rules, 1966. The proviso to Rule 5(1) of the 1966 Rules clearly lays a postulate that the number of posts filled up under clause (c) shall not, at any time, exceed five per cent of the total number of posts in the cadre and one post in any particular year. It was fairly conceded before this Court that five per cent in the cadre could not have exceeded four posts. However, there was a requisition for 20 posts to be filled up by special drive. Thus, there was selection in excess of the quota provided in the Rule. Nothing was shown to justify the departure since nothing really could have been demonstrated as the Commission had already recommended the names of the candidates meant for direct recruits. [Para 35] [617-C-E]

1.3. The Selection Committee had not recommended the case of the special batch recruits to the Commission. As the affidavit filed by the Secretary to the Commission

before the tribunal clearly stated that the procedure was not followed and the same has been accepted by the tribunal and concurred with by the High Court, there is no reason to differ with the same. The selection has been made in excess of the quota and in the absence of a recommendation of the Selection Committee as prescribed under the rules. Plainly speaking, a maladroit effort was made to appoint the special batch recruits first despite the recommendation of the direct recruits pending before the State Government. It is also disturbing that though the Cabinet had not approved the proposal for special drive to appoint from other source yet the Director General of Police impressed upon the Commission to recommend 20 names. It is also equally perplexing that the concept of the special drive was meant to have young officers but in the ultimate eventuate, officers were nearing fifty got the appointment. It is obvious that it was totally arbitrary and exhibits indecent enthusiasm to confer benefits on the special batch by making the rules comatosed. [Para 38] [620-H; 621-A-E]

1.4. When there is violation of the recruitment rules, the recruitment is unsustainable. Whether any active part is played by a selectee or not has nothing to do with the appointment made in contravention of the rules. In the case at hand, the special batch recruits have encroached into the quota of the direct recruits. The whole selection was made de hors the rules. However, as there had been long delay in challenging the selection of the special batch recruits and some of them have already retired, it would not be apposite to annul their appointments. [Para 42] [622-B-E]

1.5. Rule 18 of the Assam Police Service Rules, 1966 deals with seniority. The two facets which emerge from the scanning of the aforesaid Rule are that the seniority

of a member of the service is to be determined on the basis of the date of appointment to the service and the seniority has to follow a particular order as has been stipulated therein. The other significant aspect is that power has been conferred on the Governor to consider the previous service of an incumbent and fix a deemed date of appointment for the purpose of seniority by adopting a specific method. As far as the first part is concerned, the tribunal as well as the High Court has not accepted the stipulation that in the present case the seniority should be determined on the basis of the date of appointment as the same has been made in flagrant violation of the rules and this Court concurs with the same. As far as the computation of the previous service is concerned, the High Court expressed the view that the appointments had been made in contravention of the rules, the question of conferment of the benefit under the second proviso to Rule 18(1) did not arise. The said conclusion is absolutely defensible for the simon pure reason when the infrastructure is founded on total illegal edifice, the endeavour to put forth a claim for counting the previous service to build a pyramid is bound to founder. [Para 44] [624-C-G]

1.6. As was observed by the High Court, there was no decision to relax the rules in favour of the special batch recruits. That apart, whenever there has to be relaxation about the operation of any of the rules, regard has to be given to the test of causation of undue hardship in any particular case. That apart, the authority is required to record satisfaction while dispensing or relaxing the requirements of any rule to such an extent and subject to such conditions as he may consider necessary for dealing with the case in a just and equitable manner. The language of the Rule really casts a number of conditions. It provides guidance. It cannot be exercised in an

arbitrary manner so as to dispense with the procedure of selection in entirety in respect of a particular class, for it has to be strictly construed and there has to be apposite foundation for exercise of such power. It is to be borne in mind that if a particular rule empowers the authority to throw all the rules overboard in all possibility, it may not withstand close scrutiny of Article 14 of the Constitution. Be that it may, no decision was taken to relax the rules and, the concept of deemed relaxation is not attracted and, therefore, the relief claimed by the special batch recruits has no legs to stand upon. [Para 46] [625-D-G]

1.7. There can be no scintilla of doubt that the selection of the special batch recruits was totally de hors the Rules; that there was a maladroit effort to go for a special drive when there was no need for the same by the State which is supposed to be a model employer; that neither the concept of relaxation nor the conception of benefit of Rule 18 would be attracted for grant of conferring any privilege to the special batch recruits; that their seniority has to be pushed down and, hence, the directions given by the tribunal and the High Court in that regard are absolutely flawless; and that regard being had to the delayed challenge and long rendering of service in the posts and further promotions having been effected, it would be inapposite to quash their appointments. [Para 47] [625-H; 626-A-C]

State of U.P. v. Rafiquddin and Others **AIR 1988 SC 162: 1988 SCR 794;** *Roshan Lal and Others v. International Airport Authority of India and Others* **1980 (Supp) SCC 449;** *The Direct Recruit Class-II Engineering Officers' Association and Others v. State of Maharashtra and Others* **AIR 1990 SC 1607: 1990 (2) SCR 900;** *Madan Gopal Garg v. State of Punjab and Others* **1995 Supp. (3) SCC 366: 1995 (1) Suppl. SCR 815;** *Maharashtra Vikrikar Karamchari Sangathan v. State of Maharashtra and Another* **(2000) 2 SCC 552: 2000 (1) SCR**

166; *D. Ganesh Rao Patnaik and Others v. State of Jharkhand and Others* **(2005) 8 SCC 454: 2005 (4) Suppl. SCR 102;** *State of W.B. and Others v. Aghore Nath Dey and Others* **(1993) 3 SCC 371: 1993 (2) SCR 919;** *State of Haryana and others v. Vijay Singh and Others* **(2012) 8 SCC 633;** *University of Kashmir and Others v. Dr. Mohd. Yasin and Others* **(1974) 3 SCC 546: 1974 (2) SCR 154;** *Swapan Kumar Pal and Others v. Samitabhar Chakraborty and Others* **(2001) 5 SCC 581: 2001 (3) SCR 641;** *State of Haryana v. Haryana Veterinary and AHTS Association and Another* **(2000) 8 SCC 4: 2000 (3) Suppl. SCR 322 – relied on.**

Dalilah Sojah v. State of Kerala and Others **(1998) 9 SCC 641;** *Bachan Singh v. Union of India* **(1972) 3 SCC 489: 1972 (3) SCR 898;** *Narender Chadha v. Union of India* **(1986) 6 SCC 157;** *J.C. Yadav v. State of Haryana* **(1990) 2 SCC 189: 1990 (2) SCR 470 and** *A.K. Subraman v. Union of India* **AIR 1975 SC 483: 1975 (2) SCR 979 – referred to.**

2. The State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it. But in the present case, the State has atrophied the rules. Hence, the need for hammering the concept. It is hoped that in future a deliberate disregard is not taken recourse to and deviancy of such magnitude is not adopted to frustrate the claims of the employees. It should always be borne in mind that legitimate aspirations of the employees are not guillotined and a situation is not created where hopes end in despair. Hope for everyone is gloriously precious and a model employer should not convert it to be deceitful and treacherous by playing a game of chess with their seniority. A sense of calm sensibility and concerned sincerity should be reflected in every step. An atmosphere of trust has to prevail and when the employees are absolutely sure that their trust shall not be betrayed and they shall be treated with dignified

fairness then only the concept of good governance can be concretized. [Paras 48, 53] [626-D; 627-C-F]

Balram Gupta vs. Union of India & Anr. **1987 (Supp) SCC 228;** *State of Haryana v. Piara Singh and Ors.* **(1992) 4 SCC 118: 1992 (3) SCR 826;** *Secretary, State of Karnataka And vs. Umadevi And Others* **(2006) 4 SCC 1: 2006 (3) SCR 953 and** *Mehar Chand Polytechnic & Anr. vs. Anu Lamba & Ors.* **(2006) 7 SCC 161: 2006 (4) Suppl. SCR 436 – relied on.**

Case Law Reference:

1988 SCR 794	**relied on**	**Para 8, 14, 24**
(1998) 9 SCC 641	**referred to**	**Para 8**
1972 (3) SCR 898	**referred to**	**Para 13**
(1986) 6 SCC 157	**referred to**	**Para 13**
1990 (2) SCR 470	**referred to**	**Para 13**
1980 (Supp) SCC 449	**relied on**	**Para 22**
1990 (2) SCR 900	**relied on**	**Para 27**
1975 (2) SCR 979	**referred to**	**Para 27**
1995 (1) Suppl. SCR 815	**relied on**	**Para 28**
2000 (1) SCR 166	**relied on**	**Para 29**
2005 (4) Suppl. SCR 102	**relied on**	**Para 30**
1993 (2) SCR 919	**relied on**	**Para 32**
(2012) 8 SCC 633	**relied on**	**Para 33**
1974 (2) SCR 154	**relied on**	**Para 40**
2001 (3) SCR 641	**relied on**	**Para 40**
2000 (3) Suppl. SCR 322	**relied on**	**Para 40**

1987 (Supp) SCC 228	**relied on**	**Para 49**
1992 (3) SCR 826	**relied on**	**Para 50**
2006 (3) SCR 953	**relied on**	**Para 51**
2006 (4) Suppl. SCR 436	**relied on**	**Para 52**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8514-8515 of 2012.

From the Judgment & Order dated 09.09.2008 of High Court of Gauhati in Writ Appeal Nos. 448 & 465 of 2004.

WITH

C.A. No. 8516 of 2012.

M.N. Krishnamani, V. Shekhar, Azim H. Laskar, Abhijit Sengupta, Prashant Bhushan, Sachin Das, Avijit Roy (for Corporate Law Group), Balraj Dewan for the appearing parties.

The judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. In these appeals, the challenge is to the common judgment and order dated 9.9.2008 passed by the Division Bench of the High Court of Gauhati, Assam in WA Nos. 448 of 2004, 459 of 2004 and 465 of 2004 whereby stamp of approval has been given to the judgment and order dated 19.11.2004 passed by the learned single Judge in WP(C) Nos. 7482 of 2002, 7843 of 2002, 7564 of 2002, 8081 of 2002 and 298 of 2003 whereunder the learned single Judge had maintained the order dated 11.10.2002 passed by the Assam Administrative Tribunal, Guwahati (for short "the tribunal") in Appeal Case No. 79ATA of 1999, and dismissed WP(C) Nos. 4028 of 2003, 4129 of 2003 and 1031 of 2003 which were preferred directly for issuance of mandamus commanding the respondent authorities to consider the previous services rendered by the petitioners therein prior to their appointments in the Assam

Police Service (Junior Grade) in the year 1993 and to determine their inter se seniority in the promotional cadre accordingly and further disposed of WP(C) 69 of 2003 preferred by an Additional Superintendent of Police, Guwahati for quashing of the appointment to the promotional post of the private respondents therein on the foundation that they had been promoted in violation of the provisions of the Assam Police Service Rules, 1966 (for brevity "the 1966 Rules").

3. Shorn of unnecessary details, the facts which are requisite to be stated are that the Assam Public Service Commission (for short "the Commission") issued an advertisement No. 9/92 dated 23.6.1992 inviting applications for preliminary examination for the Combined Competitive Examination, 1992-93 for selecting candidates for various posts and services including thirty vacancies in the Assam Police Service (Junior Grade) (for short "the APS") as requisitioned by the Commissioner-cum-Secretary to the Government of Assam in the Department of Personnel on 5.9.1992. On 29.8.1992, the Commission published another advertisement No. 12/92 inviting applications for filling up of 20 posts in the APS under Rule 5(1)(c) of the 1966 Rules. There is no dispute that the initial 30 vacancies were put in the compartment of "regular batch" or "direct recruitment" and the other 20 vacancies, which were sought to be filled up by way of special drive, were kept in the category of "special batch" or "promotional recruits". The main examination for the regular batch was held on 15.11.1992 for total marks of 1400. The examination for the special batch was held on 22.11.1992 for 650 marks. The Commission declared the result in respect of regular batch on 23.4.1993 and, vide letter dated 24.4.1993, recommended 30 candidates for appointment in order of merit. Despite the recommendation by the Commission, no appointment was made till 13.8.1993. At this juncture, the Commissioner-cum-Secretary to the Government of Assam in the Department of Home requested the Commission to furnish the select list of the special recruits at the earliest. On the basis

of the aforesaid letter of request, the Commission sent its recommendations in respect of the candidates belonging to the special batch and on the basis of the said recommendation, vide notification No. HMA.478/86/Pt-I/17 dated 3.7.1993, the respondent Nos. 6 to 24 before the tribunal were appointed. The respondent No. 25 was appointed on 31.81994. Thereafter, the Competent Authority, vide notification No. HMA.110/93/43 dated 13.8.1993, appointed 28 persons from the regular batch. As the recruits of the special batch were appointed earlier, they were treated senior to the recruits belonging to the regular batch.

4. The facts, as further uncurtained, are that the determination of seniority came to the notice of the recruits of the regular batch at the time of their confirmation of service in the year 1999. Being dissatisfied with the action of the authorities, they immediately submitted a representation. When the representation was pending consideration, a provisional gradation list showing the inter se seniority as on 31.12.1992 was published on 12.3.1999. In the said provisional gradation list, the recruits of the special batch were shown as senior to the recruits of the regular batch. As warranted, the recruits belonging to the regular batch filed their objections to the fixation of seniority on 24.9.1999, but without publishing the final gradation list, the respondent No. 3, namely, the Secretary in the Department of Home, promoted 14 officers belonging to the special batch and 16 officers belonging to the regular batch to the Senior Scale of APS (Grade-II). In the promotional order, the officers belonging to the regular batch were shown below the officers belonging to the special batch. Because of the aforesaid situation, the direct recruits invoked the jurisdiction of the tribunal for the apposite determination of seniority claiming to be senior to the respondent Nos. 6 to 24.

5. The claim of the appellants before the tribunal was resisted by the respondent-State and the private respondents therein on many a ground including the one that the appeal was

barred by limitation. It is worthy to note that in an affidavit, the Secretary to the Commission asseverated that the Government had not consulted the Commission before publishing the provisional gradation list; that when the selection process for the regular batch was already underway, there was no justification whatsoever to go for special recruitment; that the recourse taken to fill up the posts by way of special recruitment was in gross violation of the rules and procedure inasmuch as all vacancies could have been filled up by resorting to the usual and regular procedure of recruitment; that the Competent Authority of the State Government should have acted on the list sent by the Commission relating to the regular candidates in quite promptitude but delayed it for no apparent reason and called for the recommendation for the special batch and issued letters of appointment in their favour which exhibited unwarranted interest; and that the inter se seniority deserved to be refixed and the regular batch should be treated to be senior to the special batch.

6. The tribunal dealt with the issue of limitation and observed that the appeal did not concern itself with the validity or propriety of the appointments of the respondent Nos. 6 to 25 but fixation of inter se seniority and hence, the appeal was not barred under the provisions of the Assam Administrative Tribunals Act, 1977. It further opined that it was curious that despite the fact that the recommendation in respect of the regular batch had already been forwarded to the Government by the Commission, no steps were taken. The aforesaid act of the authority, observed the tribunal, on one hand, exposited lackadaisical attitude in dealing with the case of the regular batch and, on the other, unreasonable alacrity in the appointment of the special batch. The tribunal attributed motive to such an action and proceeded to opine that there was no administrative decision by the appropriate authority for making appointment to the service by resorting to the process of special recruitment in preference to general recruitment.

7. It is apt to note that the tribunal referred to various

departmental communications including the letter dated 17.8.1991 which emanated from the Office of the DGP proposing to enlist 20 Deputy Superintendent of Police from other departments under Rule 5(1)(c) of the 1966 Rules. The tribunal referred to Rules 5, 7 and 8 of the 1966 Rules and came to hold that a close perusal of the provisions of the service Rules clearly show that recruitment by resorting to clause (c) of sub-rule (1) of Rule 5 should be made only in special cases and at all time such recruitment must be limited only to 5 per cent of the total number of posts in the cadre and such special recruitment must be limited only to one post in a particular year. It further stated that the 1966 Rules are quite silent as regards carry forward of such posts and, therefore, there could not have been accumulation of vacancies to be filled up by resorting to the provision contained in clause (c) of sub-rule (1) of Rule 5 and as such, the question of selecting and appointing as many as 20 persons in a year did not arise. The tribunal further held that as per Rule 8(1), the Governor is required to call for recommendations from the recommending authorities for the purpose of recruitment to the service under clause (c) of sub-rule (1) of Rule 5 and the recommending authorities are also required to submit recommendations in respect of the persons having regard to the laid down criteria but in the instant case, the said procedure was given a total go by which is not permissible. The tribunal further noticed that Rule 8(2), which is mandatory, provides that all the recommendations are required to be submitted before the selection committee constituted under Rule 7(1) and the selection committee is required to interview the recommended candidates and prepare the select list and, therefore, the Commission, in no circumstance, could have been entrusted with the responsibility of interviewing, testing, selecting and recommending any candidate for special recruitment under clause (c) of sub-rule (1) of Rule 5. In this backdrop, the tribunal observed that, admittedly, all the processes undertaken by the Commission and the third respondent were in gross violation

of the mandatory provisions of the Rules and hence, the selection was not valid.

8. After so stating, the tribunal proceeded to hold that as the respondent Nos. 6 to 25 had been appointed in violation of the rules, they could not be treated as regular recruits within the meaning of Rule 5(1)(a) of the 1966 Rules. It also stated that had the appeal been filed earlier in a different form, the selection and appointment of the special batch recruits could have possibly been set aside. Eventually, the tribunal placing reliance on *State of U.P. v. Rafiquddin and Others*[1] and *Dalilah Sojah v. State of Kerala and Others*[2], came to hold that due to unreasonable delay and inaction on the part of the Government in notifying the appointments, the regular batch candidates, who were earlier recommended by the Commission, could not be put in jeopardy and lose their seniority and accordingly directed for refixation of the seniority list. It further directed that the regular batch shall be allowed consequential benefits with effect from the date on which the senior most member of the special batch availed of any benefit even by creating supernumerary duty post in the cadre.

9. Being dissatisfied with the order passed by the tribunal, as has been stated earlier, certain writ petitions were preferred and some writ petitions were directly filed before the High Court seeking quashment of the appointment of the private respondents as Deputy Superintendent of Police. The prayer in the other batch of writ petitions was to treat the direct recruits as per the rules regard being had to their date of appointment and to extend the benefit of earlier services as stipulated under Rule 18 of the 1966 Rules.

10. The learned single Judge adverted to the facts in detail, the proposal before the Cabinet for appointment of 20 officers in the post of Deputy Superintendent of Police by taking resort

1. AIR 1988 SC 162.
2. (1998) 9 SCC 641.

to Rule 5(1)(c) of the 1966 Rules and basically posed three questions, namely, (i) whether the appeal preferred before the tribunal was barred by limitation; (ii) whether the members of the regular batch could be treated as senior when their appointments were violative of the recruitment process as envisaged under the relevant recruitment rules; and (iii) whether the tribunal was justified in directing rectification in the gradation list when there was no appeal seeking removal of the special batch recruits being in violation of the rules. Be it noted, as far as question No. (iii) is concerned, the learned single Judge framed five ancillary questions.

11. While dealing with the facet of limitation, the learned single Judge referred to the relevant provisions of the Act and expressed the view that the appellants before the tribunal having the remedy which was available to them in terms of the directions contained in the circular dated 1.4.1999 were entitled to prefer the appeal in terms of the proviso to sub-section (2) of Section 4 of the AAT Act, 1977 and hence, the appeal was not barred by limitation.

12. Adverting to the facet of appointment, the learned single Judge scanned the anatomy of the 1966 Rules and came to hold that the number of persons who got selected as members of the special batch were not eligible for consideration for appointment in terms of Rule 5(1)(c) and further the procedure engrafted under the said sub-rule was not followed and, in fact, was mutilated and flouted in every conceivable manner leading, eventually, to the appointment of the members of the special batch. Dwelling upon the issue that the appointments were arbitrary, malafide and discriminatory vis-à-vis the appointment of the direct batch, the learned single Judge referred to the factual matrix pertaining to the recommendations sent for recruitment by special drive, the Cabinet Memorandum and the Cabinet decision and eventually held that notwithstanding the fact that the proposal for recruitment of twenty Dy. Superintendents of Police, as a

special case, was submitted by the Home Department and the Government did not agree to the proposal, yet the decision to make the recruitment and the manner and modalities for holding of the interview and the test for the purpose of recruitment of the Special Batch was taken in the chamber of the Chairman of the Commission, on the basis of a discussion held between the then DGP, Assam, and the Chairman of the Commission and, therefore, the decision, so reached, could not be termed as a decision of the Government. He also observed that the members of the Special Batch were selected throwing over-board, in entirety, the relevant recruitment rules. Regard being had to chronology of events leading to the appointment of the members of the Special Batch, the learned single Judge opined that the entire exercise for selecting the Special Batch was wholly de hors the relevant recruitment rules. The urgency shown by the Government to obtain the result of the examination held in respect of the Special Batch was an indication that the Government was waiting, for no justified and valid reason, to, first, make appointment of the members of the Special Batch, though selected in complete disregard of the Rules, and, then, issue appointment in respect of the members of the Direct Batch, whose process of selection was never questioned. After so stating, the learned single Judge held that contrary to the provisions of Rule 5(1)(c), which prescribes upper age limit for selection to be 35 years and throwing to the wind the very purpose for which special recruitment was sought to be made, the age was relaxed to 45 years and persons, who were born in 1942, came to be selected in the year 1992, and thereby many of the officers recruited under the special drive were as old as 50 years, whereas proposal for the special drive was made on the pretext of recruiting young officers. He also opined that the whole process of selection of the special batch recruited was malafide and arbitrary.

13. After so stating, the learned single Judge dealt with issues whether the appointments were ab-initio void, whether the relevant rules of recruitment were relaxed in respect of the

special batch at the time of making their recruitment and what was the permissible limit of relaxation and whether there can be deemed relaxation. Delving into the said aspects, the learned single Judge ruled that while appointing the special batch, the rules of recruitment were completely shelved, no order of relaxation was passed under Rule 23 relaxing the provisions contained in Rule 5(1)(c) of the 1966 Rules; and that there could not have been any deemed relaxation. The learned single Judge referred to various pronouncements of this Court with regard to relaxation and deemed relaxation and expressed the view that the Special Batch was recruited, ostensibly, on the ground that the department was in need of young officers in the grade of Deputy Superintendent of Police, but the officers recruited were as old as 50 years, and, thus, the very purpose for which the proposal was mooted stood defeated. The writ court discussed the ratio laid down in *Bachan Singh v. Union of India*[3], *Narender Chadha v. Union of India*[4] and *J.C. Yadav v. State of Haryana*[5] and held that contrary to the facts of the case of *J.C. Yadav* (supra), wherein the relaxation of the rules could be justified by the Government, the State-respondent had, in the obtaining factual matrix, miserably failed to show any justification to relax the rules and in any case could not have relaxed the rules to such an extent to make it nugatory. It was also observed that when the Cabinet Memorandum had failed to receive the approval of the Cabinet, the then DGP, Assam, in consultation with the Chairman of the Commission, could not have, through the back-door and with the help of an authority like the Commission, flouted the relevant rules and made the appointments.

14. The learned single Judge ruled that the appointment in the promotional cadre was de hors the rules and, therefore, the court cannot direct that the period of service rendered in

3. (1972) 3 SCC 489.
4. (1986) 6 SCC 157.
5. (1990) 2 SCCC 189.

the promotional post by virtue of illegal promotional appointment should be counted for the purpose of seniority. Relying on the pronouncement in *Raffiquddin* (supra), the learned single Judge held that the case in hand is more akin to the facts of *Raffiquddin* (supra) and ruled that it is possible that without setting aside and quashing the appointment of an irregular appointee, the Court or tribunal may direct the appointing authority to treat a regular appointee in service, though appointed later in point of time than the irregular appointee, as senior to the irregular appointee.

15. It is worthy to note that the learned single Judge referred to Rule 18 of the 1966 Rules which clearly states that the seniority of the members of the service shall be determined on the basis of their respective dates of appointment to the service. He distinguished the applicability of Rule 18 and ultimately maintained the order passed by the tribunal and dismissed the writ petitions challenging the order of the tribunal. It is apt to note that in WP(C) 69 of 2003 wherein the petitioner had directly approached the High Court for quashment of the appointments of the special batch recruits, the learned single Judge observed that the appointments of the special batch deserved to be set aside and quashed, but he refrained from doing so considering the period of service which they had rendered.

16. Being dissatisfied with the aforesaid order, the special recruits preferred WA Nos. 448 of 2004 and 465 of 2004. WA 459 of 2004 was filed by the recruits under Rule 5(1)(a) of the 1966 Rules. The Division Bench noted the facts, adverted to the orders passed by the tribunal and the learned single Judge, dealt at length with the submissions canvassed by the learned counsel for the parties and came to hold that the tribunal had jurisdiction to deal with the appeals and thereafter, dealing with the stand that the appointments having not been challenged the delineation thereof by the tribunal and the learned single Judge was barred by the doctrine of res judicata, repelled them on

the base that the memorandum of appeal before the tribunal had graphically challenged the appointments to be non est being in violation of the rules though that there was no prayer for cancellation of the appointments. The Division Bench analysed the scheme of the rules and stated that Rule 5(1)(c) envisages a selection in special cases from amongst the limited categories of persons referred to and the number of vacancies to be filled up by that procedure has also been restricted. The Division Bench referred to Rule 8 and regarded it as unequivocal on the conditions of eligibility, commencement of the process contemplated and the culmination thereof, and observed that the assessment of eligibility by the Recommending Authority of the person is a sine qua non for consideration of his candidature to be recruited. The candidate, as per the mandate of Rule 8, has to be of outstanding merit and ability, possessing the academic qualification as prescribed by Rule 10, should not be above 35 years of age on the first day of the year in which the recommendations are called for and should have not less than two years of experience in duties comparable in status and responsibility to that of the Deputy Superintendent of Police or 8 years of experience in duties comparable in status and responsibility to that of the Inspector of Police.

17. After so stating, the Division Bench referred to various authorities and, eventually, came to hold that though the appointments of the special recruits had been made in deviation of the Rules, yet the same cannot by any means be branded as de hors any procedure whatsoever known to public employment. Their induction of the special recruits cannot be equated with ad hoc, casual or temporary recruitments or an entry through the backdoor and hence, their appointment cannot be regarded as de hors the rules. Dealing with the aspect of seniority it ruled that their appointments not being in observance of the statutory provision stricto sensu, the fixation of their batch wise seniority over the direct recruits of the same year is impermissible and the benefit as stipulated under the proviso

to Rule 18(1) was not extendable.

18. The Division Bench further opined that at such a belated time their appointments could not be annulled. In the ultimate analysis, the Division Bench concurred with the view expressed by the learned single Judge on the issue of fixation of seniority.

19. It is worthy to note that in compliance of the judgment and order passed by the learned single Judge, a notification No. HMA.154/2004/Pt.1/176 was issued on 6.12.2004 wherein the direct recruits of the 1993 batch were placed above the special recruits of the same year in the APS Senior Grade-II. The Bench also perused file No. H.M.A. 10/99 of the Home Department from which it transpired that the names of the candidates to the promotional posts were recommended in order of preference following the same seniority in which their names appeared in the provisional gradation list dated 12.3.1999 as the Selection Committee did not find any reason justifying supersession of a senior by a junior. The Division Bench noticed that as the inter se seniority of promotees was a replication of that in the provisional gradation list which has been unsettled, the challenge to the notification dated 6.12.2004 was unsustainable. Being of this view, the Division Bench dismissed all the appeals.

20. We have heard Mr. Prashant Bhushan, learned counsel representing the special batch recruits, and Mr. V. Shekhar, learned senior counsel appearing for the direct recruits in all the appeals.

21. The fundamental questions that emanate for consideration before this Court are, namely, whether the appointments have been made in violation of the rules; whether the selection of the special batch recruits if accepted to be in violation of the rules, can be treated to be de hors the rules; and whether the concept of relaxation has been extended to them or is extendable to them and further whether they can avail

the benefit under the second proviso to Rule 18 of the Rules and whether the tribunal as well as the High Court is justified in refixing the seniority without quashing the appointment of the special batch recruits.

22. Regard being had to the aforesaid issues, we think it seemly to refer to certain authorities in the field. In *Roshan Lal and others v. International Airport Authority of India and Others*[6], a two-Judge Bench, while entertaining a petition under Article 32 of the Constitution, held that when the appointments were made in 1975 and the writ petition was filed in 1978, it would not be justified in reopening the question of legality of the appointments of the respondents therein. The Bench also noticed that the prayer in the writ petition was also confined primarily to the seniority list and the consequences flowing from the seniority list.

23. We have referred to the said pronouncement only for the purpose that before the tribunal, the challenge was not for the quashment of the appointments on the foundation that they were made in violation of the rules and the propriety in the matter of appointment of the special recruits was not maintained and that apart, the appeal was filed after a span of nine years after the selection and appointment and hence, the principle stated therein is squarely applicable to the case at hand.

24. Be it noted, the tribunal as well as the High Court has placed reliance on *Rafiquddin and Others* (supra) to refix the seniority and justify the direction for refixation of seniority by putting the direct recruits over and above the special recruits on the foundation that it was necessitous to strike the balance. In *Rafiquddin* case (supra), the U.P. Public Service Commission published a notification on September 3, 1970 inviting applications for recruitment to 85 posts of Munsifs. It recommended names of 46 candidates for appointment on October 25, 1971. The State Government requested the

6. 1980 (Supp) SCC 449.

Commission to recommend some more candidates by suggesting that minimum of 40% marks may be reduced to 35%. Considering the said request, the Commission forwarded another list of 33 candidates on April 25, 1972. All the 79 candidates were appointed between May 1972 to June 12, 1973. Thereafter, on July 17, 1973, a notification was issued determining the inter se seniority of all the 79 candidates under Rule 19 of the U.P. Civil Service (Judicial Branch) Rules, 1951. In the meantime, the UP Public Service Commission held another competitive examination for appointment to the posts of 150 Munsifs and, eventually, they were appointed on different dates between 1975 to 1977. As the factual narration would show, a proposal was sent by the State Government to the Commission requesting it to reconsider the result of the examinations of 1967, 1968, 1969 and 1970 for appointment to the service of persons/candidates who might have obtained 40% of marks or more in the aggregate even if they had failed to secure the minimum marks in the viva voce test. The Commission declined to accede to the said request. A meeting was held by the High Level Committee and, eventually, a third list of 37 candidates was sent by the Commission for the aforementioned years in which list the name of Rafiquddin featured. As out of 37 candidates, 16 had already appeared in the 1972 examination and had been selected, the Government requested the Commission to select 16 more candidates from the 1972 examination. In pursuance of the Government's request, the Commission forwarded the list of 16 candidates for appointment. In this factual matrix, in March, 1977, the State Government published a seniority list of successful candidates of the competitive examination of 1970. The candidates belonging to the third list made a representation to the High Court for determining their seniority in accordance with Rule 22 of the Rules on the footing that they were recruited to service in pursuance of the 1970 examination and, therefore, they were entitled to the seniority as candidates belonging to that examination irrespective of their appointment made in 1975. They claimed seniority above the recruits of the

1972 examination. As the representation was rejected, a writ petition was filed and the High Court allowed the same on the ground that as the third category candidates were appointed on the basis of the result of the 1970 examination, they were to be treated as senior in accordance with the stipulates engrafted under Rule 22 of the Rules. While dealing with such a situation, this Court scanned the anatomy of the Rules and its purport, the role of the Commission and held that the selection and appointment of 21 Munsifs at the later stage was invalid. However, it declined to strike down their appointments in view of the fact that they had already rendered 12 years of service.

25. After so holding, the Bench proceeded to deal with the issue as to what seniority should be assigned to the unplaced candidates who were appointed. In that context, the Bench came to hold that as they were appointed not in accordance with the rules, they could not be treated as selectees under the 1970 examination for the purpose of determining their seniority under Rule 22 of the Rules and, accordingly, the Bench directed that the said candidates have been placed below the candidates of recruits of the 1972 examination. In the 1972 examination, 16 candidates were appointed to the service on the basis of the result of the 1972 examination and their appointment did not suffer from any legal infirmity and they were entitled to seniority of the recruits of the 1972 examination on the basis of their position in the merit list but they were not entitled to be treated as senior on the basis of the 1970 examination.

26. We have referred to the facts in detail and what this Court had ultimately held only for the purpose that where recruitment of service is regulated by the statutory rules, the recruitment must be made in accordance with those rules and if any appointment is made in breach of the rules, the same would be illegal and the persons so appointed have to be put in a different class and they cannot claim seniority.

27. In *The Direct Recruit Class-II Engineering Officers' Association and Others v. State of Maharashtra and Others*[7], the Constitution Bench was dealing with the issue of seniority between direct recruits and the promotees under the Maharashtra Service of Engineers (Regulation of Seniority and Preparation and Revision of Seniority Lists for Specified Period) Rules, 1982. The Constitution Bench referred to the decision in *A.K. Subraman v. Union of India*[8] and ruled that if a rule fixing the ratio for recruitment from different sources is framed, it is meant to be respected and not violated at the whims of the authority. It ought to be strictly followed and not arbitrarily ignored. A deviation may be permissible to meet the exigencies. The Constitution Bench posed the question as to what would be the consideration if the quota rule is not followed at all continuously for a number of years and it becomes impossible to adhere to the same. The Constitution Bench opined that if the rule fixes the quota and it becomes impracticable to act upon, it is of no use insisting that the authorities must continue to give effect to it. But the Government, before departing from the rule, must make every effort to respect it and only when it ceases to be feasible to enforce it, then it has to be ignored. In such a situation, if appointments from one source are made in excess of the quota but in a regular manner and after following the prescribed procedure, there is no reason to push down the appointees below the recruits from other sources who are inducted in the service subsequently. A reference was made to the rules that permitted the Government to relax the provisions fixing the ratio. In the said case, the Court observed that there was no justification to urge lack of bona fide on the part of the State. Eventually, the Bench summed up its conclusions and we proceed to reproduce some of them which are relevant for our purpose: -

"(A) Once an incumbent is appointed to a post according

7. AIR 1990 SC 1607.

8. AIR 1975 SC 483.

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

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

xxx xxx xxx

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

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

28. In *Madan Gopal Garg v. State of Punjab and Others*[9], the controversy related to inter se seniority of promotees and direct recruits in respect of the posts, namely, District Food and Supplies Controller and Deputy Director, Food and Supplies in the State of Punjab governed by the Punjab Food and Supplies Department (State Service Class II) Rules, 1966. After analyzing the facts and the appointments in excess of quota,

9. 1995 Supp. (3) SCC 366.

the Court observed that the appointment of the controller was in excess of the quota and it continued to be so till the respondent No. 2 therein was appointed by direct recruitment. In that context, the Bench opined:-

"Once it is held that the appointment of the appellant was in excess of the quota fixed for promotees and officers appointed by transfer, the said appointment has to be treated as an invalid appointment and it can be treated as a regular appointment only when a vacancy is available against the promotion quota against which the said appointment can be regularized. In other words, any such appointment in excess of the quota has to be pushed down to a later year when it can be regularized as per the quota and such an appointment prior to regularization cannot confer any right as against a person who is directly appointed within the quota prescribed for direct recruits."

29. In *Maharashtra Vikrikar Karamchari Sangathan v. State of Maharashtra and Another*[10], a two-Judge Bench took note of the fact that when promotions are made in excess of the prescribed quota and the Government had not taken any conscious decision in accordance with law to treat the promotions of excess promotees on regular basis, it would be wrong to assert that such promotions were on regular basis. In that context, the Bench further proceeded to state thus: -

"Lastly, it was contended on behalf of the appellants that some of the appellants have put in more than 17 years of service when a few of the direct recruits were either schooling and/or not born in the cadre. If the appellants were to be pushed down, it would cause great hardship to them. We are unable to subscribe to this contention because if there is patent violation of the quota rule, the result must follow and the appellants who remained in the office for all these years cannot take the advantage of this

10. (2000) 2 SCC 552.

situation. This submission is, therefore, devoid of any substance."

30. In *D. Ganesh Rao Patnaik and Others v. State of Jharkhand and Others*[11], a three-Judge Bench was dealing with inter se seniority between the direct recruits and the promotees under the Bihar Superior Judicial Service Rules, 1946. The Bench also dealt with the concept of temporary posts and the computation of posts under Rule 6 therein, the definition of cadre and posed a question whether the temporary posts of Additional District and Sessions Judges are to be included in the cadre. After referring to various decisions, the Court opined that for determining the quota of direct recruits, both the temporary and permanent posts have to be counted and taken into consideration and their quota cannot be confined to permanent posts alone. In the said case, the promotees had exceeded their quota and entrenched into the quota of direct recruits and, in that context, the Court held that the promotion given to the promotees was not in accordance with law. The Court further proceeded to state that it did not lie in the mouth of the respondent therein to contend that the quota rule had broken down or that though their promotions were made beyond the quota fixed for promotees, yet the same should be treated not only perfectly valid but also in a manner so as to give them the benefit of seniority over the direct recruits. Eventually, the Bench ruled that the inevitable conclusion was that the contesting respondent could not claim seniority over the appellant.

31. We have referred to the aforesaid pronouncements to restate the legal principle that if the quota rule has been broken down, the appointee should not be pushed down below the appointees from other source; but, the Government before departing from the rule must make every effort to respect it and then only it may proceed to appoint from other source.

12. (2005) 8 SCC 454.

32. At this juncture, it is necessary to state that the decision in *The Direct Recruit Class II Engineering Officers' Association* (supra) was clarified by a three-Judge Bench in *State of W.B. and Others v. Aghore Nath Dey and Others*[12] as the later Bench perceived an apparent contradiction in conclusions (A) and (B). While clarifying, the Bench has stated thus: -

> "19. The constitution bench in *Maharashtra Engineers* case (supra), while dealing with *Narender Chadha* (supra) emphasised the unusual fact that the promotees in question had worked continuously for long periods of nearly fifteen to twenty years on the posts without being reverted, and then proceeded to state the principle thus: (SCC p. 726, para 13)
>
> > "We, therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with the rules prescribed for regular substantive appointments in the service."
>
> 20. The constitution bench having dealt with Narender Chadha (supra) in this manner, to indicate the above principle, that decision cannot be construed to apply to cases where the initial appointment was not according to rules.
>
> xxx xxx xxx
>
> 22. There can be no doubt that these two conclusions have to be read harmoniously, and conclusion (B) cannot cover cases which are expressly excluded by conclusion (A). We may, therefore, first refer to conclusion (A). It is clear from conclusion (A) that to enable seniority to be counted from the date of initial appointment and not according to the

12. (1993) 3 SCC 371.

date of confirmation, the incumbent of the post has to be initially appointed 'according to rules'. The corollary set out in conclusion (A), then is, that 'where the initial appointment is only ad hoc and not according to rules and made as a stopgap arrangement, the officiation in such posts cannot be taken into account for considering the seniority'. Thus, the corollary in conclusion (A) expressly excludes the category of cases where the initial appointment is only ad hoc and not according to rules, being made only as a stopgap arrangement. The case of the writ petitioners squarely falls within this corollary in conclusion (A), which says that the officiation in such posts cannot be taken into account for counting the seniority."

Thereafter, the Bench proceeded to state as follows: -

"Admittedly, this express requirement in Rule 11 was not followed or fulfilled subsequently, and, therefore, the initial ad hoc appointments cannot be treated to have been made according to the applicable rules. These ad hoc appointments were clearly not in accordance with the rules, and were made only as a stopgap arrangement for fixed period, as expressly stated in the appointment order itself."

[Emphasis supplied]

33. Recently, in *State of Haryana and Others v. Vijay Singh and Others*[13], the question arose with regard to the fixation of seniority in the backdrop of ad hoc initial appointment made de hors the statutory rules but later on services were regularized by the State Government. The Court took note of the fact that the respondents therein were neither appointed by the competent authority on the recommendations made by the Board which was constituted by the Governor of Haryana nor were they placed on probation as required under the rules and, therefore, their ad hoc period could not be counted for the

13. (20120 8 SCC 633.

purpose of fixation of seniority. Thus, emphasis was laid that when appointment is made without following the procedure prescribed under the rules, the appointees are not entitled to have the seniority fixed on the basis of the total length of service. In essence, it has been ruled that when the appointment is made de hors the rules, the appointee cannot claim seniority even if his appointment is later on regularized.

34. Regard being had to the aforesaid enunciation of law pertaining to fixation of seniority when the initial appointment is made in breach of rules and further departure from provision pertaining to quota in their essential nature, it is apposite to refer to the relevant rules of the 1966 Rules. Rule 4 defines the 'Cadre'. Rule 4(1)(a) deals with the categories of posts in the junior grade and Rule 4(1)(b) deals with the senior grade posts. Rule 5 provides for the recruitment and procedure of selection, etc. Rule 5(1), being pertinent, is reproduced below:-

"5. **Methods of recruitment to the service.** (1) Recruitment to the service, after the commencement of these rules, shall be by the following methods, namely:

(a) by a competitive examination conducted by the Commission;

(b) by promotion of confirmed Inspectors of Police; and

(c) by selection, in special case, from amongst –

(i) persons other than Inspectors of Police serving in connection with the affairs of the Government; and

(ii) other persons having qualifications and experiences eminently suitable for service in the Police Department in the rank of Deputy Superintendent of Police :

Provided that fifty per cent of the total number of posts in the cadre shall be filled up by recruitment under Cls. (a) and (c) and the other fifty per cent exclusively under Cl. (b), and that the number of posts filled up under Cl. (c) above shall not at any time exceed five per cent of the total number of posts in the cadre and one post in any particular year."

35. On scanning of Rule 5(1), it is evident that various methods have been stipulated for recruitment. In the case at hand, the direct recruits have been recruited by way of competitive examination conducted by the Commission. The special batch has been selected under Rule 5(1)(c). In that context, the proviso to Rule 5(1) of the 1966 Rules is significant. It clearly lays a postulate that the number of posts filled up under clause (c) shall not, at any time, exceed five per cent of the total number of posts in the cadre and one post in any particular year. As has been stated hereinabove, there was a requisition for 20 posts to be filled up by special drive. On a query being made during hearing, it was fairly conceded before us that five per cent in the cadre could not have exceeded four posts. Thus, there has been selection in excess of the quota provided in the Rule and nothing had been shown to justify the departure since nothing really could have been demonstrated as the commission had already recommended the names of the candidates meant for direct recruits.

36. Rule 8 deals with recruitment by selection. It is reproduced hereunder:-

"8. **Recruitment by selection.** (1) The Governor may, from time to time, for the purpose of recruitment to the service under Cl. (c) of sub-R. (1) of R. 5, call upon the recommending authorities to submit recommendations in respect of persons who-

(a) are of outstanding merit and ability;

(b) have to their credit not less than 2 years of experience in duties comparable in status and responsibility to that of Deputy Superintendent of Police or 8 years of experience in duties comparable in status and responsibility to that of Inspectors of Police;

(c) possess the academic qualification prescribed under R.10; are not above the age of 35 years on the 1st day of the year in which the recommendations are called for; and are otherwise eligible, in the opinion of recommending authorities to be appointed to the service.

(2) On receipt of the recommendations, the Governor shall refer them and also simultaneously send the character rolls/ testimonials of character and service records/other relevant records of the persons recommended to the committee which will, after examination of the records forwarded to it and interviewing, such of the persons recommended as it considers necessary, draw up a list of persons in order of the preference who are considered suitable for appointment to the service. The procedure details in sub-Rr. (4) to (7) of R. 7, mutatis mutandis be followed in regard to the list of persons prepared under this sub-rule.

(3) For every recruitment a separate list shall be drawn up and the list once approved by the Commission shall lapse immediately on the year's quota of posts for persons under Cl. (c) of sub-R. (1) of R. 5 having been filled up from the list."

37. On a perusal of the aforesaid Rule, it is graphically clear that the recommending authority has to submit the recommendations to the Governor regard being had to certain aspects which have been prescribed under Rule 8(1). Rule 8(1)(d) prescribes the age limit on the first date of the year in which the recommendations are called for. Sub-rule (2) of Rule 8 stipulates that the procedure detailed in sub-rules (4) to (7)

of Rule 7 mutatis mutandis be followed in regard to the list of persons prepared. In this context, it is necessary to reproduce sub-rules (4) to (7) of Rule 7 which are as follows:-

> "(4) The list prepared by the Committee shall give the names in order of preference and the total number of such names shall not be more than double the number of vacancies that may arise in the promotion quota of the cadre and the ex-cadre temporary posts of the rank of Deputy Superintendent of Police during a period of approximately one year thereafter. In every case, where in drawing up the list the committee changes the order of seniority of any person in the rank of Inspector of Police or supersedes any one in that rank by omission of his name, the Committee shall record in writing the reason for such change or supersession.
>
> (5) The Committee shall forward the list to the Governor and on receipt of the list the Governor shall forward the same to the Commission together with the character rolls and other relevant papers.
>
> (6) The Commission shall consider the list prepared by the Committee along with other documents received from the Governor or on receipt of other documents as may be called for by the Commission unless it considers any change necessary, approve the list. If the Commission considers any change necessary, it shall inform the Governor of the changes proposed and after taking into account the comments, if any, by the Governor, may approve the list finally with such modification, if any, as may in its opinion be just and proper.
>
> (7) The list, as finally approved by the Commission, shall be forwarded to the Governor along with all the papers received under sub-Rr. (5) and (6)."

38. It needs to be noted that under Rule 8(2), the Governor

is required to send the character rolls/testimonials of the character and service records/other relevant records of the persons recommended to the Committee which would, after examination of the records forwarded to it and interviewing such of the persons recommended as it considers necessary, draw up a list of persons in order of the preference who are considered suitable for appointment to the service. "Committee" has been defined in Rule 2(c) and it reads as follows:-

> "(c) "Committee" means a committee constituted in accordance with sub-R. (1) of R. 7."

The aforesaid definition makes sub-rule (1) of Rule 7 important. The said sub-rule reads as follows: -

> "7. **Recruitment by promotion.** (1) There shall be a Selection Committee consisting of the following, namely:
>
> (a) Chairman, Assam Public Service Commission, or, where the Chairman is unable to attend, a Member, Assam Public Service Commission nominated by him;
>
> (b) Chief Secretary to the Government;
>
> (c) Inspector-General of Police;
>
> (d) A Senior Deputy Inspector General of Police to be nominated by Chief Secretary;
>
> (e) Secretary to the Government of Assam in the Home Department or any other officer of the Home Department nominated in this behalf by the Chief Secretary. The Chairman, Assam Public Commission or the Member, Assam Public Service Commission, as the case may be, shall preside at the meeting of the Selection Committee at which he is present."

In the obtaining factual matrix, the Selection Committee

had not recommended the case of the special batch recruits to the Commission. As the affidavit filed by the Secretary to the Commission before the tribunal clearly stated that the procedure was not followed and the same has been accepted by the tribunal and concurred with by the High Court, there is no reason to differ with the same. Therefore, we give the seal of imprimatur to the said conclusion. At the risk of repetition, we state that the selection has been made in excess of the quota and in the absence of a recommendation of the Selection Committee as prescribed under the rules. Plainly speaking, a maladroit effort was made to appoint the special batch recruits first despite the recommendation of the direct recruits pending before the State Government. It is also disturbing that though the Cabinet had not approved the proposal for special drive to appoint from other source yet the Director General of Police impressed upon the Commission to recommend 20 names. It is also equally perplexing that the concept of the special drive was meant to have young officers but in the ultimate eventuate, officers were nearing fifty got the appointment. It is obvious that it was totally arbitrary and exhibits indecent enthusiasm to confer benefits on the special batch by making the rules comatosed.

39. At this stage, it is requisite to clarify one aspect. The learned single Judge has treated the selection of the special batch recruits totally de hors the rules and the Division Bench has opined that it is not de hors the rules on the foundation that they were not casual appointees and their recommendation had been made by the Commission and further they had not played any overt act in getting their selection done.

40. In *University of Kashmir and Others v. Dr. Mohd. Yasin and Others*[14], this Court expressed the view that an equitable ground does not clothe an appointment with a legal status. Similar view was also expressed in *Swapan Kumar Pal and Others v. Samitabhar Chakraborty and Others*[15].

14. (1974) 3 sCC 546.

15. (2001) 5 SCC 581.

41. In *State of Haryana v. Haryana Veterninary and AHTS Association and Another*[16], a three-Judge Bench, after x-ray of the relevant rules, came to hold that when appointments are made in violation of the recruitment rules, the said appointments cannot be treated to be regular.

42. The aforesaid authorities clearly lay down the principle that when there is violation of the recruitment rules, the recruitment is unsustainable. Whether any active part is played by a selectee or not has nothing to do with the appointment made in contravention of the rules. In the case at hand, the special batch recruits have encroached into the quota of the direct recruits. The whole selection process is in violation of the rules and, therefore, we are inclined to concur with the opinion expressed by the learned single Judge that the selection was made de hors the rules. The Division Bench was not justified in stating that the selection could not be said to be de hors the rules. However, we accept the conclusion of the tribunal as well as the High Court that as there had been long delay in challenging the selection of the special batch recruits and some of them have already retired, it would not be apposite to annul their appointments.

43. Presently, we shall refer to Rule 18 which deals with seniority. Mr. Prashant Bhushan, during the course of hearing, has laid immense emphasis on the said Rule to buttress the stance that if the service rendered in the previous posts by the special batch recruits are taken into consideration on the anvil of Rule 18, they should be treated as senior to the direct recruits. Regard being had to the said submission, it becomes necessitous to refer to the said Rule in entirety. It reads as follows: -

> "18. **Seniority.** (1) The seniority of a member of the service shall be determined on the basis of his date of appointment to the service :

16. (2000) 8 SCC 4.

Provided that inter se seniority of the persons recruited under Rr. 5(1)(a), 5(1)(b) and 5(2) on the same date shall be according to the following order :

(i) Persons recruited under R. 5(2);

(ii) Persons recruited under R. 5(1)(b);

(iii) Persons recruited under R. 5(1)(a);

Provided further that in the case of a person recruited under R.5(1)(c) the Governor may, in consideration of his previous service and/or experience, fix a deemed date of appointment for the purpose of seniority after taking into consideration half the period of continuous service in completed years subject to a maximum of 4 years rendered in previous service.

(2) Inter se seniority of persons appointed under any of the three clauses of R. 5(1), shall be in the order in which their names appear in the list from which the appointment is made.

(3) The date of appointment for the purposes of this rule shall be, if a date is specified in the notification of appointment, such date, or if no such date is specified, the date on which such notification is issued.

(4) Notwithstanding anything contained in sub-Rr. (1) to (3) the seniority of a person who does not join the service within three months of the date of appointment as defined in sub-R.(3), shall be determined on the basis of the actual date of his joining the service.

(5) If the confirmation of a member of the service is delayed on account of his failure to qualify for such confirmation, he shall lose his post in the order of seniority vis-à-vis such of his juniors as may be confirmed earlier than he. His original position shall, however, be restored on his

confirmation subsequently but any benefits of promotion, etc., shall not accrue to him with retrospective effect on such confirmation.

(6) Inter se seniority of persons promoted to the senior grade of the service shall be in the order in which their names appear in the list from which the promotion is made."

44. The two facets which emerge from the scanning of the aforesaid Rule are that the seniority of a member of the service is to be determined on the basis of the date of appointment to the service and the seniority has to follow a particular order as has been stipulated therein. The other significant aspect is that power has been conferred on the Governor to consider the previous service of an incumbent and fix a deemed date of appointment for the purpose of seniority by adopting a specific method. As far as the first part is concerned, the tribunal as well as the High Court has not accepted the stipulation that in the present case the seniority should be determined on the basis of the date of appointment as the same has been made in flagrant violation of the rules and we have already concurred with the same. As far as the computation of the previous service is concerned, the learned single Judge as well as the Division Bench, after adequate ratiocination, has expressed the view that the appointments had been made in contravention of the rules, the question of conferment of the benefit under the second proviso to Rule 18(1) did not arise. In our considered view, the said conclusion is absolutely defensible for the simon pure reason when the infrastructure is founded on total illegal edifice, the endeavour to put forth a claim for counting the previous service to build a pyramid is bound to founder.

45. Another specious contention has been urged that power is vested with the Governor to dispense with or relax any rule and in the case at hand, it should be treated that the authority by its conduct has relaxed the rules. In this context, it

is appropriate to refer to Rule 23 which reads as follows: -

> **"Power of the Governor to dispense with or relax any rule.** Where the Governor is satisfied that the operation of any of these rules may cause undue hardship in any particular case, he may order to dispense with or relax the requirements of that rule to such an extent and subject to such conditions as he may consider necessary for dealing with the case in a just and equitable manner:
>
> Provided that the case of any person shall not be dealt with in any manner less favourable to him than that provided by any of these rules."

46. As has been observed by the learned single Judge which has been accepted by the Division Bench, there was no decision to relax the rules in favour of the special batch recruits. That apart, whenever there has to be relaxation about the operation of any of the rules, regard has to be given to the test of causation of undue hardship in any particular case. That apart, the authority is required to record satisfaction while dispensing or relaxing the requirements of any rule to such an extent and subject to such conditions as he may consider necessary for dealing with the case in a just and equitable manner. The language of the Rule really casts a number of conditions. It provides guidance. It cannot be exercised in an arbitrary manner so as to dispense with the procedure of selection in entirety in respect of a particular class, for it has to be strictly construed and there has to be apposite foundation for exercise of such power. It is to be borne in mind that if a particular rule empowers the authority to throw all the rules overboard in all possibility, it may not withstand close scrutiny of Article 14 of the Constitution. Be that it may, no decision was taken to relax the rules and, the concept of deemed relaxation is not attracted and, therefore, the relief claimed by the special batch recruits has no legs to stand upon.

47. From the aforesaid analysis, there can be no scintilla

of doubt that the selection of the special batch recruits was totally de hors the Rules; that there was a maladroit effort to go for a special drive when there was no need for the same by the State which is supposed to be a model employer; that neither the concept of relaxation nor the conception of benefit of Rule 18 would be attracted for grant on conferring any privilege to the special batch recruits; that their seniority has to be pushed down and, hence, the directions given by the tribunal and the High Court in that regard are absolutely flawless; and that regard being had to the delayed challenge and long rendering of service in the posts and further promotions having been effected, it would be inapposite to quash their appointments.

48. Before parting with the case, we are compelled to reiterate the oft-stated principle that the State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it. But in the present case, the State has atrophied the rules. Hence, the need for hammering the concept.

49. Almost a quarter century back, this Court in *Balram Gupta vs Union of India & Anr.* [1987 (Supp) SCC 228] had observed thus:

> "As a model employer the Government must conduct itself with high probity and candour with its employees."

50. In *State of Haryana v. Piara Singh and Ors.*[(1992)4SCC118], the Court had clearly stated:

> "The main concern of the court in such matters is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16".

51. In *Secretary, State Of Karnataka And vs. Umadevi And Others* [(2006)4SCC1], the Constitution Bench, while discussing the role of state in recruitment procedure, stated that if rules have been made under Article 309 of the Constitution,

then the Government can make appointments only in accordance with the rules, for the State is meant to be a model employer.

52. In *Mehar Chand Polytechnic & Anr. vs. Anu Lamba & Ors.* [(2006) 7 SCC 161] the Court observed that public employment is a facet of right to equality envisaged under Article 16 of the Constitution of India and that the recruitment rules are framed with a view to give equal opportunity to all the citizens of India entitled for being considered for recruitment in the vacant posts.

53. We have stated the role of the State as a model employer with the fond hope that in future a deliberate disregard is not taken recourse to and deviancy of such magnitude is not adopted to frustrate the claims of the employees. It should always be borne in mind that legitimate aspirations of the employees are not guillotined and a situation is not created where hopes end in despair. Hope for everyone is gloriously precious and a model employer should not convert it to be deceitful and treacherous by playing a game of chess with their seniority. A sense of calm sensibility and concerned sincerity should be reflected in every step. An atmosphere of trust has to prevail and when the employees are absolutely sure that their trust shall not be betrayed and they shall be treated with dignified fairness then only the concept of good governance can be concretized. We say no more.

54. Consequently, all the appeals are dismissed leaving the parties to bear their respective costs.

B.B.B. Appeals dismissd.

STATE BANK OF INDIA AND OTHERS
v.
PALAK MODI AND ANOTHER
(Civil Appeal Nos. 7841-7842 of 2012)

DECEMBER 03, 2012

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

Service Law – Termination – Of Bank Probationary Officers (private respondents) – Challenge to – Held: If the competent authority holds an inquiry for judging the suitability of the probationer or for his further continuance in service or for confirmation and such inquiry is the basis for taking decision to terminate his service, then the action of the competent authority cannot be castigated as punitive – However, if an allegation of misconduct constitutes the foundation of the action taken, the ultimate decision taken by the competent authority can be nullified on the ground of violation of the rules of natural justice – On facts, the decision to dispense with the services of the private respondents was taken solely on the ground that they were guilty of using unfair means in the confirmation test which constituted a misconduct – However, this exercise was not preceded by an inquiry involving the private respondents and no opportunity was given to them to defend themselves against the charge of use of unfair means – They were condemned unheard which was legally impermissible – Appellants to reinstate the private respondents and give them all consequential benefits – However, competent authority not precluded from taking fresh decision in the matter of confirmation of the private respondents after giving them effective opportunity of hearing against the allegation of use of unfair means in the confirmation test – State Bank of India (Officers' Service) Rules, 1992 – rr.15(1) and 16.

The private respondents were appointed as Probationary Officers in the appellant-bank in the year 2006. In 2010, they were informed that they are due for confirmation and, were therefore, required to appear in a confirmation test. The private respondents appeared in the test, and subsequently the result thereof was declared. The names of the private respondents did not figure in the result apparently because the Institute of Banking Personnel Selection ('IBPS'), an independent expert body engaged in conducting recruitment for various services, which was entrusted with the task of preparing the examination papers and evaluating the answer sheets sent a report to the Bank that some candidates including the private respondents were suspected to have used unfair means.

The probation of the private respondents was extended for three months by invoking Rule 16(2) of the State Bank of India (Officers' Service) Rules, 1992. However, prior to expiry of the extended period of probation, the services of the private respondents was terminated under Rule 16(3) of the State Bank of India (Officers' Service) Rules, 1992. The private respondents challenged the termination of their services by filing writ petitions mainly on the grounds that the action taken by the concerned authorities of the Bank was arbitrary and violative of the rules of natural justice. They pleaded that during the period of probation, no one had informed them about any shortcoming, deficiency or defect in their work and yet their services were terminated without giving them notice and opportunity of hearing. The private respondents further pleaded that even though they had requested the concerned officers of the Bank to disclose the reasons for extension of probation and termination of their services but no response was received from them.

The High Court did not directly deal with the question whether the action taken by the General Manager was arbitrary, unfair and unjustified and whether in the garb of termination simpliciter, the concerned authority had penalized the private respondents on the charge of their having indulged in malpractices in the confirmation test but held that the action taken by the appellants was contrary to the guidelines framed by the IBPS for detecting cases of use of unfair means. The High Court referred to paragraph 4 of the guidelines framed by the IBPS and opined that after considering the report suggesting that the private respondents were suspected to have used unfair means in the examination, the Bank should have scrutinized their cases on the basis of their performance in the descriptive papers and then taken a final decision. The High Court held that the Bank could not have discharged the private respondents from service by assuming that they had used unfair means in the objective type papers.

Whether the alleged use of unfair means by the private respondents in the confirmation test held by appellant–Bank constituted the foundation of the decision taken to terminate their services under Rule 16(3) of the State Bank of India (Officers' Service) Rules, 1992 is the question which arose for consideration in the instant appeals.

Dismissing the appeals, the Court

HELD: 1.1. A probationer has no right to hold the post and his service can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post held by him. If the competent authority holds an inquiry for judging the suitability of the probationer or for his further continuance in service or for confirmation and such inquiry is the

basis for taking decision to terminate his service, then the action of the competent authority cannot be castigated as punitive. However, if the allegation of misconduct constitutes the foundation of the action taken, the ultimate decision taken by the competent authority can be nullified on the ground of violation of the rules of natural justice. [Para 20] [656-A-C]

1.2. A combined reading of Rules 15(1) and 16 of the State Bank of India (Officers' Service) Rules, 1992 and paragraph 5 of the conditions of appointment makes it clear that a person appointed as a Probationary Officer remains on probation for a minimum period of two years at the end of which he is entitled to be confirmed if the competent authority is of the opinion that he has satisfactorily completed the training in any institution to which he may have been deputed and the in-service training in the Bank. The Probationary Officer can also be subjected to screening for judging his merit and suitability. If the Probationary Officer fails to satisfactorily complete the training(s) or fails to pass the screening test or his service is not satisfactory, then the Bank can extend the period of probation by a further period of which the outer limit is one year. In a given case, the competent authority can, if it is of the opinion that the Probationary Officer is not fit for confirmation, terminate his service by one month's notice or payment of one month's emoluments. It is thus evident that satisfactory performance during the period of probation, successful completion of training(s) and passing of the test conducted by the Bank for judging his suitability for the post constitute the touchstone for his confirmation. [Paras 22, 23] [669-G-H; 670-A-D]

1.3. The primary object of the confirmation test held on 27.2.2011, which could also be termed as evaluation test within the meaning of paragraph 5(c) of the

appointment letter was to decide whether the officer has made use of the opportunities made available to him by the Bank to prove his worth for the job for which he was recruited and whether he has acquired sufficient knowledge about the functional requirements of the Bank. The test also gave an opportunity to the Probationary Officer to demonstrate that he was meritorious enough to be placed in the higher grade. [Para 25] [670-G-H; 671-A-B]

1.4. There is a marked distinction between the concepts of satisfactory completion of probation and successful passing of the training/test held during or at the end of the period of probation, which are sine qua non for confirmation of a probationer and the Bank's right to punish a probationer for any defined misconduct, misbehaviour or misdemeanor. In a given case, the competent authority may, while deciding the issue of suitability of probationer to be confirmed, ignore the act(s) of misconduct and terminate his service without casting any aspersion or stigma which may adversely affect his future prospects but, if the misconduct/ misdemeanor constitutes the basis of the final decision taken by the competent authority to dispense with the service of the probationer albeit by a non stigmatic order, the Court can lift the veil and declare that in the garb of termination simpliciter, the employer has punished the employee for an act of misconduct. [Para 26] [671-B-E]

1.5. The use of unfair means in the evaluation test/ confirmation test held by the Bank certainly constitutes a misconduct. The Bank itself had treated such an act to be a misconduct (paragraph 10 of advertisement dated 1.7.2008). The services of the private respondents were not terminated on the ground that there was any deficiency or shortcoming in their work or performance during probation or that they had failed to satisfactorily

complete the training or had failed to secure the qualifying marks in the test held on 27.2.2011. The note prepared by the Deputy General Manager, which was approved by the General Manager makes it crystal clear that the decision to dispense with the services of the private respondents was taken solely on the ground that they were guilty of using unfair means in the test held on 27.2.2011. The foundation of the action taken by the General Manager was the accusation that while appearing in the objective test, the private respondents had resorted to copying. IBPS had relied upon the analysis made by the computer and sent report to the Bank that 18 candidates were suspected to have used unfair means. The concerned authority then sent for the chart of seating arrangement and treated the same as a piece of evidence for coming to the conclusion that the private respondents had indeed used unfair means in the examination. This exercise was not preceded by an inquiry involving the private respondents and no opportunity was given to them to defend themselves against the charge of use of unfair means. In other words, they were condemned unheard which was legally impermissible. [Para 27] [671-F-H; 672-A-D]

Ajit Singh v. State of Punjab **(1983) 2 SCC 217: 1983 (2) SCR 517;** *Krishnadevaraya Education Trust v. L.A. Balakrishna* **(2001) 9 SCC 319: 2001 (1) SCR 387;** *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences* **(2002) 1 SCC 520: 2001 (5) Suppl. SCR 41;** *Progressive Education Society v. Rajendra* **(2008) 3 SCC 310: 2008 (2) SCR 1005 and** *Rajesh Kumar Srivastava v. State of Jharkhand* **(2011) 4 SCC 447: 2011 (3) SCR 823 – held inapplicable.**

Parshotam Lal Dhingra v. Union of India **1958 SCR 828;** *State of Punjab and Another v. Sukh Raj Bahadur* **(1968) 3 SCR 234;** *State of Bihar v. Shiva Bhikshuk Mishra* **(1970) 2**

SCC 871: 1971 (2) SCR 191; *Union of India v. R.S. Dhaba, Income Tax Officer, Hoshiarpur,* **1969 (3) SCC 603;** *Samsher Singh v. State of Punjab* **(1975) 1 SCR 814;** *Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha* **(1980) 2 SCC 593: 1980 (2) SCR 146;** *Anoop Jaiswal v. Government of India* **(1984) 2 SCC 369: 1984 (2) SCR 453;** *R.S. Sial v. State of U.P.* **(1974) 3 SCR 754;** *State of U.P. v. Ram Chandra Trivedi* **(1976) 4 SCC 52: 1977 (1) SCR 462;** *I.N. Saksena v. State of M.P.* **(1967) 2 SCR 496;** *Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences* **(1999) 3 SCC 60: 1999 (1) SCR 532;** *Chandra Prakash Shahi v. State of U.P.* **(2000) 5 SCC 152: 2000 (3) SCR 529 and** *Union of India v. Mahaveer C. Singhvi* **(2010) 8 SCC 220: 2010 (9) SCR 246 – referred to.**

2. The appellants shall reinstate the private respondents and give them all consequential benefits like pay, allowances, etc. However, this judgment shall not preclude the competent authority from taking fresh decision in the matter of confirmation of the private respondents after giving them effective opportunity of hearing against the allegation of use of unfair means in the test held on 27.2.2011. [Para 34] [681-B-D]

Case Law Reference:

1983 (2) SCR 517	held inapplicable	Para 8
2001 (1) SCR 387	held inapplicable	Para 8
2001 (5) Suppl. SCR 41	held inapplicable	Para 8
2008 (2) SCR 1005	held inapplicable	Para 8
2011 (3) SCR 823	held inapplicable	Para 8
1958 SCR 828	referred to	Paras 11, 16
(1968) 3 SCR 234	referred to	Paras 12, 13, 16

1971 (2) SCR 191	**referred to**	**Paras 13, 16**
1969 (3) SCC 603	**referred to**	**Paras 13, 16**
(1975) 1 SCR 814	**referred to**	**Paras 14, 16**
1980 (2) SCR 146	**referred to**	**Para 15**
1984 (2) SCR 453	**referred to**	**Para 16**
(1974) 3 SCR 754	**referred to**	**Para 16**
1977 (1) SCR 462	**referred to**	**Para 16**
(1967) 2 SCR 496	**referred to**	**Para 16**
1999 (1) SCR 532	**referred to**	**Para 17**
2000 (3) SCR 529	**referred to**	**Para 18**
2010 (9) SCR 246	**referred to**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos.. 7841-7842 of 2012.

From the Judgment & Order dated 17.11.2011 of the High Court of Judicature at Allahabad, Lucknow Bench in WP No. 1298 of 2011 and WP No. 1512 of 2011.

WITH

C.A. No.7843 of 2012.

U.U. Lalit, Harish N. Salve, Pallav Shishodia, Vikas Singh, Shobha Dixit, Sanjay Kapur, Deven Khanna, Tara V. Ganju, Praveena, Gautam, Preeti Gupta, Ashmi Mohan, Arti Singh, Pradeep Misra, Daleep Dhyani, Suraj Singh and Yatish Mohan, R.K. Bachchan for the appearing parties.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Whether the alleged use of unfair means by Palak Modi and Prabhat Dixit (hereinafter described as 'the private respondents') in the test held by appellant No.1 – State Bank of India (for short, 'the Bank') constituted the foundation of the decision taken by General Manager (NW-I), State Bank of India, Human Resource Department (respondent No.3) to terminate their services under Rule 16(3) of the State Bank of India (Officers' Service) Rules, 1992 (for short, 'the Rules') is the pivotal question which arises for consideration in these appeals filed against order dated 17.11.2011 passed by the Allahabad High Court in Writ Petition Nos.1298/2011 and 1512/2011.

2. In response to an advertisement issued by appellant No.1, which was published on 1.7.2008, the private respondents applied for appointment as Probationary Officers. They appeared in the two-tier examination held by the Bank, which was followed by group discussion and interview. On being declared successful, the private respondents were appointed as Probationary Officers vide letters dated 5.5.2006, paragraph 5 of which reads as under:

> "5. You will be on probation for a period of two years from the date of appointment. Your confirmation in the Bank shall be subject to:
>
> (a) Satisfactory reports from our own sources as well as from District Authorities regarding your character and antecedents.
>
> (b) Satisfactory completion of the in-service training during probation.
>
> (c) Satisfactory performance in the evaluation tests to be conducted by the Bank during the probation period. Your failure in evaluation tests twice will make you unfit for continuing in Bank's service and in that eventuality, your appointment will be cancelled and your services terminated by the Bank."

3. Vide letter dated 22.12.2010 of Deputy Managing

Director and Corporate Development Officer of the Bank, the Probationary Officers of 2009-10 batch were informed that they are due for confirmation on 15.5.2011 and, therefore, they may appear in the test proposed to be conducted on 27.2.2011. Paragraph 2 of that letter which has bearing on the decision of these appeals reads as under:

"2. The relative extract from the extant policy for confirmation of probationary officers is reproduced below:-

(i) The confirmation test shall be held after 21 months from the date of appointment of the probationary officers (during the probation period)

(ii) Candidates scoring a minimum of 75% marks in the written test would qualify for the further process that will include group discussion and interview. Candidates scoring minimum 75% marks in-group discussion/interview also shall be confirmed and placed in the grade of MMGS-II. Those scoring less than 75% marks but minimum 50% (45% for SC/ ST/PWD) marks in the written test shall be confirmed in the grade of JMGS-I. Candidates scoring less than 50% (45% for SC/ST/PWD) marks will be given two options as under:

OPTION-I

Candidate will be required to appear in another confirmation test on or before completion of 24th month of his/her probation and in the event of not qualifying in the re-test his/her services will be terminated with immediate effect and he/she will be paid one month's emoluments in lieu of one month's notice in terms of Rule 16(3)(a) of SBI Officer's Service Rule read with the present policy of confirmation of Probationary officers as application hitherto.

OPTION-II

Candidate's probation will be extended by a further period of maximum one year in terms of two periods of six months each (extending the total probation period to a maximum of 36 months) with the provision to appear in 02 more confirmation tests at 06 monthly intervals i.e. 02nd test in 27th month & 03rd test in 33rd month of his/her probation respectively with the following conditions:-

In the event of:

Passing the proposed 02nd test after 27th month of probation candidate will be confirmed as JMGS-I on completion of 30th month of probation including extended period of probation of 06 months. The extended period of probation of six months will, however, not to be counted for service seniority.

Failing in the 02nd test put passing the proposed 03rd test after 33rd month of his/her probation he/ she will be confirmed as JMGS-I on completion of 36th month of probation including the extended period of probation of one year. The extended period of probation of one-year will, however, not be counted for service seniority.

Failing in the proposed 03rd test administered in 33rd month of his/her probation, 04 increments in basic salary given to him/her on appointment, as Probationary Officer will be withdrawn and he/she will be absorbed as Officer JMGS-I on completion of 36th month of probation period including the extended period of probation of one year. The extended period of probation of one year will not

be counted for service seniority. In all the above cases, as mentioned in Option II, where probation period is extended, the annual increment date will be shifted by skipping the extended probation period of six or twelve months, as the case may be.

"Further, the service rendered by him/her during extended probation period of six or twelve months will also not be counted as eligible service for seniority as well as for next promotion."

The committed for the Group Discussion /Interview will comprise of a Chief General Manager, a General Manager and a Deputy General Manager besides one SC/ST representative who should at least be of SMGS IV incumbency."

4. The private respondents appeared in the test held on 27.2.2011, the result whereof was declared on 10.5.2011. Their names did not figure in the result apparently because Institute of Banking Personnel Selection (for short, 'IBPS'), an independent expert body engaged in conducting recruitment for various services, which was entrusted with the task of preparing the examination papers and evaluating the answer sheets sent a report to the Bank that some candidates including the private respondents are suspected to have used unfair means. After four days, respondent No.3 issued letters dated 14.5.2011 and extended the probation of the private respondents for three months by invoking Rule 16(2) of the Rules. However, without waiting for expiry of the extended period of probation, respondent No.3 terminated their services vide letters dated 27.6.2011 by indicating that this was being done under Rule 16(3) of the Rules.

5. The private respondents challenged the termination of their services by filing writ petitions mainly on the grounds that the action taken by the concerned authorities of the Bank was

arbitrary and violative of the rules of natural justice. They pleaded that during the period of probation, no one had informed them about any shortcoming, deficiency or defect in their work and yet their services were terminated without giving them notice and opportunity of hearing. The private respondents further pleaded that even though they had requested the concerned officers of the Bank to disclose the reasons for extension of probation and termination of their services but no response was received from them.

6. In the counter affidavits filed on behalf of the appellants, it was pleaded that the decision to extend the probation of the private respondents and to terminate their services was taken after considering the report sent by IBPS about suspected use of unfair means by the candidates. It was further pleaded that on checking the record of seating arrangement, it was revealed that the private respondents and other candidates were seating in close proximity with each other and that was considered as a corroborative evidence of their having used unfair means, namely, copying answers from one another. According to the appellants, action was taken against the private respondents strictly in accordance with the conditions of appointment without holding any formal inquiry into the allegation involving misconduct.

7. The Division Bench of the High Court did not directly deal with the question whether the action taken by the General Manager was arbitrary, unfair and unjustified and whether in the garb of termination simpliciter, the concerned authority had penalized the private respondents on the charge of their having indulged in malpractices in the confirmation test but held that the action taken by the appellants was contrary to the guidelines framed by the IBPS for detecting cases of use of unfair means. The Division Bench referred to paragraph 4 of the guidelines framed by the IBPS and opined that after considering the report suggesting that the private respondents were suspected to have used unfair means in the examination, the Bank should

have scrutinized their cases on the basis of their performance in the descriptive papers and then taken a final decision. The Division Bench took cognizance of the statement of the senior counsel appearing for the Bank that performance of the private respondents in the descriptive papers was not evaluated and held that the Bank could not have discharged them from service by assuming that they had used unfair means in the objective type papers.

8. Shri U. U. Lalit, learned senior counsel appearing for the appellants argued that the impugned order is liable to be set aside because the view taken by the High Court on the legality and propriety of the decision taken by respondent No.3 in consonance with the terms of appointment of the private respondents and Rule 16(3) of the Rules is ex facie erroneous and is contrary to the terms and conditions of their appointment. Shri Lalit emphasized that officers and employees of unquestionable integrity are required by the Bank because their work involves high degree of responsibility and any compromise in that regard would be detrimental to larger public interest. Learned senior counsel then argued that the assessment made by the appointing authority on the issue of suitability of the private respondents for confirmation was based on an objective consideration of the report received from IBPS and in the absence of any express stigma in the order of termination/ discharge, the respondents were not entitled to complain of violation of the rules of natural justice. Shri Lalit submitted that holding of regular inquiry is not sine qua non for discharging a probationer and the High Court committed grave error by nullifying the decision taken by respondent No.3 on the ground of violation of the guidelines/policy framed by IBPS for evaluation of the answer sheets. Shri Lalit produced before the Court xerox copy of the proceedings which culminated in the issue of letters dated 27.6.2011 to show that respondent No.3 approved the note prepared by Deputy General Manager, Central Recruitment and Promotion Department, who had examined the report sent by IBPS and checked the record

relating to seating arrangement which conclusively established that the private respondents had used unfair means in the confirmation test. Shri Lalit finally argued that discharge of a probationer on the ground of unsuitability cannot be termed as punitive and respondent No.3 was not required to give notice and opportunity of hearing to the private respondents. In support of this argument, Shri Lalit relied upon the judgments of this Court in *Ajit Singh v. State of Punjab* (1983) 2 SCC 217, *Krishnadevaraya Education Trust v. L.A. Balakrishna* (2001) 9 SCC 319, *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences* (2002) 1 SCC 520, *Progressive Education Society v. Rajendra* (2008) 3 SCC 310 and Rajesh Kumar Srivastava *v. St*ate of Jharkhand (2011) 4 SCC 447.

9. Shri Vikas Singh, learned senior counsel appearing for IBPS submitted that the institute is an expert body which has been conducting examinations for the officers and employees of various organizations and financial institutions. Shri Singh submitted that IBPS has developed a software of its own for identifying the cases of use of unfair means and the software generates report of all pairs of cases which have identical responses. The report of the software is then reviewed by a group of experts and then and then only a conclusion is reached about suspected use of unfair means. Learned senior counsel then argued that the interpretation placed by the High Court on para 4(B) of the guidelines framed by IBPS is wholly erroneous and the word 'may' used in that paragraph cannot be construed as 'shall' so as to make evaluation of the descriptive papers as mandatory even in the cases of suspected use of unfair means. He submitted that IBPS had sent report regarding suspected use of unfair means because the candidates had given 11 identical wrong answers and 44 identical correct answers, which was highly improbable and the appellant did not commit any error by relying upon that report. Learned senior counsel referred to the revised guidelines issued by IBPS for detecting the cases of use of unfair means and submitted that the report sent to the Bank was based on evaluation of the

papers of objective test in consonance with the revised guidelines and the concerned officers of the Bank took decision after fully satisfying themselves that the private respondents had used unfair means in the examination. Shri Vikas Singh emphasized that the action taken against the private respondents had salutary and sobering effects on other candidates and not a single case of unfair means was detected by IBPS in the tests held between 17.7.2011 and 24.6.2012 for various batches of new recruits.

10. Shri Pallav Shishodia, Mrs. Shobha Dixit, Senior Advocates and other learned counsel appearing for the respondents argued that even though the High Court did not specifically dealt with the question whether the action taken by respondent No.3 was vitiated due to violation of the rules of natural justice, the material produced before the High Court and this Court unmistakably shows that the decision contained in letters dated 27.6.2011 was founded on the conclusion reached by the officers of the Bank that the private respondents were guilty of using unfair means in the confirmation test and this could not have been done without giving them action oriented notice and fair opportunity of hearing. Shri Shishodia pointed out that the report prepared by IBPS was based on computer scanning of the answer sheets of the objective papers and the appellants could not have relied upon such report for jeopardizing the career of the private respondents without holding an inquiry and without giving them opportunity to controvert the allegation of use of unfair means. Learned senior counsel submitted that there was no deficiency or defect or shortcoming in the work or performance of the private respondents as Probationary Officers and in the guise of discharging their services under Rule 16(3), the Bank had penalized them on the specific allegation of using unfair means in the confirmation test without complying with the basics of the natural justice.

11. The question whether termination of the service of a

temporary employee or a probationer can be treated as punitive even though the order passed by the competent authority does not contain any stigma has been considered in a series of judgments. In *Parshotam Lal Dhingra v. Union of India,* 1958 SCR 828, which can be considered as an important milestone in the development of one facet of service jurisprudence in the country, the Constitution Bench was called upon to decide whether the order of reversion of an official holding a higher post in an officiating capacity could be treated as punitive. After elaborate consideration of the relevant provisions of the Constitution and judicial decisions on the subject, the Constitution Bench observed:

> "...In short, if the termination of service is founded on the right flowing from contract or the service rules then, prima facie, the termination is not a punishment and carries with it no evil consequences and so Article 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with...."

12. In *State of Punjab and Another v. Sukh Raj Bahadur* (1968) 3 SCR 234, Mitter, J. considered several precedents and culled out the following propositions:

> "1. The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.
>
> 2. The circumstances preceding or attendant on the order of termination have to be examined in each case, the

motive behind it being immaterial.

3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.

4. An order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service does not attract the operation of Article 311 of the Constitution.

5. If there be a full-scale departmental enquiry envisaged by Article 311 i.e. an Enquiry Officer is appointed, a charge-sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said article."

13. In *State of Bihar v. Shiva Bhikshuk Mishra* (1970) 2 SCC 871, the three Judge Bench considered the question whether the respondent's reversion from the post of Subedar-Major to that of Sergeant in the backdrop of an inquiry made into the allegation of assault on his subordinate was punitive. On behalf of the appellant, reliance was also placed on the judgments in *State of Punjab v. Sukh Raj Bahadur* (supra) and *Union of India v. R. S. Dhaba, Income-tax Officer, Hoshiarpur,* 1969 (3) SCC 603 and it was argued that the order of reversion cannot be treated as punitive because it did not contain any word of stigma and the High Court committed an error by relying upon the inquiry conducted by the Commandant for coming to the conclusion that the order of reversion was punitive. While rejecting the contention, this Court observed:

"We are unable to accede to the contention of the appellant that the ratio of the above decision is that so long as there are no express words of stigma attributed to the

conduct of a Government Officer in the impugned order it cannot be held to have been made by way of punishment. The test as previously laid and which was relied on was whether the misconduct or negligence was a mere motive for the order of reversion or whether it was the very foundation of that order. In Dhaba case, it was not found that the order of reversion was based on misconduct or negligence of the officer. So far as we are aware no such rigid principle has ever been laid down by this court that one has only to look to the order and if it does not contain any imputation of misconduct or words attaching a stigma to the character or reputation of a Government Officer it must be held to have been made in the ordinary course of administrative routine and the court is debarred from looking at all the attendant circumstances to discover whether the order had been made by way of punishment. The form of the order is not conclusive of its true nature and it might merely be a cloak or camouflage for an order founded on misconduct. It may be that an order which is innocuous on the face and does not contain any imputation of misconduct is a circumstance or a piece of evidence for finding whether it was made by way of punishment or administrative routine. But the entirety of circumstances preceding or attendant on the impugned order must be examined and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order."

(emphasis supplied)

14. In *Samsher Singh v. State of Punjab* (1975) 1 SCR 814, a seven-Judge Bench considered the legality of the discharge of two judicial officers of the Punjab Judicial Service, who were serving as probationers. A. N. Ray, CJ, who wrote opinion for himself and five other Judges made the following observations:

"No abstract proposition can be laid down that where the

services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311(2) of the Constitution.

The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may, in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311. In such a case, the simplicity of the form of the order will not give any sanctity. That is exactly what has happened in the case of Ishwar Chand Agarwal. The order of termination is illegal and must be set aside".

Krishna Iyer, J, who agreed with the learned Chief Justice, made the following concluding observations:

"Again, could it be that if you summarily pack off a probationer, the order is judicially unscrutable and immune? If you conscientiously seek to satisfy yourself about allegations by some sort of enquiry you get caught in the coils of law, however harmlessly the order may be phrased? And so, this sphinx-complex has had to give way in later cases. In some cases the rule of guidance has been stated to be 'the substance of the matter' and the 'foundation' of the order. When does 'motive' trespass into 'foundation'? When do we lift the veil of 'form' to touch the 'substance'? When the Court says so. These 'Freudian'

frontiers obviously fail in the work-a-day world and Dr Tripathi's observations in this context are not without force."

15. In *Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha* (1980) 2 SCC 593, Krishna Iyer, J. considered as to when the termination simpliciter can be termed as punitive and observed:

"A termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case, the grounds are recorded in different proceedings from the formal order, does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service, the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used.

On the contrary, even if there is suspicion of misconduct, the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal but termination simpliciter, if no injurious record of reasons or punitive cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge."

16. In *Anoop Jaiswal v. Government of India* (1984) 2 SCC 369, this Court considered the question whether termination of the appellant's service, who was appointed to Indian Police Service and was on probation, by invoking Rule 12(b) of the Indian Police Service (Probation) Rules, 1954 was

punitive in nature. The facts found by the Court were that while undergoing training at National Police Academy, Hyderabad, the Probationary Officers had delayed attending the ceremonial drill practice. The Director of the Academy called explanation from all the probationers. The appellant was accused of having instigated others not to join ceremonial drill practice on time. He denied the allegation. Thereafter, his service was terminated by a non-stigmatic order. The appellant challenged the termination of his service on the ground of violation of Articles 14 and 311(2) of the Constitution. The writ petition filed by him was summarily dismissed by the Delhi High Court. This Court referred to the averments contained in the pleadings of the parties, the judgments in *Parshotam Lal Dhingra v. Union of India* (supra), *Samsher Singh v. State of Punjab* (supra) *State of Punjab v. Shri Sukh Raj Bahadur* (supra), *Union of India v. R.S. Dhaba* (supra), *State of Bihar v. Shiva Bhikshuk Mishra* (supra), *R.S. Sial v. State of U.P.* (1974) 3 SCR 754, *State of U.P. v. Ram Chandra Trivedi* (1976) 4 SCC 52 and *I.N. Saksena v. State of M.P.* (1967) 2 SCR 496 and held:

> "It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the court before which the order is challenged to go behind the form and ascertain the true character of the order. If the court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee.
>
> In the instant case, the period of probation had not yet been over. The impugned order of discharge was passed in the middle of the probationary period. An explanation was called for from the appellant regarding the alleged act of indiscipline, namely, arriving late at the gymnasium and

> acting as one of the ringleaders on the occasion and his explanation was obtained. Similar explanations were called for from other probationers and enquiries were made behind the back of the appellant. Only the case of the appellant was dealt with severely in the end. The cases of other probationers who were also considered to be ringleaders were not seriously taken note of. Even though the order of discharge may be non-committal, it cannot stand alone. Though the noting in the file of the Government may be irrelevant, the cause for the order cannot be ignored. The recommendation of the Director which is the basis or foundation for the order should be read along with the order for the purpose of determining its true character. If on reading the two together the Court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for that incident it would not have been passed then it is inevitable that the order of discharge should fall to the ground as the appellant has not been afforded a reasonable opportunity to defend himself as provided in Article 311(2) of the Constitution."
>
> (emphasis supplied)

17. In *Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences* (1999) 3 SCC 60, the two Judge Bench considered the appellant's challenge to the termination of his service after adverting to the various communications sent by the Head of the Organization to the appellant and formulated the following points:

> "(1) In what circumstances, the termination of a probationer's services can be said to be founded on misconduct and in what circumstances could it be said that the allegations were only the motive?
>
> (2) When can an order of termination of a probationer be said to contain an express stigma?

(3) Can the stigma be gathered by referring back to proceedings referred to in the order of termination?

(4) To what relief?"

While dealing with the first point, the Court referred to various earlier judgments and observed:

"As to in what circumstances an order of termination of a probationer can be said to be punitive or not depends upon whether certain allegations which are the cause of the termination are the motive or foundation. In this area, as pointed out by Shah, J. (as he then was) in Madan Gopal v. State of Punjab there is no difference between cases where services of a temporary employee are terminated and where a probationer is discharged. This very question was gone into recently in Radhey Shyam Gupta v. U.P. State Agro Industries Corpn. Ltd. and reference was made to the development of the law from time to time starting from Parshotam Lal Dhingra v. Union of India to the concept of "purpose of enquiry" introduced by Shah, J. (as he then was) in State of Orissa v. Ram Narayan Das and to the seven-Judge Bench decision in Samsher Singh v. State of Punjab and to post-Samsher Singh case-law. This Court had occasion to make a detailed examination of what is the "motive" and what is the "foundation" on which the innocuous order is based.

<u>If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad.</u> But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to

enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid."

(emphasis supplied)

18. In *Chandra Prakash Shahi v. State of U.P.* (2000) 5 SCC 152, the Court considered the correctness of the order passed by the High Court which had allowed the writ petition filed by the State and set aside the order passed by U. P. Public Services Tribunal for reinstatement of the appellant. The competent authority had terminated the appellant's service in terms of Rule 3 of the U. P. Temporary Government Servants (Termination of Service) Rules, 1975. It was argued on behalf of the appellant that the order by which his service was terminated, though innocuous, was, in fact, punitive in nature because it was founded on the allegation that he had fought with other colleagues and used filthy and unparliamentary language. In the counter affidavit filed on behalf of the respondents, it was admitted that there was no adverse material against the appellant except the incident in question. The original record produced before the Tribunal revealed that the appellant's service was terminated on account of his alleged involvement in the quarrel between the constables. After noticing various precedents, this Court observed:

"The whole case-law is thus based on the peculiar facts of each individual case and it is wrong to say that decisions have been swinging like a pendulum; right, the order is valid; left, the order is punitive. It was urged before this Court, more than once including in Ram Chandra Trivedi case that there was a conflict of decisions on the question of an order being a simple termination order or a punitive order, but every time the Court rejected the contention and held that the apparent conflict was on account of different facts of different cases requiring the

principles already laid down by this Court in various decisions to be applied to a different situation. But the concept of "motive" and "foundation" was always kept in view.

The important principles which are deducible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".

"Motive" is the moving power which impels action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this action? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary inquiry is held behind his back to ascertain the truth of those allegations and a termination

order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary inquiry.

Applying these principles to the facts of the present case, it will be noticed that the appellant, who was recruited as a Constable in the 34th Battalion, Pradeshik Armed Constabulary, U.P., had successfully completed his training and had also completed two years of probationary period without any blemish. Even after the completion of the period of probation under para 541 of the U.P. Police Regulations, he continued in service in that capacity. The incident in question, namely, the quarrel was between two other Constables in which the appellant, to begin with, was not involved. When the quarrel was joined by few more Constables on either side, then an inquiry was held to find out the involvement of the Constables in that quarrel in which filthy language was also used. It was through this inquiry that the appellant's involvement was found established. The termination was founded on the report of the preliminary inquiry as the employer had not held the preliminary inquiry to find out whether the appellant was suitable for further retention in service or for confirmation as he had already completed the period of probation quite a few years ago but was held to find out his involvement. In this situation, particularly when it is admitted by the respondent that the performance of the appellant throughout was unblemished, the order was definitely punitive in character as it was founded on the allegations of misconduct."

(emphasis supplied)

19. In *Union of India v. Mahaveer C. Singhvi* (2010) 8 SCC 220, the three-Judge Bench considered the question whether termination of the respondent's service who was serving as I.F.S. probationer by way of discharge in

accordance with the terms of employment was punitive. The Court noted that the respondent's service was terminated because he had sought extension to join the Mission at Madrid in Spain because of sudden deterioration in the health condition of his parents and also requested for providing medical facilities and diplomatic passports to them. The Court also noted that the Ministry of External Affairs had taken cognizance of the complaint made by one Mrs. Narinder Kaur Chadha that the respondent had been threatening her entire family and in particular her daughter which was followed by some enquiries conducted into his conduct or character by Joint Secretary, Foreign Service Institute and a memorandum was issued to the respondent alleging his unauthorized absence. The Joint Secretary found that the complaint was wholly unfounded. The Court then referred to the principles laid down in earlier judgments and approved the view taken by the High Court that even though the order of discharge did not contain any stigma, the same was not conclusive and the High Court had rightly termed the same as punitive. Some of the observations made in the judgment are extracted below:

> "The materials on record reveal that the complaint made by Mrs Narinder Kaur Chadha to the Minister of External Affairs had been referred to the Joint Secretary and the Director (Vigilance) on 8-2-2002 with a direction that the matter be looked into at the earliest. Although, nothing adverse was found against the respondent, on 19-2-2002, the Joint Secretary (Vigilance) held further discussions with the Joint Secretary (Admn.) in this regard. What is, however, most damning is that a decision was ultimately taken by the Director, Vigilance Division, on 23-4-2002, to terminate the services of the respondent, stating that the proposal had the approval of the Minister of External Affairs. This case, in our view, is not covered by the decision of this Court in Dipti Prakash Banerjee case."

20. The ratio of the above noted judgments is that a

probationer has no right to hold the post and his service can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post held by him. If the competent authority holds an inquiry for judging the suitability of the probationer or for his further continuance in service or for confirmation and such inquiry is the basis for taking decision to terminate his service, then the action of the competent authority cannot be castigated as punitive. However, if the allegation of misconduct constitutes the foundation of the action taken, the ultimate decision taken by the competent authority can be nullified on the ground of violation of the rules of natural justice.

21. We shall now consider whether termination of the services of the private respondents is vitiated due to violation of the rules of natural justice. It will be useful to notice Rules 15 and 16 of the Rules which regulate probation and confirmation of the officers of Bank, paragraphs 7(part) and 10 of the advertisement issued by the Bank for recruitment of Probationary Officers, the extracts of note prepared by Deputy General Manager, Central Recruitment and Promotion Department, which was approved by respondent No.3, letters dated 12.5.2011 and 3.6.2011 of Assistant General Manager (HR), which were duly initialed by the General Manager. The same read as under:

RULES

"15 (1) A person appointed as a Probationary Officer or a Trainee Officer shall be on probation for a period of two years.

15(2) Any other employee promoted as an officer to the Junior Management Grade shall be on probation for a period of one year.

15(3) Any other person appointed to any grade including the Junior Management Grade shall be on

probation for such period as may be decided by the competent authority.

Provided that the competent authority may, in the case of any officer, reduce or dispense with the period of probation under this rule.

16(1) An officer referred to in rule 15 shall be confirmed in the service of the Bank, if in the opinion of the competent authority, the officer has satisfactorily completed the training in any institution to which the officer may have been deputed for training, and the in-service training in the Bank.

Provided, that Bank may at its discretion subject to the merit and suitability of a Probationary Officer/Trainee Officer for future leadership role, being determined through a screening process to be prescribed by the Central Human Resources Committee may confirm and give placement (fitment) to such officers in MMGS II.

Provided that an officer directly recruited in any grade may be required also to pass a test in a language other than his mother tongue or a professional course.

16(2) If, in the opinion of the competent authority, an officer has not satisfactorily completed either or both the trainings referred to in sub-rule (1) or if the officer has not passed the test referred to therein or an officer's service is not satisfactory, the officer's probation may be extended by a further period not exceeding one year.

16(3) Where during the period of probation, including the period of extension, if any, the competent authority is of the opinion that the officer is not fit

for confirmation:-

(a) in the case of a direct appointee, his services may be terminated by one month's notice or payment of one month's emoluments in lieu thereof, and

(b) in the case of a promotee from the Bank's service, he may be reverted to the grade or cadre from which he was promoted."

ADVERTISEMENT

"7. xx xx xx

CAREER PATH

The Bank may at its discretion, subject to merit and suitability after probation period of a probationary officer for future leadership role, to be determined through a screening process, confirm and give placement (Fitment) to selected officers in next higher grade i.e. Officers Middle Management Grade Scale II.

The Probationary Officers will be on probation of two years during which they will be given intensive training and towards end of their probation/training period they will be subjected to a screening process. While those probationary officers who achieve the pre-determined standards may be confirmed and given placement in the next higher grade i.e. Officer Middle Management Grade Scale II . Others who qualify the test by fail to achieve the standards set for placement in Middle Management Grade Scale II, will be confirmed as Officer Junior Management Grade I. The services of those Probationary officers who fail to qualify this process may be terminated.

10. ACTION AGAINST CANDIDATES FOUND GUILTY

OF MISCONDUCT:

Candidates are warned that they should not furnish any particulars that are false, tampered/fabricated or should not suppress any material information while filing up the application form.

At the time of written examination/interview, if a candidate is (or has been) found guilty of:

(i) Using unfair means during the examination or (ii) impersonating by any person or (iii) misbehaving in the examination hall or taking away the question booklet (or any part thereof)/ answer sheet from the examination hall or (iv) resorting to any irregular or improper means in connection with his/her candidature for selection or (v) obtaining support for his/her candidature by any unfair means, such a candidate may, in addition to rendering himself/herself liable to criminal prosecution, be liable;

a) To be disqualified from the examination for which he/ she is a candidate.

b) To be debarred either permanently or for a specified period, from any examination or recruitment conducted by SBI.

c) For termination of service, if he/she has already joined the Bank."

NOTE PREPARED BY THE DEPUTY GENERAL MANAGER

STAFF SUPERVISING:

PROBATIONARY OFFICERS 2009-10 BATCH

WRITTEN EXAMINATION FOR CONFIRMATION

HELD ON 27-02-2011.

Placed alongside are: -

- ECCB Memorandum dated the 04th December 2003 vide which policy for confirmation of PO/TO as JMGS-I / MMGS-II was formed and was made effective for the batches of the PO/TO who were due for confirmation as from a date after the date of the approval of the policy i.e. 04th December 2003(Flag "A").

- Letter No. P&HRD: CM: 5:SPL: 815 dated the 29th September 2004 & P&HRD/CM/5/3982 dated the 28th October 2005 regarding pattern for the screening process for considering PO/TO for confirmation as JMGS-I / MMGS-II and also for extension of probation period by 06 months for those who will fail to secure minimum qualifying marks in the written test of functional knowledge (Flag "B").

- Cadre Management Department Memo No. HR/ CM/8/691 dated 17-01-2008 regarding modification in screening process for confirmation of POs in JMGS-I / MMGS-II consequent upon revision in recruitment procedure / criteria approved by the ECCB in its meeting held on 28th December 2007(Flag "C").

- Cadre Management Department Memo No. HR/ CM/6/SPL/517 dated 20-09-2010 forwarding therewith copy of note no. HR/CM/6/111/2010-11 dated the 09th September 2010 with supplementary note dated the 13th September 2010 put up before CHRC in its meeting held on 13th September 2010 advising modification to be effected in the policy for confirmation of Probationary Officers (POs) and Trainee Officers (TOs) (Flag "D").

. A copy of our approved note No. CRPD/SNP/PO-09-10/269 dated 08-12-2010(Flag "E") finalizing date of confirmation of written test for probationary officers 2009-10 batch.

3. Accordingly, written test was conducted for confirmation of probationary officers 2009-10 batch on 27-02-2011, wherein 2185 candidates appeared in the test against 2204 candidates called for the examination.

4. As per the approved testing pattern, the minimum qualifying marks in the written test for confirmation in JMGS I is 50% i.e. 100 out of 200 (for SC/ST/PWD 45% i.e. 90 out of 200) and 75% (150 out of 200) for qualifying them for Group Discussion / Interview for their confirmation in MMGS II direct.

5. The policy for confirmation of PO/TO has been modified after announcing the date of the written test but before processing the result thereof. The process of declaring the results as also advising the candidates the effects of their securing less than the minimum passing marks at 50% (45% for SC/ST/PWD candidates) in the written test held on 27-02-2011 have been modified as detailed in the Annexure-II.

6. The evaluation of all the answer papers (Objective type and Descriptive type) in respect of 2185 candidates has since been completed. We are in receipt of the merit list drawn on the basis of aggregate marks secured in Objective & Descriptive Papers from IBPS. The descriptive papers of all candidates who secured marks between 48% and 50% GEN/OBC (43% and 45% in respect of SC/ST/PWD candidates) as also those securing marks between 74% and 75% in the aggregate were subjected to 100% moderation.

7. We have also received report on "Use of Unfair Means"

i.e. copying based on analysis done by IBPS, Mumbai. A brief write up in "Detection of use of unfair means in objective tests by the candidates" is enclosed as Annexure-III. They have found 11 such pairs involving 20 candidates (Annexure-IV) as per undernoted table

Copying Cases in Written Test held on 27-02-2011 for Confirmation of Probationary Officers 2009-10 Batch

SR. NO.	CENTRE	NO. OF PAIRS	NO. OF CANDI-DATES	CATEGORY
01	Ahmedabad	02	04	Use of Unfair Means is suspected.
02	Guwahati	01	02	Use of Unfair Means is suspected.
03	Patna	07	12	Use of Unfair Means is suspected.
04	Lucknow	01	02	Use of Unfair Means is suspected.
	TOTAL	11	20	

We have analysed the report given by IBPS, which is based on correct answers, identical wrong answers (IWW) and other mismatches given by pairs, which have indulged in copying. IBPS has made analysis after excluding right answers and most popular wrong answers. Thus the chances of having large identical wrong answers are practically not possible.

Subsequently, we have called the seating arrangement of the candidates involved in copying (Annexure-V). In the seating arrangement, one pair of candidates from Patna

Circle are seated in different rooms and have Identical Wrong Answers, which are at the lower end of suspected category. In this case the data evaluated by the IBPS they also observed 4 mismatches in the answers (in non identical wrong answers). Considering all relevant factors, we propose to give benefit of doubt to candidates forming this pair and exclude them from candidates who used unfair means. Other than this pair, each of the pairs of candidates are seated next to each other, in addition to their being in the same room. This further strengthens the view that these candidates used unfair means namely copying answers from one another.

8. Excluding the pair mentioned above, the statistical and corroborative evidences are against the remaining 18 candidates, we propose to

(i) Cancel their candidature for the confirmation test.

(ii) Extend their probation for a period of 3 months.

(iii) All these officers in terms of their appointment are on probation for 2 years from their date of joining and provisions of SBIOSR 1992 are applicable to them. Provisions of Rule 16 (1, 2 and 3) (Annexure-VI) of SBIOSR enable the Appointing Authority to terminate the services of involved officers during the probation period in such cases without going through disciplinary proceedings. Legal opinion obtained in this regard in similar cases in an earlier examination is enclosed (Annexure-VII).

(iv) Circles will be asked to initiate investigations against the invigilators manning the rooms where such candidates were seated followed by disciplinary proceedings as per Service Conditions applicable for such cases.

9. On perusal / analysis of the Annexure-I, we submit

the summary as under:-

(i) xx xx xx

(ii) xx xx xx

(iii) 59 candidates (60-1 candidate involved in copying) have failed to secure 50% i.e. 100 out of 200 (for SC/ST/PWD 45% i.e. 90 out of 200) as such these 59 candidates are not suitable for their confirmation.

10. Accordingly, we recommend:

(i) xx xx xx

(ii) xx xx xx

(iii) Probation period of 59 candidates (60-1 candidate involved in copying), who have failed to secure 50% i.e. 100 out of 200 (for SC/ST/PWD 45% i.e. 90 out of 200), be extended by 6 months. They will be subjected to confirmation re-test within the extended period of probation in terms of the extant policy (Annexure-I).

(iv) 19 candidates (Annexure-I) were absent in the confirmation written test, are not suitable for their confirmation as JMGS-I. Circles have advised the reasons for their absence in the test. Subject to verification by the Circles, the probation period of eligible candidates is to be extended by a further period of 6 months and they will be subjected to confirmation re-test within the extended period of probation.

(v) There are 18 candidates against whom statistical and corroborative evidences (IBPS report, seating plan) are available showing their involvement in use of unfair means i.e. copying in the written test. We propose to cancel their candidature for the confirmation test and Circles will be asked to

initiate action as suggested in Para "8".

(emphasis supplied)

LETTER DATED 12.5.2011.

"GENERAL MANAGER NW-I.

CIRCLE DEVELOPMENT OFFICER

STAFF: SUPERVISING PROBATIONARY OFFICERS - 2009-10 BATCH RESULT OF WRITTEN EXAMINATION HELD ON 27.02.2011

A written examination for determining the suitability of the Probationary Officers 2009-10 batch for confirmation as officer JMGS-I/ direct placement as officer MMGS-II was conducted on 27.02.2011 in which out of 140 eligible POs, 139 appeared in the above test from our Circle. One PO had tendered resignation from Bank's services just before the above test.

2. In this connection, we have been advised by Corporate Center, vide their letter No. CRPD/SNP/PO2009 10/ CONF/74-A dated 10.05.2011 (placed alongside) that out of 139 POs from our Circle, 39 POs, as per Annexure "A", have secured qualifying marks of 150 or more out of 200 (i.e. 75% or more) to become eligible for Group Discussion/ Interview for considering their confirmation as officer MMGS-II in terms of Rule 16 (1) of State Bank of India officers service rules. In case any of these 39 candidates do not secure qualifying marks i.e. 75% or more in GD/Interview, he/she will be considered suitable for confirmation in JMGS-I w.e.f. 15.05.2011 or upon completion of two years probation from the date of their joining the Bank.

3. 96 candidates, as per Annexure "B", have secured minimum qualifying marks of 50% or more but less than

75% (45% or more for SC/ST/PWD) and have thus become eligible for being considered suitable for confirmation as officer JMGS-I w.e.f. 15.05.2011 or upon completion of two years probation from the date of their joining the Bank in terms of Rule 16(1) of State Bank of India Officers Service Rules.

4. 2 candidates, as per Annexure "C", who scored less than 50% (less than 45% for SC/ST/PWD) marks, are not eligible for confirmation at this stage and their probation will be extended for a period of 6 months. They will have to appear for confirmation re-test, which will be scheduled during the extended period of probation. In the event of any candidate failing in the re-test, his/her services will be terminated in terms of offer of appointment letter.

5. In terms of the Corporate Centre letter under reference, mentors (SMGS-IV/V) have to be identified for the 2 candidates (Annexure "C"), who could not qualify the confirmation test, for proper guidance and counselling to upgrade their knowledge / skills in the Bank. In order to enable them to imbibe more learning during their extended probation period, we also propose to change their branches. The mentors and branches identified for them are as under:

Sl.	Name	Present Branch	Proposed Branch/Office	Mentors identified
1.	Ms. Smriti Anand	Indira Nagar, Bareilly	RASMECCC, Bareilly	Mrs. Shubha AGM (Trg.), Doorwar, SBLC, Bareilly
2.	Shri Abhishek Debnath	Kamachha, Varanasi	RASMECCC, Varanasi	Shri S.K.Srivastava, CM (Trg.), SBLC, Varanasi

6. Further, 2 candidates, as per Annexure "D", have been found suspected to have indulged in copying and as such their probation will be extended by 3 months in terms of Corporate Centre letter No. CRPD/SNP/PO2009-10/ CONF/75 dated 10.05.2011.

7. Accordingly, in respect of 2 candidates of the above batch of Probationary Officers (2009-10 batch), who could not qualify in the confirmation test conducted on 27-02-2011, and 2 candidates who have been found suspected to have indulged in copying will have to be served letters on the lines of draft letters (Annexure-E & F) and their acknowledgement will have to be obtained. We, therefore, propose to deliver letters (placed below for your signature) to these 4 candidates. Further, we also propose to confirm 96 candidates (Annexure "B") as officer JMGS-I w.e.f. 15.05.2011 or upon completion of two years probation from the date of their joining the Bank in terms of Rule 16(1) of State Bank of India Officers Service Rules.

Submitted for approval, please.

ASSISTANT GENERAL MANAGER (HR)"

Annexure-"D"

"Central Recruitment Promotion Department, Corporate Centre, Mumbai Confirmation of Probationary Officers (2009-10) Batch Written Examination Held On Sunday, 27-02-2011 COPYING CASES

CSRNO	CIR	ROLLNO	TITLE	NAME	DOB	PFINDEX
1	LUC	2263701061	MS	PALAK MODI	19-06-85	5910633
2	LUC	2263701067	SHRI	PRABHAT DIXIT	22-11-83	5908930

LETTER DATD 3.6.2011.

"General Manager NW-I (Appointing Authority)

Circle Development Officer

Staff : Supervising

Probationary officers : 2009 Batch

Result of Confirmation Test Held on 27.02.2011

Copying Case : Extension of Probation Period by Three Months

139 Probationary Officers of 2009 batch appeared in the screening test for confirmation in JMGS-I and MMGS-II on 27.02.2011 from our Circle. Corporate Centre vide their e-mail letter no. CRPD/SNP/PO-2009-10/CONF/75 dated 10.05.2011 (Flag-'A') has forwarded a list of 02 candidates viz Ms. Palak Modi, PF index no. 5910633 and Shri Prabhat Dixit, PF index no. 5908930 where the use of unfair means (copying) is suspected as per report furnished by IBPS which is further supported by the corroborative evidence of sitting next to one-another J in different rows in the same room, as indicated by the sitting plan in the above mentioned test.

2. Corporate Centre also advised that as approved by the Appropriate Authority, the probation period of these candidates is to be extended by 03 months in terms of Rule 16(2) of SBIOSR and appropriate process to be completed within extended probation period. Further, as the statistical and additional corroborative evidences are against these candidates, as an examination conducting body, Corporate Centre has cancelled their candidature for the confirmation test.

3. A note was placed to the appointing authority i.e.

General Manager (NW-I) and upon his approval (Flag-'B') the probation period of these 02 candidates has been extended by 03 months. We propose to initiate appropriate action against the above mentioned 02 Probationary Officers in the matter at the earliest within the extended probation period.

4. Corporate Centre has advised that keeping in view the unsatisfactory conduct of these 02 officers during the written examination held on 27.02.2011, these candidates cannot be deemed to be fit for confirmation and are, therefore, liable for action in terms of Rule 16(3) of SBIOSR by the Appropriate Authority. In this connection, we have also discussed the matter with AGM (Law) at Corporate Centre.

5. We, therefore, propose subject to your approval, to initiate necessary action against these 02 Probationary Officers for termination of their services at the earliest. Upon approval we will draft a letter for termination of their services and forward the same to Corporate Centre for vetting. Upon receipt of advices from Corporate Centre, we will put up the termination letter, to be served to these 02 POs, for your signature. The appropriate authority in the matter is Appointing Authority, i.e., senior most General Manager of the Circle.

Submitted for approval.

Asstt. General Manager (HR)"

22. A combined reading of Rules 15(1) and 16 and paragraph 5 of the conditions of appointment makes it clear that a person appointed as a Probationary Officer remains on probation for a minimum period of two years at the end of which he is entitled to be confirmed if the competent authority is of the opinion that he has satisfactorily completed the training in any institution to which he may have been deputed and the in-

service training in the Bank. The Probationary Officer can also be subjected to screening for judging his merit and suitability. If the Probationary Officer fails to satisfactorily complete the training(s) or fails to pass the screening test or his service is not satisfactory, then the Bank can extend the period of probation by a further period of which the outer limit is one year. In a given case, the competent authority can, if it is of the opinion that the Probationary Officer is not fit for confirmation, terminate his service by one month's notice or payment of one month's emoluments.

23. It is thus evident that satisfactory performance during the period of probation, successful completion of training(s) and passing of the test conducted by the Bank for judging his suitability for the post constitute the touchstone for his confirmation.

24. The policy of confirmation, which was circulated vide letter dated 20.9.2010 envisaged placement of the Probationary Officers scoring 75% or more marks in the written test, group discussion and interview in MMGS-II. Those scoring less than 75% but minimum 50% (general category) and 45% (SC/ST/PWD) could be confirmed in JMGS-I. Those scoring less than 50% or 45%, as the case may be, are eligible to again appear in the confirmation test and qualify the same before completion of two years' probation. If he fails to qualify the test second time, his service is liable to be terminated in terms of Rule 16(3) of the Rules. An alternative available to the Bank is to extend the period of probation of the candidate for maximum one year with two opportunities to appear in the confirmation tests at six-monthly interval.

25. The primary object of the confirmation test held on 27.2.2011, which could also be termed as evaluation test within the meaning of paragraph 5(c) of the appointment letter was to decide whether the officer has made use of the opportunities

made available to him by the Bank to prove his worth for the job for which he was recruited and whether he has acquired sufficient knowledge about the functional requirements of the Bank. The test also gave an opportunity to the Probationary Officer to demonstrate that he was meritorious enough to be placed in the higher grade.

26. There is a marked distinction between the concepts of satisfactory completion of probation and successful passing of the training/test held during or at the end of the period of probation, which are sine qua non for confirmation of a probationer and the Bank's right to punish a probationer for any defined misconduct, misbehaviour or misdemeanor. In a given case, the competent authority may, while deciding the issue of suitability of probationer to be confirmed, ignore the act(s) of misconduct and terminate his service without casting any aspersion or stigma which may adversely affect his future prospects but, if the misconduct/misdemeanor constitutes the basis of the final decision taken by the competent authority to dispense with the service of the probationer albeit by a non stigmatic order, the Court can lift the veil and declare that in the garb of termination simpliciter, the employer has punished the employee for an act of misconduct.

27. The use of unfair means in the evaluation test/ confirmation test held by the Bank certainly constitutes a misconduct. The Bank itself had treated such an act to be a misconduct (paragraph 10 of advertisement dated 1.7.2008). It is not in dispute that the services of the private respondents were not terminated on the ground that there was any deficiency or shortcoming in their work or performance during probation or that they had failed to satisfactorily complete the training or had failed to secure the qualifying marks in the test held on 27.2.2011. As a matter of fact, the note prepared by the Deputy General Manager, which was approved by the General Manager makes it crystal clear that the decision to dispense with the services of the private respondents was taken solely

on the ground that they were guilty of using unfair means in the test held on 27.2.2011. To put it differently, the foundation of the action taken by the General Manager was the accusation that while appearing in the objective test, the private respondents had resorted to copying. IBPS had relied upon the analysis made by the computer and sent report to the Bank that 18 candidates were suspected to have used unfair means. The concerned authority then sent for the chart of seating arrangement and treated the same as a piece of evidence for coming to the conclusion that the private respondents had indeed used unfair means in the examination. This exercise was not preceded by an inquiry involving the private respondents and no opportunity was given to them to defend themselves against the charge of use of unfair means. In other words, they were condemned unheard which, in our considered view, was legally impermissible.

28. Before concluding, we may notice the judgments relied upon by the learned senior counsel for the appellants. In *Ajit Singh v. State of Punjab* (supra), this Court considered the question whether the decision of the State Government to terminate the services of the appellants, who were appointed as Executive Officers on probation of one year, could be nullified on the ground of violation of Articles 14 ad 16 of the Constitution. The facts of the case show that the Punjab Town Improvement Act, 1922 was enacted to make provision for the improvement and expansion of towns in Punjab. The Act envisages the creation and constitution of Trusts and the Trust so created will have a corporate personality with perpetual succession and a common seal. The duties and functions of the Trust inter alia include preparing of schemes under the Act for various purposes. Section 17 conferred power on the State Government to constitute certain services in the manner therein prescribed. One such service contemplated by the section was Punjab Service of Trust Executive Officers. Sub-section (2) of Section 17 conferred power on the State Government to make rules for regulating the recruitment and the conditions of service

of members of the Trust services constituted by the State Government. Armed with this power, the State Government constituted Punjab Service of Trust Executive Officers. In exercise of the power conferred by Section 73 read with Section 17(2) of the Act, the State Government framed rules styled as Punjab Trust Services (Recruitment and Conditions of Service) Rules, 1978 ("1978 Rules" for short). Rule 5(2)(i) inter alia provided that 50 per cent of the vacancies in the cadre of Executive Officers shall be filled by direct recruitment and for this purpose Rule 5(4) envisaged the setting up of a Selection Committee called Punjab Trust Services Selection Committee. In 1978, Directorate of Local Government, Punjab issued Advertisement No. 1078 inviting applications for the posts in Class I, II and III of Trust Executive Officers. Pursuant to this advertisement, large number of persons applied for various posts. The Punjab Trust Services Selection Committee interviewed various candidates and ultimately recommended 11 persons for the post of Trust Executive Officers. Ajit Singh and Rajinder Singh were recommended for Class I post; S. Sarup Singh and R.L. Bhagat were recommended for Class II post of Trust Executive Officers and the remaining seven petitioners in this group of petitions were recommended for Class III post of Trust Executive Officers. These recommendations were accepted and appointment orders were issued by Punjab Government on May 28, 1979. After each appointee completed one year of service, an increment was released in his favour. After one year, the State Government terminated their services vide orders dated 25.9.1980.

One of the several grounds on which the appellants challenged the termination of their services was that the action of the employer was wholly arbitrary, discriminatory and violative of equality clause contained in the Constitution. While quashing orders dated 25.9.1980, this Court observed:

"When the master-servant relation was governed by the

archaic law of hire and fire, the concept of probation in service jurisprudence was practically absent. With the advent of security in public service when termination or removal became more and more difficult and order of termination or removal from service became a subject-matter of judicial review, the concept of probation came to acquire a certain connotation. If a servant could not be removed by way of punishment from service unless he is given an opportunity to meet the allegations if any against him which necessitates his removal from service, rules of natural justice postulate an enquiry into the allegations and proof thereof. This developing master-servant relationship put the master on guard. In order that an incompetent or inefficient servant is not foisted upon him because the charge of incompetence or inefficiency is easy to make but difficult to prove, concept of probation was devised. To guard against errors of human judgment in selecting suitable personnel for service, the new recruit was put on test for a period before he is absorbed in service or gets a right to the post. Period of probation gave a sort of locus pententiae to the employer to observe the work, ability, efficiency, sincerity and competence of the servant and if he is found not suitable for the post, the master reserved a right to dispense with his service without anything more during or at the end of the prescribed period which is styled as period of probation. Viewed from this aspect, the courts held that termination of service of a probationer during or at the end of a period of probation will not ordinarily and by itself be a punishment because the servant so appointed has no right to continue to hold such a post any more than a servant employed on probation by a private employer is entitled to (see Parshotam Lal Dhingra v. Union of India). The period of probation therefore furnishes a valuable opportunity to the master to closely observe the work of the probationer and by the time the period of probation expires to make up his mind whether to retain

the servant by absorbing him in regular service or dispense with his service. Period of probation may vary from post to post or master to master. And it is not obligatory on the master to prescribe a period of probation. It is always open to the employer to employ a person without putting him on probation. Power to put the employee on probation for watching his performance and the period during which the performance is to be observed is the prerogative of the employer."

The Court then took cognizance of the fact that on completion of one year's probation an increment was released in favour of the appellants and proceeded to observe:

"It is implicit in release of increment that the petitioners had satisfactorily discharged their duty during the probation period, and at any rate the work and conduct was not shown to be unsatisfactory, which permitted an increment to be earned. Assuming, as contended for on behalf of the respondents that period of probation was two years, the fact that on the expiry of one year of service an increment was released, would imply that during the period of one year the work and conduct has not been unsatisfactory. If it was otherwise the release of increment could have been interdicted on the ground that neither the work nor the conduct was satisfactory. The fact that the increment was released would at least permit an inference that there was satisfactory completion of the probation period and that during the probationary period, the work and conduct of each of the petitioners was satisfactory. If up to the end of June, 1980 the work and conduct of each of the petitioners was satisfactory and if the service of each of them was, simultaneously on the same day September 25, 1980 dispensed with on the ground mentioned in Rule 9(2)(a) in that in the opinion of the appointing authority, the work and conduct of each of the petitioners was not satisfactory, then between June 1980 and September 1980 something

was simultaneously done by each of the petitioners to permit the appointing authority - the State - to reach an affirmative conclusion that the work and conduct, became wholly unsatisfactory and the degree of dissatisfaction with the service was so high that the service of all the 11 petitioners recruited on the same day was required to be dispensed with on identical ground. This is too fortuitous to carry conviction."

29. In *Krishnadevaraya Education Trust v. L.A. Balakrishna* (supra), the Court noted that the services of the respondent, who was appointed as Assistant Professor on probation were terminated on the ground of unsuitability and observed:

"There can be no manner of doubt that the employer is entitled to engage the services of a person on probation. During the period of probation, the suitability of the recruit/ appointee has to be seen. If his services are not satisfactory which means that he is not suitable for the job, then the employer has a right to terminate the services as a reason thereof. If the termination during probationary period is without any reason, perhaps such an order would be sought to be challenged on the ground of being arbitrary. Therefore, naturally services of an employee on probation would be terminated, when he is found not to be suitable for the job for which he was engaged, without assigning any reason. If the order on the face of it states that his services are being terminated because his performance is not satisfactory, the employer runs the risk of the allegation being made that the order itself casts a stigma. We do not say that such a contention will succeed. Normally, therefore, it is preferred that the order itself does not mention the reason why the services are being terminated.

If such an order is challenged, the employer will have to indicate the grounds on which the services of a probationer

were terminated. Mere fact that in response to the challenge the employer states that the services were not satisfactory would not ipso facto mean that the services of the probationer were being terminated by way of punishment. The probationer is on test and if the services are found not to be satisfactory, the employer has, in terms of the letter of appointment, the right to terminate the services.

In the instant case, the second order which was passed terminating the services of the respondent was innocuously worded. Even if we take into consideration the first order which was passed which mentioned that a Committee which had been constituted came to the conclusion that the job proficiency of the respondent was not up to the mark, that would be a valid reason for terminating the services of the respondent. That reason cannot be cited and relied upon by contending that the termination was by way of punishment."

30. In *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences* (supra), this Court again considered the question whether termination of the service of probationer can be termed as punitive merely because it is preceded by an inquiry for the purpose of judging his suitability and answered the same in negative. The two-Judge Bench referred to a large number of precedents and observed:

"29. ... Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic. The decisions cited by

the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job."

31. In Progressive Education Society v. Rajendra (supra), this Court examined correctness of the order passed by the School Tribunal constituted under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, which was approved by the High Court, quashing the termination of the service of respondent No.1 on the ground of unsatisfactory performance during the period of probation. This Court referred to the relevant provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 and observed:

"The law with regard to termination of the services of a probationer is well established and it has been repeatedly held that such a power lies with the appointing authority which is at liberty to terminate the services of a probationer if it finds the performance of the probationer to be unsatisfactory during the period of probation. The assessment has to be made by the appointing authority itself and the satisfaction is that of the appointing authority as well. Unless a stigma is attached to the termination or the probationer is called upon to show cause for any shortcoming which may subsequently be the cause for termination of the probationer's service, the management or the appointing authority is not required to give any explanation or reason for terminating the services except informing him that his services have been found to be unsatisfactory.

The facts of this case are a little different from the normal cases relating to probation and the termination of the services of a probationer in that the satisfaction required to be arrived at under sub-section (3) of Section 5 of the

MEPS Act has to be read along with Rule 15 of the MEPS Rules, 1981 with particular reference to sub-rule (6) which provides that the performance of an employee appointed on probation is to be objectively assessed by the Head during the period of his probation and a record of such assessment is to be maintained. If the two provisions are read together, it would mean that before taking recourse to the powers vested under sub-section (3) of Section 5 of the MEPS Act, the performance of an employee appointed on probation would have to be taken into consideration by the school management before terminating his services.

Accordingly, while Rules 14 and 15 of the MEPS Rules, 1981 cannot override the provisions of sub-section (3) of Section 5 of the MEPS Act, it has to be said that the requirements of sub-rule (6) of Rule 15 would be a factor which the school management has to take into consideration while exercising the powers which it undoubtedly has and is recognised under sub-section (3) of Section 5 of the Act.

This brings us to the next question regarding the sufficiency of the materials before the school management while purporting to pass the order of termination on 1-8-1994. As has been discussed, both by the School Tribunal and the High Court, the confidential report which has been produced on behalf of the school management does not inspire confidence on account of the different dates which appear both in Part I and Part II of the said report. Part I of the self-assessment form gives the particulars of the teacher concerned and the remarks of the reporting authority, namely, the Head Mistress of the school. The date in the said part is shown as 4-7-1994, whereas the date at the end of Part II, which is the form of the confidential report giving details of the teacher's performance is dated 24-6-1994, which appears to be in

line with the date given of the forwarding letter written by the Head Mistress to the Secretary of the Society. To add to the confusion created by the different dates on the form, there is a third date which appears on Part I of the self-assessment form which shows that the documents were presumably forwarded to the management of the school on 6-8-1994, which is a date which is prior to the date of termination of the services of Respondent 1, namely, 1-8-1994.

This merely goes to show that the said documents are not above suspicion and that the requirements of Rule 15(6) and Rule 14 had not been complied with prior to invocation by the school management of the powers under sub-section (3) of Section 5 of the MEPS Act."

32. In *Rajesh Kumar Srivastava v. State of Jharkhand* (supra), the two-Judge Bench examined challenge to the termination of the appellant's service, who was a Probationer Munsif. After examining the record placed before it, the Bench held that the competent authority had terminated the service of the appellant because his work was not satisfactory and such decision cannot be termed as stigmatic or punitive.

33. The proposition laid down in none of the five judgments relied upon by the learned counsel for the appellants is of any assistance to their cause, which were decided on their own facts. We may also add that the abstract proposition laid down in paragraph 29 of the judgment in *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences* (supra) is not only contrary to the Constitution Bench judgment in *Samsher Singh v. State of Punjab* (supra), but large number of other judgments – *State of Bihar v. Shiva Bhikshuk Mishra* (supra), *Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha* (supra) and *Anoop Jaiswal v. Government of India* (supra) to which reference has been made by us and to which attention of the two-Judge Bench does not appear to have been drawn. Therefore, the said proposition must be read

as confined to the facts of that case and cannot be relied upon for taking the view that a simple order of termination of service can never be declared as punitive even though it may be founded on serious allegation of misconduct or misdemeanor on the part of the employee.

34. In the result, the appeals are dismissed. The appellants shall reinstate the private respondents within 15 days of the production of copy of this judgment before respondent No.3 and give them all consequential benefits like pay, allowances, etc. within next one month. However, it is made clear that this judgment shall not preclude the competent authority from taking fresh decision in the matter of confirmation of the private respondents after giving them effective opportunity of hearing against the allegation of use of unfair means in the test held on 27.2.2011.

O R D E R

1. This appeal is directed against order dated 13.1.2012 passed by the Division Bench of the Allahabad High Court in Writ Petition (Civil) No. 37121 of 2011. The operative portion of the High Court's order reads as under:

> "In the result, the petition succeeds and is allowed. The order relating to discharge of the petitioner from service passed by the General Manager (NW-II), State Bank of India, Human Resources Department, 13 Floor, Local Head Office 11, Sansad Marg, New Delhi on 13.05.2011 (Annexure No.9 to the writ petition) is hereby quashed. A direction is issued to the respondent-bank to examine and evaluate the descriptive paper of the written examination of the petitioner and to scrutinize the case of the petitioner for confirmation on the basis of her performance in the said descriptive paper and interview, if any. Till a fresh decision is taken in this regard, the petitioner shall be allowed to continue in service with continuity, on the post of Probationary Officer and be paid emoluments, as would have been payable to her, had her services not been discharged. As far as back wages are concerned, the petitioner would be entitled to 50% of the back wages, which shall be paid to her within one month of the production of certified copy of this order."

2. By a separate judgment pro*nounced today in Civil Appeal Nos. 7841-7842 of 2012 – State Bank of India and others v. Palak Modi and Another,* we have upheld an almost identical order passed by the High Court in Writ Petition (Civil) Nos. 1298 of 2011 and 1512 of 2011.

3. For the detailed reasons recorded in the aforesaid judgment which shall be read as part of this order, the appeal is dismissed.

4. The appellants are directed to reinstate respondent No.1 within 15 days of the production of copy of this order before respondent No.3 and give her all consequential benefits like pay, allowances, etc. within next one month. However, it is made clear that this order shall not preclude the competent authority from taking fresh decision in the matter of confirmation of respondent No.1 after giving her effective opportunity of hearing against the allegation of use of unfair means in the test held on 27.2.2011.

B.B.B. Appeals dismissed.

RAM KARAN GUPTA
v.
J.S. EXIM LTD. AND ORS.
(Civil Appeal No. 8652 of 2012)

DECEMBER 03, 2012

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

Code of Civil Procedure, 1908 – Or.21, rr.84 and 85 – Auction sale – Auction running into crores of rupees – Held: In such a situation, auction purchaser not expected to pay the amount in cash on the fall of the hammer.

Code of Civil Procedure, 1908 – Or.21, r.89 – Object, applicability and effect of – Held: Or.21 r.89 CPC gives a final opportunity to the judgment debtor to save his property by setting the sale aside before confirmation upon satisfying the decretal debt and by paying compensation to the auction purchaser – Or.21 r.89 CPC is intended to (i) to save the judgment debtor from the threatened deprivation of his property, (ii) to satisfy the claim of the decree holder and (iii) to compensate the auction purchaser – Clause (a) of Sub-rule (1) of r.89 of Or.21 requires the applicant to deposit in Court 5% of the purchase money for payment to the auction purchaser – Deposit of the requisite amount in the Court is a condition precedent or a sine qua non to an application for setting aside the execution of sale and such amount must be paid within a period specified in the rule and if deposit is made after the time limit, the application must be dismissed – Deposit made u/r.89 of Or.21 CPC should be unconditional and unqualified and the decree holder or the auction purchaser should be able to get the amount at once – The rule is in the nature of a concession shown to the judgment debtor, so he has to strictly comply with the requirements thereof and a sale will not be set aside unless the entire

amount specified in rub-rule (1) is deposited within 60 days from the date of the sale and, if it is beyond 60 days, the Court cannot allow the application.

In a suit for partition, the suit property was ordered to be sold in public auction and the sale proceeds directed to be distributed among the shareholders. Auction was held on 8-10-2010. The 1st respondent was found to be the highest bidder for a bid amount of Rs.9.60 crores. The auction purchaser (1st respondent) deposited Rs.2.40 crores by way of 27 demand drafts of even date towards 25% of the bid amount. Later, the auction purchaser moved an application for depositing the remaining 75% of the sale price/bid amount of the suit property and the application was allowed and 75% of the sale amount was deposited by the auction purchaser on 23.10.2010. Subsequently the auction purchaser moved an application under Order 21 Rules 94 and 95 of CPC for confirmation of sale. The appellant/judgment debtor then sought for cancellation of the auction held on 8.10.2010 stating that it was vitiated due to violation of the mandatory provisions of Order 21 Rule 84 and 85 CPC. The Executing Court rejected the objection raised by the appellant/judgment debtor and confirmed the auction. In appeal, the High Court upheld the order, and therefore the instant appeal.

The appellant submitted that the auction purchaser had not complied with the mandatory provisions of Order 21 Rules 84 and 85 CPC, inasmuch as he did not deposit 25% of the bid amount "immediately" on the fall of the hammer; that on 1.12.2010 (i.e. within 60 days of the date of sale), the appellant had preferred an application before the Executing Court to allow him to deposit the entire amount of the sale, after deduction of his one-forth share in the property, and handover the possession to him; that though the application was filed before confirmation

of sale, but it was not considered by the Executing Court which committed an error in confirming the sale before entertaining the said application; and that even now the appellant is willing to pay the entire amount deposited by the auction purchaser including interest and willing even to pay Rs.1 crore more so that he can save the property where he is residing.

Dismissing the appeal, the Court

HELD:1.1. In the instant case, the auction purchaser had deposited 25% of the amount on 8.10.2010. When the auction is for such a large amount, running in crores of rupees, nobody can expect the auction purchaser to pay the amount in cash on the fall of the hammer. In the instant case, the auction purchaser had paid Rs.2.40 crores, may not be in cash, but by way of drafts on 8.10.2010 and the balance amount i.e. 75 % of the bid amount was also paid on 23.10.2010, consequently, the auction purchaser had complied with the provisions of Order 21 Rules 84 and 85 CPC. In *Talco Bank* case, this Court extended the meaning of the term "immediately" which occurs in Order 21, Rule 84 CPC. [Paras 13, 14] [693-D-F]

1.2. Order 21 Rule 89 CPC gives a final opportunity to the judgment debtor to save his property by setting the sale aside before the confirmation upon the terms of satisfying the decretal debt and of paying compensation to the auction purchaser. On setting aside the sale under Order 21 Rule 89 CPC the property continues to be the property of the judgment debtor. Order 21 Rule 89 CPC is intended to (i) to save the judgment debtor from the threatened deprivation of his property, (ii) to satisfy the claim of the decree holder and (iii) to compensate the auction purchaser. Rule 89 of Order 21 CPC also applies to a sale in execution of a decree for payment of money and an order of sale of property under the Partition Act,

1893 is a deemed decree under the Code and, therefore, an application for setting aside sale in execution of such decree is maintainable. It also applies to a decree passed in terms of an award in a Partition suit, so also to a sale in execution of mortgage decree. Order 21 Rule 92 CPC provides for confirmation of sale, as also setting aside the sale. [Para 15] [695-A-D]

1.3. In the instant case, there was no reference at all to the provisions of Order 21 Rule 89 in the application filed by the appellant on 1.12.2010, be that it may, even then the appellant had not complied with the mandatory requirements of depositing the amount. Clause (a) of Sub-rule (1) of Rule 89 of Order 21 requires the applicant to deposit in Court 5 per cent of the purchase money for payment to the auction purchaser. Deposit of the requisite amount in the Court is a condition precedent or a *sine qua non* to an application for setting aside the execution of sale and such a amount must be paid within a period specified in the rule and if the deposit is made after the time limit, the application must be dismissed. The deposit made under Rule 89 of Order 21 CPC should be unconditional and unqualified and the decree holder or the auction purchaser should be able to get the amount at once. The rule is in the nature of a concession shown to the judgment debtor, so he has to strictly comply with the requirements thereof and a sale will not be set aside unless the entire amount specified in rub-rule (1) is deposited within 60 days from the date of the sale and, if it is beyond 60 days, the Court cannot allow the application. The appellant-judgment debtor did not pay the amount within the stipulated time and he only made an application on 1.12.2010 without depositing the amount and hence the Court cannot entertain such an application and bound to confirm the sale which, in this case, the Court did on 23.10.2010. There is no error in the

judgment and orders of the Executing Court as well as the High Court and the belated offer made by the appellant for depositing the amount now cannot be entertained and the same is rejected. [Paras 19, 20 and 21] [699-E-H; 700-A-D]

Rosali V. v. Talco Bank and Others **AIR 2007 SC 998: 2007 (1) SCR 1169;** *Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel and Others* **AIR 1968 SC 372: 1968 SCR 455 and** *Challamane Huchha Gowda v. M.R. Tirumala and Another* **(2004) 1 SCC 453: 2003 (6) Suppl. SCR 506 – relied on.**

Dadi Jagannadham v. Jammlu Ramulu and Others **(2001) 7 SCC 71: 2001 (2) Suppl. SCR 60 – referred to.**

Manilal Mohanlal Shah and Others v. Sardar Sayed Ahmed Sayed Mahmad and Another **AIR 1954 SC 349: 1955 SCR 108;** *Balram son of Bhasa Ram v. Ilam Singh and Others* **AIR 1996 SC 2781: 1996 (5) Suppl. SCR 104;** *P. K. Unni v. Nirmala Industries and Others* **(1990) 2 SCC 378: 1990 (1) SCR 483 and** *M. Noohukan v. Bank of Travancore and Another* **(2008) 11 SCC 161 – cited.**

Case Law Reference:

1955 SCR 108	**cited**	**Para 11**
1996 (5) Suppl. SCR 104	**cited**	**Para 11**
2001 (2) Suppl. SCR 60	**referred to**	**Para 11, 16**
1990 (1) SCR 483	**cited**	**Para 11, 16**
(2008) 11 SCC 161	**cited**	**Para 11**
2007 (1) SCR 1169	**relied on**	**Para 12**
1968 SCR 455	**relied on**	**Para 15, 16**
2003 (6) Suppl. SCR 506	**relied on**	**Para 15, 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8652 of 2012.

From the Judgment & Order dated 11.11.2011 of the High Court of Delhi at New Delhi in CM(M) No. 1093 of 2011 and E.F.A. No. 15 of 2011.

Ranjit Kumar, V. Giri, Suhail Dutt, Subodh Pathak, Dharmendra Kumar Sinha for the Appellant.

C.A. Sundram, Jagjit Singh Chhabra, Shamin Ahmed Khan, Yashvardhan Roy, Azhar Alam, Puneet Jain, Anurag Gohil, Pratibha Jain, Balbir Singh Gupta, Sudhir Mendiratta for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. This matter arises in execution and this appeal has been preferred by one of the judgment debtors challenging the common final judgment and order dated 11.11.2011 passed by the High Court of Delhi in C. M. (M) No. 1093 of 2011 and E.F.A. No. 15 of 2011.

3. Decree holders and judgment debtors are co-sharers of a property bearing No. 1-87, Ashok Vihar, Delhi (hereinafter referred to as the 'suit property'). Late Rameshwar Dass Gupta filed a suit for partition of the suit property and after passing a preliminary decree, a final decree was passed and the suit property was ordered to be sold in public auction and sale proceeds were directed to be distributed among the shareholders.

4. Decree holders filed execution petition and vide order dated 20.11.2009, the auction sale was scheduled to be held on 9.1.2010. However, objector/J.D.2 Shri Ram Karan Gupta (appellant herein) moved an application seeking stay of auction sale scheduled to be held on 9.1.2010 and a joint application

was moved by the decree holders and judgment debtors, wherein it was disclosed that J.D.2 had agreed to purchase the suit property, as such, the auction sale be adjourned. Later on, J.D.2 failed to comply with the terms and conditions of the Compromise and, therefore, a fresh process for auction sale was issued and the auction sale was scheduled to be held on 4.7.2010. Due to various reasons, it did not materialize. Later, auction sale was scheduled to be held on 8.10.2010 and the auction was completed and the auction purchaser M/s J.S. Exim Ltd. (1st respondent herein) was found to be the highest bidder for a bid amount of Rs.9.60 crores. The auction purchaser deposited Rs.2.40 crores by way of 27 demand drafts of even date towards 25% of the bid amount. The Court Auctioneer placed on record the record of the auction proceedings held on 8.10.2010.

5. Later, the auction purchaser moved an application for depositing the remaining 75% of the sale price/bid amount of the suit property and the application was allowed and 75% of the sale amount was deposited by the auction purchaser on 23.10.2010 in the State Bank of India, Tees Hazari Court, Delhi.

6. The auction purchaser, later, moved an application under Order 21 Rules 94 and 95 of the Code of Civil Procedure (for short 'CPC') for confirmation of sale. J.D.2, the appellant herein, then sought for cancellation of the auction held on 8.10.2010 stating that the auction purchaser had failed to deposit 25% of the bid amount on completion of the auction sale proceedings. Further, it was also pointed out that the auction purchaser had enclosed the drafts dated 7.10.2010 issued by the Indian Overseas Bank, Chennai, but the said bank drafts had not been enclosed by the Court Auctioneer with her report. It was also contended that the auction was vitiated due to the violation of the mandatory provisions of Order 21 Rule 84 and 85 CPC.

7. The auction purchaser refuted all those contentions and submitted that 25% of the bid amount was deposited on the

date of auction after conclusion of the auction sale proceeding and the remaining 75% of the bid amount was deposited on 23.10.2010. Further, it was pointed out that the auction purchaser had got prepared the demand drafts of Rs.2.50 crores in the name of the Court Auctioneer. But, later on, it was disclosed by the Court Auctioneer that the demand drafts should be issued in the name of the competent authority, consequently, the auction purchaser got prepared the said demand drafts on 8.10.2010 and handed over the same to the Court Auctioneer. Further, it was also pointed out that the words occurring "shall pay" and "immediately" do not mean that the 25% of the bid amount should be paid at the fall of the hammer. Further, it was also pointed out that the auction sale could be set aside only on the ground of material irregularity or fraud that had resulted in substantial injury to the applicant.

8. The Executing Court elaborately considered the various contentions raised by the parties and perused the documents and took the view that the auction purchaser had deposited 25% of the bid amount as mandated by Order 21 Rule 84 CPC. Further, it was also held that the remaining 75% of the bid amount was also deposited by the auction purchaser on 23.10.2010 in terms of Order 21 Rule 85 CPC. The Court, therefore, rejected the objection raised by the appellant/ judgment debtor and confirmed the auction, vide its order dated 24.3.2011.

9. The appellant/judgment debtor, aggrieved by the said order, preferred an appeal being E.F.A. No. 15 of 2011 and C.M. (M) No. 1093 of 2011 before the High Court of Delhi. Before the High Court, contention was raised that the auction purchaser had not complied with the mandatory requirements of Order 21 Rules 84 and 85 CPC and that 25% of the bid amount was not deposited on the fall of the hammer and, consequently, the entire sale transaction was void and liable to be set aside. Further, it was also stated that since the appellant was one of the family members, he should have been

permitted to get the sale executed in his favour, since he had a pre-emptive right and he was ready and willing to deposit the amount of Rs.9.60 crores, so as to avoid the sale.

10. The High Court considered the various contentions raised by the parties and concurred with the views expressed by the Executing Court that the auction purchaser had complied with Order 21 Rules 84 and 85 CPC. The High Court noticed that the auction purchaser had deposited 25% of the bid amount as mandated by Order 21 Rule 84 CPC and that he had also paid the remaining 75% of the bid amount within the statutory period, in terms of Order 21 Rule 85 CPC. The High Court, therefore, upheld the order of the trial Court confirming the sale and directed the parties to execute documents of title in favour of the auction purchaser. Aggrieved by the same, this appeal has been preferred.

11. Shri Ranjit Kumar, learned senior counsel appearing for the appellant, submitted that the auction purchaser had not complied with the mandatory provisions of Order 21 Rules 84 and 85 CPC, inasmuch as he did not deposit 25% of the bid amount immediately on the fall of the hammer. It was pointed out that 25% of the bid amount was deposited only on 11.10.2010 and non-compliance of the above mentioned statutory provisions has vitiated the auction sale. In support of his contentions, reliance was placed on the judgments of this Court in *Manilal Mohanlal Shah and Others v. Sardar Sayed Ahmed Sayed Mahmad and Another* AIR 1954 SC 349 and *Balram son of Bhasa Ram v. Ilam Singh and Others* AIR 1996 SC 2781. Learned senior counsel submitted that the appellant had preferred an application on 1.12.2010 before the Executing Court to allow the appellant to deposit the entire amount of the sale, after deduction of his one-forth share in the property, and handover the possession to him. Learned senior counsel submitted that the application was filed before the confirmation of sale, but was not considered by the Executing Court.Learned senior counsel submitted that only if the application is allowed

under Order 21 Rule 92(2) CPC, the appellant could deposit the amount within the time stipulated in the said provision. Learned senior counsel submitted that the Executing Court has committed an error in confirming the sale before entertaining the application and allowing the same, so that the appellant could have deposited the entire amount. Learned senior counsel submitted that even now the appellant is willing to pay the entire amount deposited by the auction purchaser including interest. Further, it was also submitted that the appellant is willing even to pay Rs.1 crore more so that he can save the property where he is residing. Learned senior counsel also placed reliance on a Constitution Bench judgment of this Court in *Dadi Jagannadham v. Jammlu Ramulu and Others* (2001) 7 SCC 71 and pointed out that there is no strict time limit in depositing the amount and the question of deposit arises only after the application is allowed. Learned senior counsel pointed out that rationale in *P.K. Unni v. Nirmala Industries and others* (1990) 2 SCC 378 and the views expressed in that judgment that Order 21 Rule 92(2) CPC prescribed a period of limitation, was found to be incorrect in *Jammlu Ramulu* (supra). Learned senior counsel also placed reliance on *M. Noohukan v. Bank of Travancore and Another* (2008) 11 SCC 161 and submitted that this Court, in the similar circumstances, had extended the time for depositing the amount. Learned senior counsel submitted that, under such circumstances, the prayer for depositing the amount, as stated above, be allowed.

12. Shri C.A. Sundram, learned senior counsel appearing for the respondent, submitted that this Court shall not interfere with the concurrent findings rendered by the Courts below. Learned senior counsel submitted that the auction purchaser deposited 25% of the bid amount on 8.10.2010 and further deposited the remaining amount i.e. 75% of the bid amount on 23.10.2010. Learned senior counsel pointed out that the mandate of Order 21 Rules 84 and 85 CPC was complied with in letter and spirit and the Court Auctioneer was satisfied that the entire amount had been paid. Learned senior counsel

submitted that the word "immediately" occurring in Order 21 Rule 84 CPC was expanded by this Court in *Rosali V. v. Talco Bank and Others* AIR 2007 SC 998. It was pointed out that, in the present case, 27 drafts of Rs.2.40 corores had been paid to the Court Auctioneer on 8.10.2010, which is reflected in the report of the Court Auctioneer dated 8.10.2010. The balance amount was also deposited in accordance with Order 21 Rule 85 CPC. Learned senior counsel submitted that there is no bona fide in the offer made by the appellant and, if, had any genuine interest for avoiding the sale, the amount offered should have been deposited before the confirmation of sale and within the time stipulated in Order 21 Rule 92(2) CPC.

13. We are in full agreement with the order passed by the Executing Court as well as the High Court that the auction purchaser had deposited 25% of the amount on 8.10.2010. When the auction is for such a large amount, running in crores of rupees, nobody can expect the auction purchaser to pay the amount in cash on the fall of the hammer. So far as the instant case is concerned, facts would reveal that the auction purchaser had paid Rs.2.40 crores, may not be in cash, but by way of drafts on 8.10.2010 and the balance amount i.e. 75 % of the bid maount was also paid on 23.10.2010, consequently, in our view, the auction purchaser had complied with the provisions of Order 21 Rules 84 and 85 CPC.

14. We may, in this connection, refer to the judgment of this Court in *Talco Bank* (supra), wherein this Court has extended the meaning of the term "immediately" which occurs in Order 21 Rule 84 CPC, as follows:

> "30. The term "immediately", therefore, must be construed having regard to the aforementioned principles. The term has two meanings. One, indicating the relation of cause and effect and the other, the absence of time between two events. In the former sense, it means proximately, without intervention of anything, as opposed

> to "immediately." In the latter sense, it means instantaneously.
>
> 31. The term "immediately", is thus, required to be construed as meaning with all reasonable speed, considering the circumstances of the case. (See Halsbury's Laws of England, 4th Edition, Vol. 23, para 1618, p. 1178)."

Learned senior counsel appearing for the appellant, as we have already indicated, submitted that the Executing Court should have allowed his application dated 1.12.2010 since he preferred that application within 60 days of the date of sale, but could not deposit the amount since the application filed in terms of Order 21 Rule 92(2) CPC was neither dealt with nor allowed. Order 21 Rule 89 CPC, it may be noted, gives a final opportunity to the judgment debtor to save his property by setting the sale aside before the confirmation upon the terms of satisfying the decretal debt and of paying compensation to the auction purchaser. Rules 89 to 92 of Order 21 deal with setting aside of sale. When a property is sold in execution of a decree and an application for setting aside the sale can be made under those provisions by the persons affected on the grounds mentioned therein. Such an application has to be made within the prescribed period of limitation, the provisions mentioned therein are in the nature of concession and those provisions must be strictly complied with before a sale is set aside before confirmation. On setting aside the sale under Order 21 Rule 89 CPC the property continues to be the property of the judgment debtor.

15. This Court in *Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel and Others* AIR 1968 SC 372 held that the rule is intended to confer a right upon the judgment debtor, even after the property is sold, to satisfy the claim of the decree holder and to compensate the auction purchaser by paying him 5 per cent of the purchase-money. In *Challamane Huchha Gowda v. M. R. Tirumala and Another* (2004) 1 SCC 453, this

Court held that it gives a final opportunity to put an end to the dispute, at the instance of the judgment debtor before the sale is confirmed by the Executing Court and enables him to save his property. Order 21 Rule 89 CPC is, therefore, intended to (i) to save the judgment debtor from the threatened deprivation of his property, (ii) to satisfy the claim of the decree holder and (iii) to compensate the auction purchaser. Rule 89 of Order 21 CPC also applies to a sale in execution of a decree for payment of money and an order of sale of property under the Partition Act, 1893 is a deemed decree under the Code and, therefore, an application for setting aside sale in execution of such decree is maintainable. It also applies to a decree passed in terms of an award in a Partition suit, so also to a sale in execution of mortgage decree. Order 21 Rule 92 CPC provides for confirmation of sale, as also setting aside the sale, which reads as follows:

> **"92. Sale when to become absolute or be set aside.-** (1) Where no application is made under Rule 89, Rule 90 or Rule 91, or where such application is made and disallowed, the court shall make an Order confirming the sale, and thereupon the sale shall become absolute:
>
> Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the court shall not confirm such sale until the final disposal of such claim or objection.
>
> (2) Where such application is made and allowed, and where, in the case of an application under Rule 89, the deposit required by that rule is made within sixty days from the date of sale, or in cases where the amount deposited under Rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the court, the court shall make an Order setting aside the sale:

> Provided that no order shall be made unless notice of the application has been given to all persons affected thereby:
>
> Provided further that the deposit under this sub-rule may be made within sixty days in all such cases where the period of thirty days, within which the deposit had to be made, has not expired before the commencement of the Code of Civil Procedure (Amendment) Act, 2002.
>
> (3) No suit to set aside an Order made under this rule shall be brought by any person against whom such Order is made.
>
> (4) Where a third party challenges the judgment-debtor's title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit.
>
> (5) If the suit referred to in sub-rule (4) is decreed, the Court shall direct the decree-holder to refund the money to the auction-purchaser, and where such an order is passed the execution proceeding in which the sale had been held shall, unless the Court otherwise directs, be revived at the stage at which the sale was ordered.

Sub-rule (1) of Rule 92 deals with cases where no application to set aside the sale is made or such an application is made and disallowed. In all these cases, the Court shall make an order confirming the sale. Sub-rule (2) of Rule 92 covers those cases where an application for setting aside is made and allowed or in an application under Rule 89 requisite deposit has been made, in all such cases, the Court is bound to set aside the sale.

16. A Constitution Bench of this Court in *Jammulu Ramulu* (supra) had occasion to consider the scope of Order 21 Rule 92(2) and Rule 89 CPC. Overruling *P.K. Unni* (supra), this Court held as follows:

"15. A plain reading of Order 21 Rule 92 CPC shows that the court could either dismiss an application or allow an application. Order 21 Rule 89 CPC prescribes no period either for making the application or for making the deposit. The Limitation Act also prescribes no period for making a deposit. However, Article 127 of the Limitation Act prescribes a period within which an application to set aside a sale should be made. Earlier, this was 30 days, now it has been enhanced to 60 days. Unless there was a period prescribed for making a deposit, the time to make the deposit would be the same as that for making the application. This is so because if an application is made beyond the period of limitation, then a deposit made at that time or after that period would be of no use.

16. Normally, when the legislature wishes to prescribe a period for making a deposit, it does so by using words to the effect "no deposit shall be made after … days" or "a deposit shall be made within … days" or "no application will be entertained unless a deposit is made within … days". Order 21 Rule 92(2) CPC does not use any such expressions. The relevant portion of Order 21 Rule 92(2) CPC reads as follows:

"92. (2) Where such application is made and allowed, and where, in the case of an application under Rule 89, the deposit required by that rule is made within thirty days from the date of sale, … the court shall make an order setting aside the sale:"

Thus Order 21 Rule 92(2) CPC is only taking away discretion of the court to refuse to set aside the sale where an application is made and allowed and the deposit has been made within 30 days from the date of sale. It is thus clear that Order 21 Rule 92(2) CPC is not prescribing any period of limitation within which a deposit has to be made.

17. Viewed in this context the intention of the

legislature in extending the period under Article 127 of the Limitation Act may be seen. It is very clear from the Statement of Objects and Reasons, which have been set out hereinabove, that the period under Article 127 of the Limitation Act was extended from 30 days to 60 days in order to give more time to persons to make deposits. The legislature has noted that the period of 30 days from the date of sale was too short and often caused hardships because judgment-debtors usually failed to arrange for money within that period. The question then would be whether by merely amending Article 127 of the Limitation Act the legislature has achieved the object for which it increased the period of limitation to file an application to set aside sale."

The Constitution Bench held that all that Order 21 Rule 92(2) CPC provides is that if the deposit is made within 30 days from the date of sale and an application is filed then the court would have no discretion but to set aside the sale. The Court held that that does not mean that if the deposit is made after 30 days the court could not entertain the application. If the deposit is made beyond the period of 30 days, but within the period of 60 days, then it will be within the discretion of the court whether or not to grant the application.

17. Law Commission in its 89th report, para 42.35, page 219, Law Commission report 139th report paras 3.1 to 3.6 and 4.1 to 4.5 considered the period of limitation of thirty days for depositing the amount to set aside sale as specified in sub-rule (2) of Rule 92 and suggested enlargement of period of sixty days so as to be consistent with Section 127 of the Limitation Act. Following that the second proviso to sub-rule (2) of Rule 92, as inserted by the Code of Civil Procedure (Amendment) Act, 2002, clarified that the amendment would also apply to all those cases where the period of thirty days within which the deposit was required to be made had not expired before the commencement of the Amendment Act, 2002. The amendment

which came into force w.e.f. 01.07.2002 extends the period of deposit up to sixty days, which is in conformity with Section 127 of the Limitation Act, as amended by the Code of Civil Procedure (Amendment) Act 1976.

18. In *Challamane Huchha Gowda* (supra), the Court was primarily dealing with the question as to whether a mode of application has been prescribed for making an application for setting aside the sale. The Court noted that Order 21 Rule 89 CPC requires an application to be made for setting aside the sale, nothing is stated in the rule regarding the mode of application and then held that purshis contains an implicit prayer for setting aside the sale and the absence of a formal application does not amount to non-compliance with the provision. The above view expressed by certain High Courts was found favour by this Court in *Tribhovandas Purshottamdas Thakkar* (supra) and this Court held that Order 21 Rule 89 CPC does not provide that the application in a particular form shall be filed to set aside the sale.

19. We notice, in this case, there was no reference at all to the provisions of Order 21 Rule 89 in the application filed by the appellant on 1.12.2010, be that it may, even then the appellant had not complied with the mandatory requirements of depositing the amount. Clause (a) of Sub-rule (1) of Rule 89 of Order 21 requires the applicant to deposit in Court 5 per cent of the purchase money for payment to the auction purchaser. Deposit of the requisite amount in the Court is a condition precedent or a sine qua non to an application for setting aside the execution of sale and such a amount must be paid within a period specified in the rule and if the deposit is made after the time limit, the application must be dismissed. The deposit made under Rule 89 of Order 21 CPC should be unconditional and unqualified and the decree holder or the auction purchaser should be able to get the amount at once.

20. We have already indicated that the rule is in the nature of a concession shown to the judgment debtor, so he has to

strictly comply with the requirements thereof and a sale will not be set aside unless the entire amount specified in rub-rule (1) is deposited within 60 days from the date of the sale and, if it is beyond 60 days, the Court cannot allow the application. We have already found that the appellant-judgment debtor did not pay the amount within the stipulated time and he only made an application on 1.12.2010 without depositing the amount and hence the Court cannot entertain such an application and bound to confirm the sale which, in this case, the Court did on 23.10.2010.

21. We, therefore, find no error in the judgment and orders of the Executing Court as well as the High Court and the belated offer made by the appellant for depositing the amount now cannot be entertained and the same is rejected.

22. The appeal, therefore, lacks in merits and the same is dismissed, with no order as to costs.

B.B.B. Appeal dismissed.

N.V. SUBBA RAO
v.
STATE, THROUGH INSPECTOR OF POLICE,CBI/SPE, VISAKHAPATNAM, A.P.
(Criminal Appeal No. 1688 of 2008)

DECEMBER 3, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Prevention of Corruption Act, 1988 – s.13(1)(d) r/w s.13(2) – Penal Code, 1860 – s.120-B r/w s.420 – Allegation that A-1, Bank Manager, abused his official position as a public servant and entered into a criminal conspiracy with A-2, proprietor of a private firm, and defrauded the Bank by sanctioning temporary over-drafts and term loans to various individuals sponsored by A-2 – Conviction of A-1 and A-2 u/ss.120B and 420 IPC and further A-1 u/s.13(1)(d) r/w s.13(2) of the Prevention of Corruption Act – Justification – Held: Justified – Obtaining of undertaking letters from the loanees was one of the important pre-requisite for sanctioning of the loans – A-1 failed to obtain undertaking letters from all the loanees and misrepresented about the same to the higher authorities of the Bank – A-1 also did not carry out pre-inspection, a mandatory requirement according to the Manual of Instructions of the Bank – A-1 also willfully evaded his duty of opening bank accounts leaving the Bank without any recourse to receive monthly installments –A-1 gave statement u/s.313 CrPC that he remitted the amount of all the loanees into the account of A-2 and A-2 admitted the same – Evidence led in by the prosecution, particularly, the evidence of Typist of A-2 shows several meetings between A-1 and A-2, acceptance of money by A-1 from A-2 on many occasions, transfer of sanctioned loans to the credit of the account of A-2 etc. – Joint role played by A-1 and A-2 and their connivance and active collusion in cheating the bank and the borrowers

thus established – From the proved facts, one can legitimately draw a presumption that in connivance with A-2, A-1 caused monetary loss to the Bank by sanctioning loans without following the established procedure – Prosecution established its charges beyond reasonable doubt by placing acceptable materials in form of oral and documentary evidence.

Penal Code, 1860 – ss.120-A and 120-B – Criminal conspiracy – Proof – Held: Conspiracy is hatched in secrecy and for proving such offence substantial direct evidence may not be possible to be obtained – An offence of criminal conspiracy can also be proved by circumstantial evidence.

FIR was registered alleging that A-1, Bank Manager, abused his official position as a public servant and entered into a criminal conspiracy with A-2, proprietor of a private firm (M/s A.P. Enterprises), and defrauded the Bank to the tune of Rs.1.168 crores by sanctioning temporary over-drafts and term loans to various individuals sponsored by A-2. It was alleged that A-1 was instructed by his Controlling Officers to disburse loans to the employees of Railways and other organisations only after obtaining an undertaking from their employers (borrowers) that the monthly installment of repayment of loan will be deducted from their salaries as primary security and also to obtain a mortgage on the plots sold to the borrowers through M/s A.P. Enterprises; that A-1 fraudulently and dishonestly disbursed loans to various railway employees and credited the proceeds to the account of A-2 without obtaining the requisite undertaking from the employers and without proper security of monthly installments to be deducted from their salaries; that A-2, after having received the proceeds of 45 such borrowers, fraudulently and dishonestly did not get 45 plots registered in their names nor the borrowers got the loan amount from the Bank.

The trial court convicted A-1 and A-2 under Section

120B and 420 IPC and further A-1 under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988. The order was affirmed by the High Court. Hence the present appeals by A-1 and A-2.

Dismissing the appeals, the Court

HELD:1. Obtaining of undertaking letters from the loanees was one of the important pre-requisite for sanctioning of the loans, which A-1 did not fulfill. A-1 failed to obtain the undertaking letters and misrepresented about the same to the higher authorities of the Bank. The claim of A-1 that it was only mere dereliction of duty cannot be accepted. It was a dishonest representation with intention to cheat causing wrongful loss to the bank and the borrowers/purchasers of the plot. From the material on record in the form of evidence, it is clear that A-1 also did not carry out pre-inspection, a mandatory requirement according to the Manual of Instructions of the Central Bank of India. The evidence of PW-3 shows that for all the 957 loanees, no Savings Bank accounts were opened at the bank except for few. A-1 did not ensure that bank accounts were opened which would have ensured crediting of installments into the bank account. In view of the materials available on record, the prosecution rightly established that A-1 willfully evaded his duty of opening bank accounts leaving the Bank without any recourse to receive monthly installments. [Paras 17, 21 and 24] [716-H; 717-A-B; 718-C-D; 719-D-F]

2. The materials placed by the prosecution clearly establish that A-2 received monies from the Bank corresponding to the loans supposedly drawn by the Railway employees. These amounts though intended for the purpose of purchase of plots, were transferred to the account of A-2 by a multitude of cheques to other persons and businesses. [Para 27] [720-G-H]

3. Though it is claimed by A-1 that several decrees were obtained, it is evident from the evidence of PW-9 that though suits were decreed against 956 loanees, 494 decrees were simple money decrees and 462 decrees were mortgage decrees. The prosecution established that the bank suffered a loss of interest, despite suits filed were decreed for non-payment of the decretal amounts. [Para 28] [721-C-D]

K.G. Premshanker vs. Inspector of Police & Anr. **(2002) 8 SCC 87: 2002 (2) Suppl. SCR 350 and** *R. Venkatkrishnan vs. CBI* **(2009) 11 SCC 737: 2009 (12) SCR 762 – referred to.**

4. Regarding payments made to A-1 by A-2, PW-5-Accountant & Typist of A-2, deposed before the Court that Exh. P-104 contains information of particulars recorded as per directions of A-2. A perusal of the same shows the details of various payments made by A-2 to A-1 on different dates and in different names. The statement of PW-5 coupled with the entries in Ex. P-104 makes it clear that A-1 is liable to be prosecuted under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act and is rightly convicted by the Courts below. [Para 29] [721-G; 722-B-C]

5. A-1 without any enquiry, allowed A-2 to represent higher value (in respect of the plots) which was subsequently discovered by the evidence of PW-6-broker of house plots, to be much lesser to the value as quoted. The joint role played by A-1 and A-2 and their connivance and active collusion in cheating the bank and the borrowers was established. In view of the fact that the land was not approved by the authorities concerned, neither transferred in the name of the loanees nor mortgaged in favour of the Bank though entire sanctioned loan amount had been credited, the evidence led in by the prosecution establishes the active collusion

of A-1 and A-2 in cheating the bank and the borrowers. Further, it cannot be claimed by A-2 that he had no fraudulent and dishonest intention to cheat the bank. In view of the statement by A-1 under Section 313 CrPC that he remitted the amount of all the loanees into the account of A-2 and of the fact that A-2 has admitted the same, i.e., he received the amount @ Rs. 10,000/- and not making the house plots ready for the purpose of allocation and execution of the sale deed approached the Bank for release of the loan amounts with the connivance of A-1 which show that both were having the intention to cheat the bank at every stage. The statement under Section 313 CrPC can be relevant consideration for the courts to examine, particularly, when the prosecution has been able to establish the chain of events. The prosecution has not only relied on the answers given by the accused but also placed acceptable oral and documentary evidence to substantiate the charge. [Paras 30, 31 and 39] [722-D, E-F, G-H; 723-A-C; 725-F]

6. It is settled principle that for the purpose of reaching one conclusion, the Court can rely on a factual presumption. In the case on hand, from those proved facts, the Court can legitimately draw a presumption that in connivance with A-2, A-1 caused monetary loss to the Bank by sanctioning loans without following the established procedure. The prosecution has established its charges beyond reasonable doubt by placing acceptable materials. [Paras 32, 33] [723-D-G, F-G]

State Bank of Hyderabad & Anr. vs. P. Kata Rao **(2008) 15 SCC 657: 2008 (6) SCR 983 – distinguished.**

M. Narsinga Rao vs. State of A.P. **(2001) 1 SCC 691: 2000 (5) Suppl. SCR 584 and** *T. Subramanian vs. State of T.N.* **(2006) 1 SCC 401: 2006 (1) SCR 180 – referred to.**

7. Criminal conspiracy has been defined under Section 120-A of IPC. It is an independent offence, hence,

the prosecution for the purpose of bringing the charge of criminal conspiracy read with the provisions of the P.C. Act was required to establish the offence by applying the same legal principles which are otherwise applicable for the purpose of bringing a criminal misconduct on the part of the accused. In order to establish the guilt what is necessary is to show the meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means. Conspiracy is hatched in secrecy and for proving the said offence substantial direct evidence may not be possible to be obtained. An offence of criminal conspiracy can also be proved by circumstantial evidence. Evidence led in by the prosecution, particularly, the evidence of Typist of A-2 shows several meetings between A-1 and A-2, acceptance of money by A-1 from A-2 on many occasions, transfer of sanctioned loans to the credit of the account of A-2 etc. [Paras 35, 36] [724-D-H]

State of Madhya Pradesh vs. Sheetla Sahai & Ors. **(2009) 8 SCC 617: 2009 (12) SCR 1048 – referred to.**

8. Irregularities or deficiencies in conducting investigation by the prosecution is not always fatal to the prosecution case. If there is sufficient evidence to establish the substratum of the prosecution case then irregularities which occur due to remissness of the investigating agency, which do not affect the substratum of the prosecution case, should not weigh with the Court. [Para 38] [725-D-E]

Kashinath Mondal vs. State of West Bengal, **(2012) 7 SCC 699 – referred to.**

9. Based on the acceptable materials placed by the prosecution, the trial Court and the High Court rightly recorded their findings and convicted A-1 and A-2 for the offence punishable under Section 120B and 420 of IPC and further A-1 under Section 13(1)(d) read with Section

13(2) of the P.C. Act. In view of the concurrent findings recorded by both the courts based on acceptable evidence in the form of oral and documentary evidence, it is not a fit case for exercise of discretionary jurisdiction under Article 136 of the Constitution of India. [Para 40] [725-H; 726-A-B]

Case Law Reference:

2002 (2) Suppl. SCR 350	**referred to**	**Para 28**
2009 (12) SCR 762	**referred to**	**Para 28**
2000 (5) Suppl. SCR 584	**referred to**	**Para 32**
2006 (1) SCR 180	**referred to**	**Para 33**
2008 (6) SCR 983	**distinguished**	**Para 34**
2009 (12) SCR 1048	**referred to**	**Para 35**
(2012) 7 SCC 699	**referred to**	**Para 38**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1688 of 2008.

From the Judgment & Order dated 29.1.2008 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 602 of 2001.

Sidharth Luthra, ASG, Mukul Gupta, Anwesh Madhukar, Sushan Kumar, Narender Singh Bisht, A. Venayagam Balan, Y. Raja Gopala Rao, Y. Vismai Rao, Hitendra Nath Rath, Rajiv Nanda, Anita Shenoy, Pranay Agarwal, Divya Agarwal, R. Nedumaran, B. Krishna Prasad, D. Mahesh Babu, Mayur R. Shah Savita Devi, Suchitra Hrangkhawl, Amit K. Nain and M.B. Shivudu for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. These appeals are directed against the common final judgment and order dated 29.01.2008 passed by the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal Nos. 602 and 617 of 2001 respectively whereby the High Court while dismissing the appeals confirmed the order of conviction passed by the trial Court but reduced the sentence of rigorous imprisonment (RI) of two years to one year.

2. **Brief facts:**

(a) According to the prosecution, basing on reliable information, on 23.03.1995, the Inspector of Police, Special CBI, Visakhapatnam registered an FIR in Crime No. RC.03 (A)/ 95-VSP against Shri N.V. Subba Rao (A-1), the then Branch Manager, Central Bank of India (in short 'the Bank'), Guntur, A.P and Shri Attur Prabhakar Hegde (A-2), Proprietor of A.P. Enterprises, Guntur, A.P. for the commission of offence punishable under Section 120-B read with Section 420 IPC and Sections 420, 468 and 471 read with Section 468 IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (in short 'the P.C. Act.) alleging that A-1 abused his official position as a public servant and entered into a criminal conspiracy with A-2 and defrauded the Bank to the tune of Rs. 1.168 crores by sanctioning temporary over drafts and term loans to various individuals sponsored by A-2.

(b) After completion of the investigation, the CBI, on 08.05.2000, filed charge sheet against both the accused persons in the Court of the Special Judge for CBI Cases at Visakhapatnam which was numbered as CC No. 8 of 1998. In the said charge sheet, it has been alleged that A-1 while functioning as Branch Manager was instructed by his Controlling Officers to disburse loans to the employees of Railways and other organisations only after obtaining an undertaking from their employers (borrowers) that the monthly installment of repayment of loan will be deducted from their salaries as primary security and also to obtain a mortgage on the plots sold to the borrowers through M/s A.P. Enterprises. A-1 fraudulently and dishonestly disbursed 494 loans of Rs.

10,000/- each to various railway employees amounting to Rs. 49,40,000/- and credited the proceeds to the account of A-2 without obtaining the requisite undertaking from the employers and without proper security of monthly installments to be deducted from their salaries. Out of the above mentioned 494 borrowers, 45 persons have been identified by the prosecution. It also came to light that A-2, after having received the proceeds of the above 45 borrowers, fraudulently and dishonestly did not get 45 plots registered in their names nor the borrowers get the loan amount from the Bank.

(c) The Special Judge for CBI cases, Visakhapatnam, by judgment and order dated 30.04.2001, sentenced A-1 and A-2 to undergo RI for a period of one year for the offence under Section 120-B of the Indian Penal Code, 1860 (in short 'the IPC') and to undergo RI for a period of 2 years alongwith a fine of Rs.5,000/-, in default, to further undergo simple imprisonment for 3 months for the offence punishable under Section 420 of the IPC. Further, A-1 was sentenced to under go RI for 1 year alongwith a fine of Rs.2,000/-, in default, to further undergo simple imprisonment for 2 months for the offence punishable under Section 13(1)(d) read with Section 13(2) of the P.C. Act and also ordered that the sentences shall run concurrently.

(d) Against the said conviction and sentence, A-1 and A-2 filed Criminal Appeal Nos. 602 and 617 of 2001 respectively before the High Court of Andhra Pradesh at Hyderabad. By impugned judgment and order dated 29.01.2008, the High Court while dismissing the appeals confirmed the conviction passed by the trial Court but reduced the sentence of rigorous imprisonment (RI) of 2 years imposed under Section 420 of the IPC to 1 year considering the age of the accused.

(e) Being aggrieved, A-1 and A-2 preferred these appeals by way of special leave and leave was granted on 20.10.2008.

3. Heard Mr. Mukul Gupta, learned senior counsel for A-1

and Mr. Y. Raja Gopala Rao, learned counsel for A-2 and Mr. Sidharth Luthra, learned Additional Solicitor General for the respondent-CBI

4. For convenience, hereinafter, we will refer the appellant in Criminal Appeal No. 1688 of 2008 as A-1 and the appellant in Criminal Appeal No. 1700 of 2008 as A-2.

Discussion:

5 A-1 joined the service of Central Bank of India in the year 1953 and served as the Branch Manager, Guntur during the period 1989-1991. At the relevant time, A-2 was the proprietor of M/s A.P. Enterprises, Guntur. According to the prosecution, A-1 being a public servant and Branch Manager of the Central Bank of India, Guntur, entered into a criminal conspiracy with A-2 in order to defraud the Bank. Pursuant to the same, A-2 floated a Scheme mooted by him in the year 1990 and a formal proposal was sent to the Bank for approval of the same on 14.09.1990. This proposal was to be backed by A-2 by arranging Foreign Currency Non-Resident (FCNR) Deposits for the Bank and in return for the sanction of loans to the employees of central and state government for purchase of house sites through M/s A.P. Enterprises and A-2 also offered to (a) procure approval from the competent authorities responsible for disbursing salaries to the employees/borrowers to ensure that the amount so lent would be deducted from their salary and (b) equitable mortgage of the proposed land to be executed. Based on these conditions, the amount of loan to individual purchasers for purchase of land would be transferred to A-2.

6. It is further seen that the proposal of September, 1990 was forwarded by A-1 to the Zonal Office proposing the Scheme for 109 borrowers containing a mechanism whereby a sum of Rs. 10,000/- to 25,000/- would be lent by the Bank to the Central Government employees (South Central Railway) to purchase plots of land (approx. 200 sq. yards) from A-2 which is evident from Exh. P-3. It is also the case of the prosecution that A-1, in

furtherance of criminal conspiracy, dishonestly disbursed the loan and credited the proceeds of the loan to the account of A-2. Further, A-2 failed to register the plots in the name of almost 50% of the purchasers/borrowers despite having received the proceeds and thereby causing wrongful loss to the Bank as well as to the purchasers. Though the loan transaction relate to several persons, the charge in the case on hand is limited to 45 railway employees/borrowers wherein it was alleged that there was no transfer of land, hence, no equitable mortgage was created, putting the bank to a loss of Rs. 4,50,000/-.

7. It is the defence of A-1 that the initial proposal made by him was approved by the higher authorities, hence, there could not be any criminal action since the approval by the appropriate authority absolves him of all the liabilities/responsibilities in disbursement of monies of which he was the custodian on behalf of the Bank. It is also his claim that whether failure to prosecute higher officials is justifiable and also whether his acts which were done with the prior approval of the higher authorities will constitute a criminal offence. According to him, at the most, it may amount to dereliction of duty. It is also his stand that, in any event, the Bank authorities themselves agreed to provide a loan to the extent of 40% of the deposits mobilized by A-2 in the form of FCNR.

8. It is highlighted by A-2 that as per the understanding, FCNR Deposits were provided to the Bank to the tune of Rs. 8 crores for a period of 3 years on which the Bank earned enormous interest. It is also highlighted that at the relevant time, the Bank had no deposits at all and the interest they have to be paid which is in banking terms called as "call money" was up to 70% to 75%. It was further projected that when the Bank was in need of money that too in the form of FCNR because of financial crisis, it was A-2 who took a lot of pains and provided such deposits to the tune of more than Rs. 8 crores. It is also highlighted by A-2 that after the sanction of the loans,

the loanees, who were all central government employees were selected by the Bank officials after verifying their genuineness, salary certificates or otherwise etc.

9. It is seen that A-2 has purchased 60 acres of land at Gorentla Village, near Guntur and other places which fact was known to the employees and approximately 463 plots were registered in the name of respective loanees/borrowers. It is the stand of A-2 that the said loanees handed over the Registered Sale Deeds to the Bank for creating equitable mortgages. A-2 further contended that he could not execute any further registered sale deeds due to non release of 40% of the loan amount against the FCNR Deposits arranged by him to the Bank as agreed. It is also highlighted by A-2 that all the plots were approved by the authorities and there were no encumbrance on the house sites procured by him. The Bank also took security from the employees not only in the form of Registered Sale Deeds, but also from two employees, who have signed the relevant documents, as lands are being sold at the rate prevailing during the year 2000. Inasmuch as the Bank itself got the decree for the entire loan amount including interest, A-2 never cheated the Bank or anybody in this regard and he had no intention to cheat the bank or the purchasers of the plots who had availed the loans from the Bank.

10. It is further seen that on receipt of a proposal for sanctioning of loans from A-2 and opening an account in his name at Naaz Centre, Guntur Branch, A-1 on 08.12.1990 has sent a letter to the Regional Office, Vijayawada recommending the proposal of M/s A.P. Enterprises wherein the following facilities were sought for, viz., (a) sanction of Over Draft facility of Rs. 12 lakhs; (b) sanctioning of term loans to the prospective buyers of plots to the extent of 40% of the FCNR Deposits to be made as assured by A-2. The proposal was recommended stating that the loans were fully secured against collateral security and temporary over draft facility secured against equitable mortgage of the landed property by the guarantors.

The Financial Report dated 08.12.1990 along with the proposal was prepared by A-1. On the basis of the proposal, when certain clarifications were sought for by the Zonal Officer, A-1 sent a letter dated 22.12.1990 to the Zonal Office stating: (i) the value of the land was Rs. 90,000/- per acre; (ii) take home salary of the employees was Rs. 1,000 and 2,500/- at Guntur and Visakhapatnam respectively and (iii) letters of undertaking has already been obtained from government employees. Finally, on 22.12.1990, a letter was sent to the Chief Managing Director, Central Office, Mumbai for the consideration of A-2's proposal. It is seen from the prosecution evidence that the proposal was forwarded on the recommendation of the Branch Manager (A-1) mainly on the basis of the availability of FCNR Deposits. However, Exh. P-139 shows that on 09.01.1991, a letter was issued by Central Office to the Zonal Office of the Bank with reference to the letter dated 22.12.1990 stating that the proposal is declined due to funds constraint. Subsequently, i.e., on 07.02.1991, sanction for term loans varying between Rs. 10,000/-to 25,000/- each to 1,000 beneficiaries subject to the additional terms and conditions was granted. As per the additional terms and conditions, a letter of undertaking from every government employees has to be obtained.

11. It is pointed out by the prosecution that on 30.04.1991, A-1 had written a letter to the Railway Senior Divisional Personnel Officer to deduct monthly installments from the salary of employees who have availed the loans and remit the same to the Bank which is evident from Exh. P-1. In reply to the above, vide letter dated 30.04.1991, the Senior Divisional Personnel Officer had stated that there is no provision to recover any amount without the employee's consent and that salary may be credited to the Bank if desired by the employee, provided a bank account is opened in his name and a consent is received from the employee. A perusal of the above shows that the condition of sanction of loan even as per the view of the Zonal Office on which A-1 relied was not met before the disbursement of amounts.

12. The prosecution, in support of the charges leveled against A-1 and A-2, have examined in all 55 witnesses, however, the defence did not lead any evidence. E.R. Somayajulu, Branch Manager was examined as PW-1, P. Sreenivasulu, Senior Personnel Officer, S.C. Railway was examined as PW-2, K. V. Subba Rao, the Manager, Central Bank of India, Regional Office was examined as PW-3, K.A.L.N. Sharma, Manager, RMV Extension Branch, Bangalore was examined as PW-4, Namburi Madhavi, Typist and Accountant of A-2 was examined as PW-5, S.K. Galeeb, Broker was examined as PW-6, Gunti Subba Rao, another Broker was examined as PW-7, Vulchi Venkayamma, Landlady of PW-5 was examined as PW-8, P. Sesha Rao, the Manager, Central Bank of India was examined as PW-9, the Railway Employees were examined as PWs. 10-46 and PWs. 48-52, one Mr. R. Laxmana Rao, Assistant General Manager, Regional Office was examined as PW-47, T.M. Kumar, ex-Army Company Hawaldar worked with A-2 was examined as PW-53, P.S. Nair, Inspector of Police was examined as PW-54 and S.B. Shankar, Inspector of Police was examined as PW-55.

13. Now, let us consider the **incriminating circumstances** against A-1 and A-2.

Undertaking letters:

As per the additional terms and conditions for sanction of loans to government employees, a letter of undertaking from every government employee has to be obtained. In the case on hand, as per the evidence of P. Sesha Rao (PW-9) – the Manager, Central Bank of India, for a total of 957 borrowers, only 122 undertaking letters had been obtained. PW-1, Branch Manager, Central Bank of India, in his evidence has stated that loans can be sanctioned only after obtaining undertaking letters of the employer or the disbursement officer of the employee. He stated in his examination that out of 957 loanee employees there were only 122 undertaking letters from the employers. It is also brought to our notice that Shri K.A.L.N. Sharma (PW-

4), who at the relevant time worked as Accountant in Guntur Branch has proved Exh.97 which shows that A-1 falsely recorded that letter of undertaking from government employees has already been obtained. In addition to the same, the contents of the document (Exh. 97) have also been proved by Shri R. Laxmana Rao (PW-47), Assistant General Manager, Regional Office.

14. The prosecution has also highlighted the correspondence between A-1 as the Branch Manager and the Senior Divisional Personnel Officer, Railways which was proved by P. Sreenivasulu (PW-2), Senior Personnel Officer, South Central Railway which establishes that there is no provision to recover the loan amount without the employees consent and salary can be credited to the bank if desired by the employee provided bank account is opened and consent is received from the employee It is demonstrated before us that there is no authorization for deduction of salary and A-1 had no authority to accept term loan applications after April 30, 1991. However, applications were accepted and monies were disbursed even after April 30, 1991 vide Exh.P-55, Exh.P-60, Exh.P-62, Exh.P-63, Exh.P-64, Exh.P-67, Exh.P-69, Exh.P-71, Exh.P-72, Exh.P-76, Exh.P-79, Exhs. P-83 to P-95.

15. In respect of 45 borrowers identified by the prosecution, there is no certificate of authorization on record given by the Senior Divisional Personnel Officer (DPO) to deduct the salary and remit the same to the bank. Even though A-1 claims that all the transactions were genuine, onus shifts on him to show that he had complied with all the requirements/ conditions. In fact, A-1 knows all the procedures and released the amounts to the credit of A-2 without fulfilling the requirements/conditions. We have already stated that A-1 was the custodian of the Branch and he has to take the entire responsibility.

16. It is the claim of A-1 that all the loans had been sanctioned only after obtaining undertaking letters of the

employers/disbursement officers of the employees. The above assertion is found to be wrong in view of the evidence of PWs 1 and 9. It is also demonstrated before us that certain undertaking letters obtained by A-1 reveal that they were not obtained from the competent authorities. The documents, viz., Exhs. P-110-137 have been proved by PW-2, Senior DPO, Railways, who asserted in his examination in chief that only the Senior D.P.O. is the competent authority to give authorization to any bank for remittance of loan instalments from salaries of employees. In other words, if any officer subordinate to Senior D.P.O. issues any authorization, it would not bind South Central Railways. A perusal of Ex.P-113 shows that the undertaking letter in the instant case has been obtained from the Chief Traction Foreman, S.C. Railways, who is not the competent authority to deduct the salary from the employees account.

17. Learned Additional Solicitor General -Mr. Sidharth Luthra took us through the evidence of railway employees,viz., PWs 10-46 and 48-52 wherein they admitted that they have not given any undertaking for deduction of salary in lieu of the loan for the purpose of purchase of house plots. It is also highlighted that A-1 in his statement under Section 313 of the Code of Criminal Procedure, 1973 (in short 'the Code') has accepted that Exhs. P-53 to 95 are the respective loan applications of 43 loanees out of 957 loanees and were signed by him. He also stated that he obtained undertaking letters from all the loanees on the registration of sale deeds for the plots in their names. When such is the position, the statement made by A-1 that he had obtained undertaking letters from all the loanees is factually incorrect. As a matter of fact, the trial Court and the High Court, after verification of the oral and documentary evidence, has noted that only 122 undertaking letters have been obtained out of 957 loanees. The above factual details show that A-1 failed to obtain undertaking letters and misrepresented about the same to the higher authorities of the Bank. We have already noted and it was also brought to our notice that obtaining of the undertaking letters was one of the important

pre-requisite for sanctioning of the loans. The claim of A-1 that it is only mere dereliction of duty cannot be accepted but as rightly argued by the counsel for the CBI, it was a dishonest representation with intention to cheat causing wrongful loss to the bank and the borrowers/purchasers of the plot and obtaining the undertaking letters was one of the pre-condition for sanctioning of loans, which A-1 has not fulfilled.

Pre-inspection:

18. PW-1, in his examination has asserted that as per the Manual of Instructions of the Central Bank of India, a pre-inspection report is necessary for disbursement of any loan. He also asserted that inspection of immovable property is necessary before disbursement. While elaborating the same in his evidence, he highlighted that it is necessary to verify the title deeds and these have to be obtained by the Branch Manager as security for the loan by way of the equitable mortgage. In addition to the evidence of PW-1, the prosecution has pressed into service, the evidence of PW-3. In his examination, PW-3 has stated that as per the instructions of A-1, he verified the names of the persons shown in the list given by A-1 with muster rolls available at South Central Railway, Guntur Section.

19. It is relevant to note the evidence of PWs 6 and 7, who were the brokers of the house plots, who have stated in their examination in chief that the lands in question were rain fed lands before forming into plots. To strengthen the above evidence, PW-53 who is an employee of A-2, has stated that before demarcation into house plots, there were ginger and chilly crops being raised by A-2. It is further seen from his evidence that at one point of time when bank officials visited the plots on complaints being received by them for non-allotment of the same, A-2 destroyed the crops on the land and placed survey stones. This factual information shows that the land which was sold to the Bank and the borrowers was (a) agricultural land; (b) land for which permission was never

granted; and (c) rain fed lands and the conduct of destroying the crops to mislead officials leads to dishonest intention.

20. Some of the employees who availed loans deposed before the Court that they have not even visited the office of A-1 and they have signed the term loan applications on the railway platform or at the office of A-2.

21. From the above materials in the form of evidence, it is clear that pre-inspection, which is a mandatory requirement according to the Manual of Instructions of the Central Bank of India, was not carried out by A-1. A-1 being a Branch Manager cannot delegate the responsibility of pre-inspection and reports thereon to anyone and he was permitted to sanction loans and disburse the amounts only after his satisfaction. About the relationship of A-1 and A-2, PW-5 an employee of A-2 stated in her deposition that A-1 visited the office of A-2 many a times. In fact, this has been admitted by A-1 in his 313 statement that he visited the office of A-2 though for inspection only.

22. It is useful to refer that similar statements were made by A-2 that A-1 has not obtained security for the loans disbursed by him. With respect to the above, PW-3 in his examination has stated that loans were sanctioned by A-1 of Rs.10,000/- to each borrower for a total 957 employees Ex. P 53-95 which are 43 loan applications out of 957 loanees were proved by PW-4. In his evidence, PW-4 has asserted that A-1 sanctioned each of the applications of Rs.10,000/- and he duly signed the same to that effect. PW-9 in his evidence stated that out of 957 only 463 plots were allotted and registered and handed over by obtaining equitable mortgage. It is further seen from his evidence that the remaining 494 plots were not registered and, therefore, no collateral security for recovery was created. We have already mentioned that the prosecution has identified 45 loanees out of 494 in whose cases A-1 failed to obtain equitable mortgage. In this regard, it is useful to refer the statement made by A-1 under Section 313 of the Code wherein he admitted that he was obtaining equitable mortgage and as

no sale deeds were present for 494 loanees, hence, getting equitable mortgage does not arise. He also explained that A-2 did not get the sale deeds on account of the default of the Bank in not financing 40% of the FCNR deposits.

23. A perusal of the evidence of PWs 1 and 9 clearly shows that pre-inspection report is necessary and out of 957 loanees only 463 plots were registered and handed over to the respective employees by obtaining the equitable mortgage. Insofar as 494 loanees in whose names plots were not registered, no collateral security for recovery of loans was created in favour of the bank.

No Bank Accounts opened for the loanees:

24. The evidence of PW-3 shows that for all the 957 loanees, no Savings Bank accounts were opened at the bank except for few. It is brought to our notice that the letter (Exh. P-2) from Senior D.P.O Railways to A-1 shows that only after employees consent to the amount being deducted, it can be credited to the bank provided that a bank account is opened for the respective employee. It is the responsibility of A-1 and in fact he did not ensure that bank accounts were opened for the employees which would ensure crediting of installments into the bank account. In view of the materials available, the prosecution has rightly established that A-1 has willfully evaded his duty of opening bank accounts leaving the Bank without any recourse to receive monthly installments.

25. PW-4, who was working as an Accountant in the Central Bank of India during the period from August, 1988 to November,1991, has deposed that all the applications for advance and their letters and term loan agreements including sanction and disbursement covered by debit vouchers (Exhs. P-5 and P-6) were processed in a single day and the proceeds were credited to the account of A-2 by credit vouchers on the same day which fact is evident from Exhs. P-7 and P-8.

Proceeds of loan credited to the account of A-2

26. It is the claim of A-1 that the amount of loan for purchase of immovable property was credited to the account of vendor, namely, A-2 since all the 45 witnesses had authorised A-1 and the prosecution has not examined any other person other than those 45 persons to prove that no authority was given to A-1. PW-3, officer of Central Bank of India, in his examination has deposed that the amounts sanctioned by the Bank to various employees for the purchase of house site were credited to the account of A-2. PW-9, in his evidence, has stated that the amounts of loans for purchase of house sites sanctioned to 957 employees by Central Bank of India, Guntur were all credited to the O.D. account of A-2. The above statement of officer of the Bank is also strengthened by the evidence of Namburi Madhavi - PW-5, Typist and Accountant of A-2 at the relevant time, who has stated in her statement that M/s A.P. Enterprises received in all Rs.97,50,000/- from Central Bank of India, Guntur Branch to their credit through transfer by debiting from the loan accounts. This aspect has been accepted by A-1 in his statement under Section 313 of the Code. It is pointed out by the prosecution that though the entire amount has been credited to the account of A-2, the security for 494 plots has not been obtained. The stand of A-2 that his failure to allot 494 plots was because of the default of the Bank in not releasing 40% of FCNR deposit is not acceptable as the materials placed by the prosecution shows that he has received the entire amount of 957 loan proceeds, though the present case is limited to 45 loanees identified by the prosecution.

27. The materials placed by the prosecution clearly establish that A-2 received monies from the Bank corresponding to the loans supposedly drawn by the Railway employees. These amounts were intended for the purpose of purchase of plots. However, it is shown to us that these amounts were transferred to the account of A-2 by a multitude of cheques to other persons and businesses. In this regard, it is relevant

to note that PW-3, who was the Manager of Central Bank of India, Bangalore, in his deposition has stated that the account copy of A-2 shows withdrawal of amounts against cheques. A-2 issued several cheques which were for cash in his own name and several other persons including telegraph transfer. In respect of above claim, the prosecution has marked several documents, viz., Exhs P-10 to P-47.

Decrees obtained:

28. Though it is claimed by A-1 that several decrees have been obtained, it is evident from the evidence of PW-9 that suits were decreed against 956 loanees, out of which 494 decrees are simple money decrees and 462 decrees are mortgage decrees. Further, it makes it clear that 126 loanees created equitable mortgage and expressed willingness for sale of plots and credit of the proceeds to their respective loan accounts, which was approved by the Regional office. It is further seen that 30 borrowers sold their plots towards discharge of their loan accounts and only one loanee liquidated the loan. The prosecution established that the bank suffered a loss of interest, despite suits filed were decreed for non-payment of the decretal amounts. In such a situation, it is relevant to mention a decision of this Court in *K.G. Premshanker vs. Inspector of Police & Anr.* (2002) 8 SCC 87 and *R. Venkatkrishnan vs. CBI* (2009) 11 SCC 737) wherein it was held that the claim in the suit cannot override the criminal prosecution.

Payments made to A-1 by A-2:

29. Regarding payments made to A-1 by A-2, PW-5-Accountant & Typist of A-2, deposed before the Court that Exh. P-104 contains information of particulars recorded as per directions of A-2. A perusal of the same shows the details regarding various payments made by A-2 to A-1 on different dates and in different names. It shows that on 06.03.1991, a sum of Rs.25,000/- was paid by way of cash to N. Subba Rao (A-1). Again on 07.04.1991, another sum of Rs.25,000.- was

paid by cash to the same person. On 14.05.1991, a sum of Rs. 35,000/- was paid by way of cash to N.S. Rao and again on 28.05.1991, a sum of Rs.20,000/- was paid by way of cash to N.S. Rao (Both N. Subba Rao and N.S. Rao denotes the same person, i.e. A-1). PW-5 has also stated that she was asked by A-2 to preserve the document (Ex. P-104) which was accordingly preserved by her at her house. The statement of PW-5 coupled with the entries in Ex. P-104 makes it clear that A-1 is liable to be prosecuted under Section 13(1)(d) read with Section 13(2) of the P.C. Act and is rightly convicted by the Courts below.

30. Regarding the value of the land, it is seen that A-1 without any enquiry, allowed A-2 to represent higher value which was subsequently discovered by the evidence of PW-6 to be Rs.35,000/- to Rs.50,000/- which is much lesser to the value of Rs.90,000/- as quoted. On the other hand, the evidence of PW-6 - broker of house plots, in his chief-examination has also stated that the value of lands is Rs.35,000/- to Rs. 50,000/- per acre. A-2, in his statement under Section 313 of the Code has stated that the value of the land is Rs.80,000/- to Rs.90,000/- per acre and not Rs.35,000/- to Rs.50,000/- per acre. The above details also establish the joint role played by A-1 and A-2 and their connivance. It also establishes the active collusion of A-1 and A-2 in cheating the bank and the borrowers.

31. Though A-2 has claimed that as requested by the authorities of the Central Bank of India, he has provided FCNR deposits to the Bank, in fact, provided FCNR deposits to a tune of more than Rs. 8 crores for a period of 3 years for which the Bank earned enormous interests. In view of the fact that the land was not approved by the authorities concerned, neither transferred in the name of the loanees nor mortgaged in favour of the Bank though entire sanctioned loan amount had been credited to his account, we are satisfied that the evidence led in by the prosecution establishes the active collusion of A-1 and A-2 in cheating the bank and the borrowers. Further, it cannot

be claimed by A-2 that he has no fraudulent and dishonest intention to cheat the bank. In view of the statement by A-1 under Section 313 of the Code that he remitted the amount of all the loanees into the account of A-2 and of the fact that A-2 has admitted the same, i.e., he received the amount @ Rs. 10,000/- and not making the house plots ready to the remaining employees for the purpose of allocation and execution of the sale deed approached the Bank for release of the loan amounts with the connivance of A-1 which, as rightly pointed out, show that both were having the intention to cheat the bank at every stage.

32. By relying on the decision of this Court in *M. Narsinga Rao vs. State of A.P.,* (2001) 1 SCC 691, learned counsel for A-1 contended that the entire case against A-1 is based on presumptions and in none of the three charges there is a scope for presumption. It is settled principle that for the purpose of reaching one conclusion, the Court can rely on a factual presumption. In the case on hand, from those proved facts, the Court can legitimately draw a presumption that in connivance with A-2, A-1 caused monetary loss to the Bank by sanctioning loans without following the established procedure which we have discussed in the earlier part of our order.

33. Learned counsel for A-1 relied on another decision of *T. Subramanian vs. State of T.N.,* (2006) 1 SCC 401, wherein it was held that the accused is not required to establish his defence by proving beyond reasonable doubt as the prosecution can establish the same by preponderance of probability. In the case on hand, we have already noted that the prosecution has established its charges beyond reasonable doubt by placing acceptable materials.

34. By drawing our attention to a decision of this Court in *State Bank of Hyderabad & Anr. Vs. P. Kata Rao,* (2008) 15 SCC 657, learned counsel for A-1 submitted that on the same facts both civil and criminal actions are not permissible.

According to him, since A-1 has already been dismissed from service, criminal prosecution is not warranted on the same set of facts. We have gone through the factual details in the above decision. The case relates to initiation of departmental enquiry after acquittal in criminal prosecution. It is not in dispute that on the same set of facts, the delinquent shall not be proceeded in a departmental proceeding and in a criminal case simultaneously. When there was an honourable acquittal of the employee during the pendency of the proceedings challenging the dismissal, the same requires to be taken note of. However, each cause must be determined on its own facts. On going through the factual details in the said decision, we are of the opinion that the same is not helpful to the case of A-1.

35. Relying on another decision of this Court in *State of Madhya Pradesh vs. Sheetla Sahai & Ors.,* (2009) 8 SCC 617, learned counsel for A-1 submitted that the prosecution has not established conspiracy among the accused. Criminal conspiracy has been defined under Section 120-A of IPC. It is an independent offence, hence, the prosecution for the purpose of bringing the charge of criminal conspiracy read with the provisions of the P.C. Act was required to establish the offence by applying the same legal principles which are otherwise applicable for the purpose of bringing a criminal misconduct on the part of the accused. In order to establish the guilt what is necessary is to show the meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means. Conspiracy is hatched in secrecy and for proving the said offence substantial direct evidence may not be possible to be obtained. An offence of criminal conspiracy can also be proved by circumstantial evidence.

36. We have already referred to the evidence led in by the prosecution, particularly, the evidence of Typist of A-2 which shows several meetings between A-1 and A-2, acceptance of money by A-1 from A-2 on many occasions, transfer of sanctioned loans to the credit of the account of A-2 etc.

37. Insofar as the charge under Section 13(1)(d) read with Section 13(2) of the P.C. Act is concerned, the ingredients of that offence are, viz., (a) that the accused should be a public servant; (b) that he should use some corrupt or illegal means or otherwise abuse his position as a public servant; (c) he should not have obtained a valuable thing or pecuniary advantage; and (d) for himself or any other person and we have already noted the materials placed by the prosecution to substantiate for the above-said offence.

38. It is also contended that there are proved irregularities or deficiencies in conducting investigation, hence, the conviction ought to be set aside. It is held by this Court in a number of decisions including in the case of *Kashinath Mondal vs. State of West Bengal,* (2012) 7 SCC 699 that irregularities or deficiencies in conducting investigation by the prosecution is not always fatal to the prosecution case. It was held that if there is sufficient evidence to establish the substratum of the prosecution case then irregularities which occur due to remissness of the investigating agency, which do not affect the substratum of the prosecution case, should not weigh with the Court.

39. Finally, it was pointed out by learned counsel for A-1 that the statement or answers to the questions under Section 313 of the Code cannot be the basis for conviction of the accused. We have already noted that the prosecution has not only relied on the answers given by the accused but also placed acceptable oral and documentary evidence to substantiate the charge. We hold that the statement under Section 313 of the Code can be relevant consideration for the courts to examine, particularly, when the prosecution has been able to establish the chain of events.

40. Based on the acceptable materials placed by the prosecution, the trial Court and the High Court rightly recorded their findings and convicted A-1 and A-2 for the offence

punishable under Section 120B and 420 of IPC and further A-1 under Section 13(1)(d) read with Section 13(2) of the P.C. Act. In view of the concurrent findings recorded by both the courts based on acceptable evidence in the form of oral and documentary evidence, we are of the opinion that it is not a fit case where we should exercise discretionary jurisdiction under Article 136 of the Constitution of India, consequently, both the appeals fail and are accordingly dismissed.

B.B.B. Appeals dismissed.

JAYESH DHANESH GORAGANDHI
v.
MUNICIPAL CORPORATION OF GREATER MUMBAI & ORS.
(Civil Appeal Nos.8708-09 of 2012)

DECEMBER 4, 2012

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

Maharashtra Regional and Town Planning Act, 1966 — Ch. VII, s.126 – Whether after framing a Town Planning Scheme and the final scheme brought into force, after reserving plots for public purposes, providing compensation under Chapter V of the Act, can the land owner insist that the land be acquired only by following the provisions of Chapter VII of the Act, especially u/s.126 – Held: s.126 can apply only when the scheme is not sanctioned and the amount of compensation has not been determined by the Arbitrator – Therefore, in cases where town planning scheme is already sanctioned and the property vests in the State Government under s.88(a), the question of resorting to s.126(2) does not arise – On facts, after completing the procedure under Chapter V, compensation was offered and paid to the appellant and the appeal preferred by the appellant was also dismissed by the Tribunal and therefore further acquisition of land u/s.126 does not arise.

The question that arose for consideration in the present appeals was whether after framing a Town Planning Scheme and the final scheme brought into force, after reserving plots for public purposes, providing compensation under Chapter V of the Maharashtra Regional and Town Planning Act, 1966 ('the MRTP Act'), can the land owner insist that the land be acquired only by following the provisions of Chapter VII of the MRTP Act, especially under Section 126 of the MRTP Act.

Dismissing the appeals, the Court

HELD: 1.1. The Town Planning Scheme envisaged under the MRTP Act is a code by itself and the provisions relating to compensation are inbuilt in the scheme itself. Provisions of Town Planning scheme provide for computation of compensation by the Arbitrator and if a party is aggrieved by the determination of compensation by the arbitrator, a party has a right of appeal before the Tribunal under the provisions of the MRTP Act. On the final scheme being sanctioned by the State Government under Section 88(a) of the MRTP Act, the property vests free of all encumbrances in the State Government and all rights of the original holders in the original plot of land stand extinguished, the rights of the parties are those governed by the provisions of the said scheme and cannot be dealt with outside the scheme. [Para 35] [757-F-H; 758-A]

1.2. The Town Planning Scheme, as per the Act, is meant for planned developments of certain local areas depending on various factors in order to make available utilities and facilities to the general public in the said area. For the purpose of said Town Planning Schemes, various facilities, utilities and services are required to be provided for which certain lands are required. These Town Planning Schemes are for immediate need of the community and not for acquisition on deferred basis and therefore these sections under Chapter V provide a machinery to prepare and develop the area and implement such schemes in praesenti. These schemes are not for future projections but for making available resources at the immediate time. In view of these circumstances, the lands required for implementation of various utilities and facilities, services of any public need and requirement would be for a public purpose and therefore the same have to be made available the

Government immediately so as to implement the scheme. [Para 45] [772-C-F]

1.3. Once the town planning scheme is finally sanctioned under Section 86, compensation is finally determined by the Arbitrator, the property vests under Section 88 in the State Government, then there is no question of resorting to further acquisition under Section 126(2) of the Act. The words "town planning scheme" used in Section 126(2) is in respect of the town planning scheme which is yet to be finalized and sanctioned under Section 86 by the State Government as a final scheme for inviting objections under Section 67 of the Act. Provisions of Section 126(2) providing for acquisition of land, therefore will apply only prior to the town planning scheme is finally sanctioned under the provision of Section 86 of the Act. [Para 46] [772-G-H; 773-A]

1.4. It is therefore held that the provisions of Section 126 can apply only when the scheme is not sanctioned and the amount of compensation has not been determined by the Arbitrator. Therefore, in cases where town planning scheme is already sanctioned and the property vests in the State Government under Section 88 (a) of the Act, the question of resorting to Section 126(2) of the Act does not arise. [Para 47] [773-B-C]

Girnar Traders (3) v. State of Maharashtra and Others **(2011) 3 SCC 1: 2011 (3) SCR 1;** *State of Gujarat v. Shantilal Mangaldas and Others* **AIR 1969 SC 634: 1969 (3) SCR 341;** *P. Vajravelu Mudaliar v. Special Deputy Collector, Madras and Another* **(1965) 1 SCR 614;** *Prakash Amichand Shah v. State of Gujarat and Others;* **1986 (1) SCC 581: 1985 (3) Suppl. SCR 1025;** *Zandu Pharmaceutical Works Ltd. v. G.J. Desai* **1969 UJ (SC) 575;** *Nagpur Improvement Trust and Another v. Vithal Rao and Others* **AIR 1973 SC 689: 1973 (3) SCR 39 and** *Laxminarayan R. Bhattad and Others v.*

State of Maharashtra and Another **(2003) 5 SCC 413: 2003 (3) SCR 409 – referred to.**

Municipal Corporation of Greater Bombay and Others v. Hindustan Pertoleum Corporation and another **(2001) 8 SCC 143: 2001 (2) Suppl. SCR 50;** *Shri Rangaswami, Textile Commissioner and Others v. The Sagar Textile (P) Ltd. and Anr.* **(1977) 2 SCC 578: 1977 (2) SCR 825;** *Sub-Committee on Judicial Accountability v. Union of India and Others* **(1991) 4 SCC 699;** *Ram Prasad Narayan Sahi and Another v. The State of Bihar and Others* **(1953) 4 SCR 1129 and** *The State of West Bengal v. Mrs. Bela Banerjee and Others* **(1954) SCR 558 – cited.**

2. It is found from the facts of the case that after completing the procedure under Chapter V, compensation was offered and paid to the appellant and the appeal preferred by the appellant was also dismissed by the Tribunal and therefore further acquisition of land under Section 126 does not arise. [Para 49] [773-F-G]

Case Law Reference:

2001 (2) Suppl. SCR 50	**cited**	**Para 14**
1977 (2) SCR 825	**cited**	**Para 14**
(1991) 4 SCC 699	**cited**	**Para 14**
(1953) 4 SCR 1129	**cited**	**Para 14**
(1954) SCR 558	**cited**	**Para 14**
2011 (3) SCR 1	**referred to**	**Para 19**
(1965) 1 SCR 614	**referred to**	**Para 39**
1969 (3) SCR 341	**referred to**	**Para 39**
(1965) 1 SCR 614	**referred to**	**Para 39**
1985 (3) Suppl. SCR 1025	**referred to**	**Para 41**

1969 UJ (SC) 575	**referred to**	**Para 41**
1973 (3) SCR 39	**referred to**	**Para 42**
2003 (3) SCR 409	**referred to**	**Para 43**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8708-8709 of 2012.

From the Judgment & Order dated 06.05.2005 of the High Court of Bombay in LPA No. 17 of 2002 & dated 16.10.2009 in RP No. 10143 of 2006 against LPA No. 17 of 2002 in FA No. 442 of 1995.

Dushyant Dave and Atul Y. Chitale, Aman Vachher, Yadunath Choudhuri, Dhiraj, Harsh Sharma, Chirag S., P.N. Puri and Karan Kanwal for the Appellant.

U.U. Lalit, Ramesh P. Bhatt, Anand Grover, R.A. Malandkar, J.J. Xavier, Bhargava V. Desai, Shreyas Mehrotra, Pooja Bahuguna and Mihir Samson for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. The question that has come up for consideration before us is whether after framing a Town Planning Scheme and the final scheme brought into force, after reserving plots for public purposes, providing compensation under Chapter V of the Maharashtra Regional and Town Planning Act, 1966 (for short 'the MRTP Act'), can the land owner insist that the land be acquired only by following the provisions of Chapter VII of the MRTP Act, especially under Section 126 of the MRTP Act.

Facts

3. Vallabhadas Goragandhi was the original owner of plot No. 9 which was renumbered as Final plot No.44 in the Town Planning Scheme for Borivali with few structures thereon. After

the death of Vallabhadas, his son Hiralal became the owner of the plot. Originally, that plot was under the Borivali Municipal Council in Thane District, Bombay. A Town Planning Scheme was prepared under the Town Planning Act, 1919 for Borivali with effect from 15.07.1919. In the year 1941, Hiralal expired and the appellant herein and respondent Nos.3 to 6 are the legal heirs of Hiralal.

4. The Bombay Town Planning Act, 1919 was replaced by the Bombay Town Planning Act, 1954 and the Borivali Municipal Council declared its intention to vary the scheme prepared earlier. Then Government of Bombay declared on 31.12.1956 the intention of the Municipal Council to vary the scheme. With effect from 01.07.1957, Borivali Suburban became a part of Greater Mumbai and Municipal Corporation of Greater Mumbai became the Planning Authority for that area. On 30.11.1959 vide Resolution No. 1108, the Municipal Corporation declared its intention to vary the said scheme under the Bombay Town Planning Act, 1954. The Municipal Corporation vide its notification dated 10.12.1959 published its intention to vary the scheme. On 21.01.1961, the scheme was approved and published and original plot No.9 was renumbered as final plot No. 44. The Municipal Corporation on 16.12.1961 informed the 6th respondent Ranjit Hiralal that the above mentioned plot was reserved for public purpose. The Government of Maharashtra on 09.03.1962 sanctioned draft scheme (first variation) wherein the property in question was reserved for a public purpose. Later, an arbitrator was appointed under the Town Planning Act who served notice upon Smt. Jayantibai whose name was mentioned as owner of the property in the Property Register Card. Two of the legal heirs (who were plaintiffs in the suit) sent a representation to the Corporation to release their land from reservation.

5. The MRTP Act came into force with effect from 11.01.1967. The Corporation informed the legal heirs about the reservation of the property in question for public purpose. Ranjit

Harilal, the 6th respondent along with his brother appeared before the Arbitrator on 03.01.1968 and filed a detailed statement on 08.02.1968 objecting the reservation of land for Municipal Offices. The Arbitrator by its order dated 10.04.1968 rejected the objections raised by the owner of the property. Later Smt. Jayantibai died on 11.01.1971. The Arbitrator gave the award under Section 72(3) (xviii) of the MRTP Act on 9.6.1973, confirming the proposal under draft scheme for reservation of the plot for the purpose of Municipal Office. The Town Planning Scheme for Borivali (II) (1st Variation) (final) was then published in the Government Gazette on 9.7.1973. Against the award of the Arbitrator dated 9.07.1973, an appeal was preferred by the respondents under Section 74 of the MRTP Act which was dismissed by the Tribunal. However, the rate of compensation was enhanced from Rs.15.60 to Rs.21.53 per sq. mtr. The Government of Maharashtra later sanctioned the final scheme on 17.07.1976 and the same was notified on 20.07.1976. The Town Planning Scheme as varied came into effect from 28.09.1976. The Corporation later sent a notice to the owners of the plot calling upon them to collect the amount of compensation to the tune of Rs.1,17,918/- and the Ward Officer of the Corporation also issued notice under Section 89 of the MRTP Act calling upon the legal heirs to remove the structure from the property.

6. The legal heirs of Hiralal challenged the above mentioned notice, the award of the Arbitrator and the decision of the Tribunal by filing Writ Petition (C) 1084 of 1978 before High Court of Bombay. Writ Petition was, however, dismissed by a learned Single Judge of the High Court on 14.10.1981. Writ Appeal No. 530 of 1981 was preferred challenging the above mentioned judgment which was also dismissed by the Division Bench on 03.12.1981.

7. The Corporation later issued a notice under Section 89 of the MRTP Act which was challenged by the legal heirs by filing a civil suit before the City Civil Court. The Court rejected

the plaint on 28.3.1988 under Order VII Rule 11(d) of CPC on the ground that under Section 149 of the MRTP Act, the City Civil Court has no jurisdiction to entertain and try the suit. The legal heirs then challenged the said order by filing Appeal No. 350 of 1988 before the High Court which was set aside and the suit was restored to the file to be heard and decided on merits. The City Civil Court vide its order dated 16/20.02.1995 decreed the suit in favour of the legal heirs and liberty was granted to the Corporation to take recourse to the proceedings under Chapter VII of the MRTP Act, particularly Section 126 for the purpose of acquisition of land.

8. The Corporation then preferred First Appeal No. 442 of 1995 which was dismissed by the learned Single Judge of the High Court, against which they preferred LPA No. 17 of 2002 which was allowed by the High Court vide its judgment dated 06.05.2005. Aggrieved by the judgment of the High Court dated 06.05.2005, the appellant preferred SLP (C) No. 20750 of 2005. The special leave petition was, however, disposed of by this Court on 24.10.2005 stating as follows:

> "It is stated by learned counsel for the petitioners that certain points which were really germane to the subject matter in dispute before the High Court, had not been placed for its consideration. It is stated that an appropriate application shall be filed before the High Court for permission to urge those points. If it is done, the High Court shall deal with the matter in its proper perspective and in accordance with law which we express no opinion.
>
> The special leave petition is, accordingly, disposed of."

9. Appellant then filed a review petition No.10143 of 2006 with an application for condonation of delay. Following are the propositions made in the review petition:

> "(1) Proposals for Development Plan must provide, inter alia, for:

(a) allocating the use of land for purposes such as; residential, industrial, commercial, agricultural, recreational.

(b) designation of land for public purposes like schools, colleges....,markets...,Government and other buildings....(vide section 22)

(2) Town Planning Schemes prepared for implementing the [proposals in the final Development plan should also make provisions for the matters specified in the Development Plan, including reservation, acquisition, or allotment of land required for all purposes mentioned in Section 59(1)(b). (vide Sections 59 & 64).

(3) The Arbitrator appointed in accordance with Section 72 is required to define, demarcate and decide the areas allotted to or reserved for the public purpose or purposes of the Planning Authority, and also the final plots.

(4) All lands required, reserved or designated in a Development Plan or town planning scheme for a public purpose, are deemed to be the land needed for a public purpose within the meaning of the Land Acquisition Act, 1894 (vide Section 125) and all such lands, required or reserved for any public purpose specified in any plan or scheme, may be acquired at any time by the Planning Authority or the Development Authority or any other appropriate Authority in accordance with the provisions contained in the Land Acquisition Act, 1894 (vide Section 126).

(5) The cost of the scheme is required to be met wholly or in part by a contribution to be levied by the Planning Authority on each final plot calculated in proportion to the increment which is estimated to accrue in respect of such plot (vide Section 99). The cost of the scheme includes all sums payable by a Planning Authority and all sums

payable as compensation for lands reserved or allotted for any public purpose or purpose of a Planning Authority which is solely beneficial to the owners or residents within the area of the scheme.

(6) Such plots of lands as are earmarked or reserved specifically for a public purpose, but which are not solely beneficial to the owners or residents within the area of the scheme, would not fall within the jurisdiction of the Arbitrator since the estimated amount of compensation payable for such lands could not be determined by him following the criterion laid down in Section 72 of the Act.

(7) The lands, which are specifically reserved for a public purpose but not solely beneficial to the owners or the residential within the area of the scheme, would have to be compulsorily acquired in accordance with the Land Acquisition Act following the mandates of Sections 125 and 126. The compensation that would become payable to the land owners for such acquisition would also not form part of such cost of such scheme and no part of the compensation amount could be met form the contribution to be levied by the Planning Authority on each final plot.

(8) The lands specifically reserved and earmarked for a public purpose in the scheme which is not solely beneficial to the owners or the residents within the area of the scheme, are not lands “required by the planning Authority” and hence, the provisions of Section 88(a) have no application in respect of such lands.

(9) The decision dated 23.12.2004 of the Division Bench of this Hon’ble Court in *Zahir Jahangir Vakil v. Pune Municipal Corporation,* has no application to the present case since the nature of the land which was the subject matter of the scheme therein was completely different. In that case, out of the original plot (revised plot no 77), two plots had been carved out - Final plot nos. 75 and 76. While

the Final Plot no. 76 was allotted to the landlord in substitution of the original plot of land, the other final plot no. 75 was reserved for a school. The purpose of the school is a public purpose, and was reserved solely for the benefit of the owners and residents within the area of the scheme and hence, the cost of the said land became payable as compensation derived from the contribution levied by the Planning Authority and became part of the cost of the scheme.

(10) In *Zahir Jahangir Vakil's* case, the provisions relating to "Finance of Schemes" contained in Section 97 and in particular clause (c) of Sub-section (1) thereof and sections 98 and 99, among others, had not been considered. Moreover, the interrelationship between the provisions in Sections 125 and 126 on the one hand, and Sections 22(b), 64(b) and 97(1)(c) read with Section 99 regarding lands reserved for specific purpose in the development plan and in the Town Planning Scheme, which are not solely beneficial to the owners or residents within the area of the scheme had not been considered. The said decision, therefore, could not be regarded as a precedent for the questions involved in the present proceedings (vide *Union of India v. Dhanwanti Devi,* (1996) 6 SCC 44, Para 9 and 10)".

10. The High Court condoned the delay in filing the review petition and examined the propositions and rejected all vide its order dated 16.10.2009. Further, the High Court also expressed the following view:

"What is important to be noted first is that all the grounds which have been raised by way of the propositions of law which has been advanced, were not part of the pleadings in the main Suit. Since the matter has arisen from the Suit, the said pleadings were very much necessary so that the other side could have had an opportunity to meet out those pleadings and led evidence in that regard. Viewed from

any angle, we do not find any substance in the afore-stated propositions advanced on behalf of the petitioner."

11. In our view, once the SLP had been disposed of on 24.10.2005, all the findings recorded in the judgment of the High Court dated 6.5.2005 had attained finality. Liberty was, however, granted on the request of the appellant to raise certain points which they could not raise earlier before the High Court. The High Court was also directed to deal with those points in accordance with law.

12. Shri Dushyant Dave, learned senior counsel appearing for the appellant, took us elaborately through the MRTP Act especially various provisions of Chapter V of the Act dealing with the Town Planning Schemes. Learned senior counsel submitted that when a land is clearly identified under the Development Plan or under the Town Planning Scheme as required for specified public purpose and it is so designated and declared in such a scheme, whether the land owner thereof is a participant in the scheme or a beneficiary of the scheme or not, such land could only be acquired in terms of the provisions contained in the Land Acquisition Act. Learned senior counsel pointed out that Section 59 of the MRTP Act opens with the words "subject to the provisions of this Act" and that has to be read along with Section 126 of the Act which provides that such land which is required or reserved for any of the public purposes specified in any plan or scheme may be acquired under the Land Acquisition Act. Learned senior counsel, therefore, submitted that any land which is required or reserved for any public purposes specified in any plan or scheme would be deemed to be land "needed for a public purpose" within the meaning of the Land Acquisition Act and hence would have to be acquired in accordance with the provisions of the Land Acquisition Act.

13. Learned senior counsel also submitted that the High Court has not properly appreciated the scope and purpose of Section 88 of the MRTP Act which has to be read in the context

of Section 126 of the MRTP Act. The expression "vest absolutely" is used in a very limited sense in Section 88, which involves only adjustment of different values between the allottees and the other beneficiaries, limiting that much of lands which are required by Planning Authority, for its own purposes, while the rest of the lands under the Scheme undergoes transformation of exchanging in the rights of the land owners falling within the scheme. Learned senior counsel also submitted that the Act does not lay down any guidelines as to the circumstances that would justify acquisition of the land under Sections 125 and 126 on the one hand and extinguishment of the rights of the owners in the lands in terms of Section 88 with a meager compensation determined by the Arbitrator. Learned senior counsel also referred to the Preamble of the MRTP Act and submitted that the object of the Act was to make compulsory acquisition of land required for the public purposes in respect of the Town Planning Schemes. Learned senior counsel also referred to various judgments of this Court in support of its contention. Reference was made to the judgments of this Court in Municipal Corporation of *Greater Bombay and Others v. Hindustan Pertoleum Corporation and Another* (2001) 8 SCC 143, *Shri Rangaswami, Textile Commissioner and Others v. The Sagar Textile (P) Ltd. and Anr.* (1977) 2 SCC 578, *Sub-Committee on Judicial Accountability v. Union of India and Others* (1991) 4 SCC 699, *Ram Prasad Narayan Sahi and Another v. The State of Bihar and Others* (1953) 4 SCR 1129, *The State of West Bengal v. Mrs. Bela Banerjee and Others* (1954) SCR 558, *P. Vajravelu Mudaliar v. Special Deputy Collector, Madras & Anr.* (1965) 1 SCR 614 etc. Learned senior counsel also submitted what Municipal Corporation required is space for Municipal office of its own approximately 50,000 sq. feet which the appellant is ready and willing to provide while carrying out the construction of the area in question free of cost.

14. Shri U.U. Lalit, learned senior counsel for the Municipal Corporation, took us through the provisions of the MRTP Act,

especially Chapter V in respect of framing of the Town Planning Scheme and submitted that the said chapter is a full and comprehensive provision for the preparation of the Town Planning Scheme. Learned senior counsel submitted that once the town planning scheme is framed in accordance with the said chapter and brought into force, the right, title of the original owner of the plot stands extinguished and the land would stand vested in the authority as per Section 88 of the MRTP Act. Learned senior counsel also submitted that Chapter VII of the MRTP Act is not applicable in such a case and the question of resorting to Section 126 does not arise, since an in-built mechanism has already been provided in Chapter V of the Act. Learned senior counsel also submitted that the appellant has already availed all the remedies available in Chapter V and there is no justification for invoking Section 126 of the MRTP Act. Learned senior counsel submitted that as per the Town Planning Scheme which came into force on 20.09.1976 the final plot No. 44 stood reserved for municipal office and has already been allotted to the Municipal Corporation and they are in physical possession of the plot in question. Learned senior counsel also submitted that SLP filed against the original judgment dated 6.5.2005 has already been dismissed by this Court and the points which attained finality cannot be reopened.

15. Learned senior counsel also pointed out that Municipal Corporation has already handed over the plot to M/s Vitrag Construction and they have already started construction of the corporation office and the grounds/foundation work is already over. Learned senior counsel submitted that the Corporation required an area of about 63,161.20 sq. ft. to accommodate all the existing offices and, therefore, the offer made by the appellant is legally unacceptable.

Maintainability of the Appeal

16. We fully endorse the view expressed by the learned senior counsel for the Corporation that, on dismissal of the SLP, the points already dealt with and decided by the High Court had

attained finality. This Court, while disposing of the petition on 24.10.2005 permitted the appellants to raise those points which are germane to the "subject matter" for which, suitable pleadings should have been made in the plaint. The High Court in the review order dt. 16.10.2009 has clearly found that the grounds, which were raised in the review petition, were not part of the pleadings. In our view, that itself is sufficient to reject this appeal.

17. We have come across several orders passed by this court making observations while dismissing the SLP at the admission stage, that too without hearing the opposite side, which may apparently seem to be innocuous but may generate more litigations and embarrassment to the respective High Courts. If this Court grants liberty to any party to raise "certain points", those points should be clearly formulated in the order of this Court, so that the High Court would be in a better position to understand the points left to be decided by the High Court. Non formulation of such points by this Court creates confusion in the mind of the litigants giving room for more rounds of litigation. Our humble view is that this calls for serious introspection. Be that it may, we are inclined to examine the legal contentions urged before us.

18. We have already stated that the only question that arises for consideration is whether the landowners can take recourse to Section 126 of the MRTP Act, once the TP Scheme is framed and the final scheme has been brought into force, vesting the land in the Corporation and providing compensation as provided in the Town Planning Scheme.

19. The scope and ambit of MRTP Act came up for consideration before a five Judge Bench of this Court in *Girnar Traders (3) v. State of Maharashtra and Others* [(2011) 3 SCC 1] and this Court has taken the view that the provisions of the MRTP Act relate to preparation, submission and sanction of approval of different plans by the concerned authorities which are aimed at achieving the object of planned development in

contradiction to haphazard development. An owner/person interested in the land and who wishes to object to the plans at the appropriate stage, a self-contained adjudicatory machinery has been spelt out in the MRTP Act. Even the remedy of appeal is available under the MRTP Act with a complete Chapter being devoted to acquisition of land for the planned development. Providing adjudicatory mechanism is one of the most important facets of deciding whether a particular statute is a 'complete code' in itself or not.

20. Various provisions of the Act comprehensively prescribe what and how the steps are required to be taken by the authorities under the Act, right from the stage of preparation of draft development plan to its finalization as well as preparation and finalization of all regional and town planning schemes. Right of the interested person to raise objections, pre-finalization of the respective plans, is specifically provided. Besides providing right of objection to the owner of the land or property, which fall within the development plan, the State Act also provides machinery for finalization and determination of disputes between the authorities and private parties. Furthermore, a person is entitled to raise all disputes including the dispute of ownership. The Arbitrator nominated under the MRTP Act has the jurisdiction to decide all such matters. The jurisdiction of the Arbitrator is a limited one like estimation and payment of compensation in relation to plots in distinction to lands as defined under the Act within the four corners of the provisions of Sections 72 to 74 of the MRTP Act with reference to Section 97 of the State Act.

21. The MRTP Act is, therefore, a code in itself and has one predominant purpose, i.e., planned development. The principal purpose of the MRTP Act can be achieved without the aid of the Land Acquisition Act which has a very limited and restricted application. Whenever a land is required or reserved for any public purpose specified in any plan or scheme under the MRTP Act, the concerned authority may, with the exception

of the provisions of Section 113A of the State Act, i.e. land designated under the Act connected with the development of the new town, acquire the land by different modes i.e. (a) by paying an amount agreed (by agreement); (b) in lieu of any such amount by granting the right specified under Section 126(1)(b); and (c) by making an application to the State Government for acquiring such land under the Land Acquisition Act. Section 126(2) lays down the procedure, primarily, as to how the application made under Section 126(1)(c) is to be dealt with by the State Government and, if it is satisfied, to make a declaration in the Official Gazette to the effect that the land is needed for a public purpose, in the manner provided in Section 6 of the Land Acquisition Act. Section 126(3) deals with the procedure to be followed after declaration contemplated under Section 126(2) has been published.

22. It is not necessary to further elaborate the scope of the above mentioned provisions since, so far as the present case is concerned, there is no necessity of invoking Chapter VII of the Act since after the publication of the final scheme, the land vested absolutely in the Planning Authority free from all encumbrances as per section 88(a) of the MRTP Act. Now to examine, how the land stands vested under Section 88 of the MRTP Act, it is unnecessary to refer to few of the provisions of the MRTP Act. Section 2(9) defines 'Development Plan' under the MRTP Act which reads as follows:

> "(9) **"Development plan"** means a plan for the development or re-development of the area within the jurisdiction of a Planning Authority and includes revision of a development plan and proposal of a Special Planning Authority for development of land within its jurisdictions."

23. Sections 30 and 31 provide for submission of a draft Development Plan and sanction to draft Development Plan respectively. Those provisions are extracted hereunder for easy reference as it stood prior to the Amendment in 2011:

"Section 30 - Submission of draft Development plan

(1) The Planning Authority or as the case may be, the said Officer shall submit the draft Development Plan to the State Government for sanction within a period of twelve months from the date of publication of the notice in the Official Gazette regarding its preparation under section 26:

Provided that, the State Government may, on an application by a Planning Authority or the said Officer by an order in writing, and for adequate reasons which should be recorded, extend from time to time the said period by such further period as may be specified in the order but not in any case exceeding twenty-four months in the aggregate.

(2) The particulars referred to in sub-section (2) of section 26 shall also be submitted to the State Government.

Section 31 - Sanction to draft Development plan

(1) Subject to the provisions of this section, and not later than one year from the date of receipt of such plan from the Planning Authority, or as the case may be, from the said Officer, the State Government may, after consulting the Director of Town Planning by notification in the Official Gazette sanction the draft Development Plan submitted to it for the whole area, or separately for any part thereof, either without modification, or subject to such modifications as it may consider proper or return the draft Development plan to the Planning Authority or as the case may be, the said Officer for modifying the plan as it may direct or refuse to accord sanction and direct the Planning Authority or the said Officer to prepare a fresh Development plan;

Provided that, the State Government may, if it thinks fit, whether the said period has expired or not, extend from

time to time, by a notification in the Official Gazette, the period for sanctioning the draft Development plan or refusing to accord sanction thereto, by such further period as may be specified in the notification :

Provided further that, where the modifications proposed to be made by the State Government are of a substantial nature, the State Government shall publish a notice in the Official Gazette and also in local newspapers inviting objections and suggestions from any person in respect of the proposed modification within a period of sixty days, from the date of such notice.

(2) The State Government may appoint an officer of rank not below that of a Class I Officer and direct him to hear any such person in respect of such objections and suggestions and submit his report thereon to the State Government.

(3) The State Government shall before according sanction to the draft Development plan take into consideration such objections and suggestions and the report of the officer.

(4) The State Government shall fix in the notification under sub-section (1) a date not earlier than one month from its publication on which the final Development plan shall come into operation.

(5) If a Development plan contains any proposal for the designation of any land for a purpose specified in clauses (b) and (c) of section 22, and if such land does not vest in the Planning Authority, the State Government shall not include that in the Development plan, unless it is satisfied that the Planning Authority will be able to acquire such land by private agreement or compulsory acquisition not later than ten years from the date on which the Development plan comes into operation.

(6) A Development plan which has come into operation

shall be called the "final Development plan" and shall, subject to the provisions of this Act, be binding on the Planning Authority."

24. The Provisions of Town Planning Scheme are covered by Chapter V of the MRTP Act. Section 59 deals with preparation and contents of town planning scheme which reads as follows:

"Section 59 - Preparation and contents of town planning scheme

(1) Subject to the provisions of this Act or any other law for the time being in force-.

(a) a Planning Authority may for the purpose of implementing the proposals in the final Development Plan, prepare one or more town planning schemes for the area within its jurisdiction, or any part thereof;

(b) a town planning scheme may make provision for any of the following matters, that is to say-

(i) any of the matters specified in section 22;

(ii) the laying out or re-laying out of land, either vacant or already built upon, including areas of comprehensive development;

(iii) the suspension, as far as may be necessary for the proper carrying out of the scheme, of any rule, by-law, regulation, notification or order made or issued under any law for the time being in force which the Legislature of the State is competent to make;

(iv) such other matter not inconsistent with the object of this Act, as may be directed by the State Government.

(2) In making provisions in a draft town planning scheme for any of the matters referred to in clause (b) of sub-

section (1), it shall be lawful for a Planning Authority with the approval of the Director of Town Planning and subject to the provisions of section 68 to provide for suitable amendment of the Development plan."

25. Section 61 of the MRTP Act deals with the making and publication of draft scheme by means of notice which is extracted hereunder for easy reference:

"Section 61 - Making and publication of draft scheme [by means of notice]:-

(1) Not later than twelve months from the date of the declaration, subject, however, to sub-section (3) the Planning Authority shall, in consultation with the Director of Town Planning, make a draft scheme for the area in respect of which the declaration was made, and published a notice in the Official Gazette, and in such other manner as may be prescribed stating that the draft scheme in respect of such area has been made. The notice shall state the name of the place where a copy thereof shall be available for inspection by the public and shall state that copies thereof or any extract therefrom certified to be correct shall be available for sale to the public at a reasonable price.

(2) If the Planning Authority fails to make a draft scheme and publish a notice regarding its making within the period specified in sub-section (1) or within the period extended under sub-section (3), the declaration shall lapse, unless the State Government appoints an Officer to prepare and submit the draft scheme to the State Government on behalf of the Planning Authority not later than twelve months from the date of such appointment or the extended period under sub-section (3); but any such lapse of declaration shall not debar the Planning Authority from making a fresh declaration any time in respect of the same area.

(3) The State Government may, on application made by the Planning Authority or, as the case may be, the officer, from time to time by notification in the Official Gazette, extend the period specified in sub-section (1) or (2) by such period not exceeding six months as may be specified in the notification."

26. The power of State Government to require Planning Authority to make scheme is provided under Section 63 which is extracted hereunder:

"Section 63 - Power of State Government to require Planning Authority to make scheme:-

(1) Notwithstanding anything contained in this Act, the State Government may, in respect of any Planning Authority after making such inquiry as it deems necessary, direct that Authority to make and submit for its sanction, a draft scheme in respect of any land in regard to which a town planning scheme may be made after a notice regarding its making has been duly published in the prescribed manner.

(2) If the Planning Authority fails to make the declaration of intention to make a scheme within three months from the date of direction made under sub-section (1), the State Government may by notification in the Official Gazette, appoint an officer to make and submit the draft scheme for the land to the State Government after a notice regarding its making has been duly published as aforesaid] and thereupon the provisions of sections 60, 61 and 62 shall, as far as may be applicable, apply to the making of such a scheme."

27. Section 64 provides for contents of draft Scheme which are as follows:

"Section 64 - Contents of draft scheme:-

A draft scheme shall contain the following particulars so far as may be necessary, that is to say,--

(a) the ownership, area and tenure of each original plot;

(b) reservation, acquisition or allotment of land required under sub-clause (i) of clause (b) of section 59 with a general indication of the uses to which such land is to be put and the terms and conditions subject to which, such land is to be put to such uses;

(c) the extent to which it is proposed to alter the boundaries of the original plots by reconstitution;

(d) an estimate of the total cost of the scheme and the net cost to be borne by the Planning Authority;

(e) a full description of all the details of the scheme with respect to such matters referred to in clause (b) of section 59 as may be applicable;

(f) the laying out or re-laying out of land either vacant or already built upon including areas of comprehensive development;

(g) the filling up or reclamation of low lying swamp or unhealthy areas or levelling up of land;

(h) any other prescribed particulars."

28. Section 65 deals with the reconstituted plot. The same is also extracted hereunder for easy reference:

"Section 65 - Reconstituted plot:-

(1) In the draft scheme, the size and shape of every reconstituted plot shall be determined, so far as may be, to render it suitable for building purposes, and where a plot

is already built upon, to ensure that the buildings as far as possible comply with the provisions of the scheme as regards open spaces.

(2) For the purpose of sub-section (1), a draft scheme may contain proposals--

(a) to form a final plot by reconstitution of an original plot by alteration of the boundaries of the original plot, if necessary;

(b) to form a final plot from an original plot by the transfer wholly or partly of the adjoining lands;

(c) to provide, with the consent of the owners, that two or more original plots each of which is held in ownership in severally or in joint ownership shall hereafter, with or without alteration of boundaries be held in ownership in common as a final plot;

(d) to allot a final plot to any owner dispossessed of land in furtherance of the scheme; and

(e) to transfer the ownership of an original plot from one person to another."

29. Section 67 deals with the objections to draft scheme which reads as follows:

"Section 67 - Objections to draft scheme to be considered:-

If within thirty days from the date of the publication of notice regarding the preparation of the draft scheme, any person affected thereby communicates in writing any objection relating to such scheme, the Planning Authority, or the officer appointed under sub-section (2) of section 61 or Section 63 shall consider such objection and may, at any time before submitting the draft scheme to the State

Government as hereinafter provided, modify such scheme as it or he thinks fit."

30. Section 68 deals with the power of State Government to sanction draft scheme, the same is extracted for easy reference:

"Section 68 - Power of State Government to sanction draft scheme:-

(1) The Planning Authority or, as the case may be, the officer aforesaid shall, not later than six months from the date of the publication of the notice in the Official Gazette, regarding the making of the draft scheme, submit the same with any modifications which it or he may have made therein together with a copy of objections received by it or him to the State Government, and shall at the same time apply for its sanction.

(2) On receiving such application, after making such inquiry as it may think fit and consulting the Director of Town Planning, the State Government may, not later than six months from the date of its submission, notification in the Official Gazette, or not later than such further time as the State Government may extend, either sanction such draft scheme with or without modifications and subject to such conditions as it may think fit to impose or refuse to give sanction.

(3) If the State Government sanctions such scheme, it shall in such notification state at what place and time the draft scheme shall be open to the inspection of the public and the State Government shall also state therein that copies of the scheme or any extract therefrom certified to be correct shall on application be available for sale to public at a reasonable price."

31. Section 72 deals with the powers and duties of the Arbitrator which reads as follows:-

"Section 72 - Arbitrator; his powers and duties:-

(1) Within one month from the date on which the sanction of the State Governments to the draft scheme is published in the Official Gazette, the State Government shall for purposes of one or more planning schemes received by it for sanction appoint any person possessing such qualifications as may be prescribed to be an Arbitrator with sufficient establishment and his duties shall be as hereinafter provided.

(2) The State Government may, if it thinks fit at any time, remove for incompetence or misconduct or replace for any good and sufficient reason an Arbitrator appointed under this section and shall forthwith appoint another person to take his place and any proceeding pending before the Arbitrator immediately before the date of his removal or replacement shall be continued and disposed of by the new Arbitrator appointed in his place.

(3) In accordance with the prescribed procedure, every Arbitrator shall,--

(i) after notice given by him in the prescribed manner define, demarcate and decide the areas allotted to, or reserved, for the public purpose or purposes of the Planning Authority, and also the final plots;

(ii) after notice given by him in the prescribed manner, decide the person or persons to whom a final plot is to be allotted; when such plot is to be allotted; and when such plot is to be allotted to persons in ownership in common, decide the shares of such person;

(iii) estimate the value of and fix the difference between the values of the original plots and the values of the final plots included in the final scheme, in accordance with the provisions contained in clause (f) of sub-section (1) of section 97;

(iv) estimate the compensation payable for the loss of the area of the original plot in accordance with the provisions, contained in clause (f) of sub-section (1) of section 97 in respect of any original plot which is wholly acquired under the scheme;

(v) determine whether the areas allotted or reserved for the public purpose or purposes of the Planning Authority are beneficial wholly or partly to the owners or residents within the area of the scheme;

(vi) estimate the proportion of the sums payable as compensation of each plot used, allotted or reserved for the public purpose or purposes of the Planning Authority which is beneficial partly to the owners or residents within the area of the scheme and partly to the general public, which shall be included in the cost of the scheme;

(vii) determine the proportion of contribution to be levied on each plot used, allotted or reserved for a public purpose or purposes of the Planning Authority which is beneficial partly to the owners or residents within the area of the scheme and partly to the general public;

(viii) determine the amount of exemptions, if any, from the payment of the contribution that may be granted in respect of plots or portions thereof exclusively used or occupied for religious or charitable purposes at the date on which the final scheme is drawn up under clause (xviii) of this sub-section;

(ix) estimate the value of final plots included in the final scheme and the increment to accrue in respect of such plots in accordance with the provisions of section 98;

(x) calculate the proportion in which the increment in respect of the final plots included in the final scheme shall be liable to contribution to the cost of the scheme in

accordance with the provisions contained in section 97;

(xi) calculate the contribution to be levied on each final plot included in the final scheme;

(xii) determine the amount to be deducted from or added to, as the case may be, the contribution leviable from a person in accordance with the provisions contained in section 100;

(xiii) provide for the total or partial transfer of any right in an original plot to a final plot or provide for the extinction of any right in an original plot in accordance with the provisions contained in section 101;

(xiv) estimate the amount of compensation payable under section 66;

(xv) where a plot is subject to a mortgage with possession or a lease, decide the proportion of compensation payable to or contribution payable by the mortgagee or lessee on one hand and the mortgagor or lessor on the other;

(xvi) estimate in reference to claims made before him, after the notice given by him in the prescribed manner, the compensation to be paid to the owner of any property or right injuriously affected by the making of a town planning scheme in accordance with the provisions contained in section 102;

(xvii) determine the period in which the works provided in the scheme shall be completed by the Planning Authority;

(xviii) draw in the prescribed form the final scheme in accordance with the draft scheme:

Provided that--

(a) he may make variations from the draft scheme;

(b) he may with the previous sanction of the State Government after hearing the Planning Authority and any owners who may raise objections make substantial variations in the draft scheme.

Explanation,--For the purpose of sub-clause (b) of this proviso, "substantial variation" means increase in the total cost of the draft scheme by more than 20 per cent. or two lacs of rupees whichever is higher, on account of the provision of new works or the reservation of additional sites for public purposes included in the final scheme drawn up by the Arbitrator.

(4) The Arbitrator shall decide all matters referred to in sub-section (3) within a period of twelve months from the date of his appointment; and in the case of an Arbitrator appointed under the Bombay Town Planning Act, 1915 (Bom. I of 1915) or a Town Planning Officer appointed under the Bombay Town Planning Act, 1954 (Bom. XXVII of 1955) (whose appointment is continued under section 165), within a period of twelve months from the date of commencement of this Act :

Provided that, the State Government may, if it thinks fit, whether the said period has expired or not, and whether all the matters referred to in sub-section (3) have been decided or not, extend from time to time by a notification in the Official Gazette, the period for deciding all the matters referred to in that sub-section (3) or any extended period therefor."

32. Section 74 deals with the Appeal, as provided against the award of the Arbitrator which reads as follows:

"Section 74 – Appeal:-

(1) Any decision of the Arbitrator under clauses (iv) to (xi), (both inclusive) and clauses (xiv), (xv) and (xvi) of sub-section (3) of section 72 shall be forthwith communicated

to the party concerned including the Planning Authority; and any party aggrieved by such decision may, within two months from the date of communication of the decision, apply to the Arbitrator to make a reference to the Tribunal of Appeal for decision of the appeal.

(2) The provisions of sections 5, 12 and 14 of the Indian Limitation Act, 1963 (36 of 1963) shall apply to appeals submitted under this section."

33. Section 86 deals with sanction by State Government to final scheme which reads as follows:

"Section 86 - Sanction by State Government to final scheme:-

(1) The State Government may, within a period of four months from the date of receipt of the final scheme under section 82 from the Arbitrator or within such further period as the State Government may extend, by notification in the Official Gazette, sanction the scheme or refuse to give such sanction provided that, in sanctioning the scheme the State Government may make such modifications as may in its opinion be necessary, for the purposes of correcting an error, irregularity or informality.

(2) If the State Government sanctions such scheme, it shall state in the notification--

(a) the place at which the final scheme is kept open to inspection by the public and also state therein that copies of the scheme or extracts therefrom certified to be correct shall, on application, be available for sale to the public at a reasonable price;

(b) a date (which shall not be earlier than one month after the date of the publication of the notification) on which all the liabilities created by the scheme shall take effect and the final scheme shall come into force:

Provided that, the State Government may, from time to time, postpone such date, by notification in the Official Gazette, by such period, not exceeding three months at a time as it thinks fit.

(3) On and after the date fixed in such notification, a town planning scheme shall have effect as if it were enacted in this Act."

34. Section 88 deals with the effect of final scheme which reads as follows:

"Section 88 - Effect of final scheme:-

On and after the day on which a final scheme comes into force--

(a) all lands required by the Planning Authority shall, unless it is otherwise determined in such scheme, vest absolutely in the Planning Authority free from all encumbrances;

(b) all rights in the original plots which have been reconstituted shall determine and the reconstituted plots shall become subject to the rights settled by Arbitrator;

(c) the Planning Authority shall handover possession of the final plots to the owners to whom they are allotted in the final scheme."

35. The Town Planning Scheme envisaged under the MRTP Act is, therefore, a code by itself and the provisions relating to compensation are inbuilt in the scheme itself. Provisions of Town Planning scheme provide for computation of compensation by the Arbitrator and if a party is aggrieved by the determination of compensation by the arbitrator, a party has a right of appeal before the Tribunal under the provisions of the MRTP Act. On the final scheme being sanctioned by the State Government under Section 88(a), the property vests free of all encumbrances in the State Government and all rights of

the original holders in the original plot of land stand extinguished, the rights of the parties are those governed by the provisions of the said scheme and cannot be dealt with outside the scheme.

36. We have already noticed that, after coming into force the MRTP Act, the Corporation had informed the legal heirs about the reservation of the property in question for public purpose. Legal heirs then appeared before the Arbitrator and objections were filed before the Arbitrator objecting the reservation of property in question for municipal office. The Arbitrator rejected the objections raised by the legal heirs and passed an award on 09.06.1973 in conformity with the draft scheme under Section 72(3)(xviii) of the MRTP Act. The Arbitrator has also awarded the compensation and, aggrieved by the same, we have already indicated, legal heirs preferred an appeal under Section 74 of the MRTP Act which was dismissed by the Tribunal. However, the rate of compensation was enhanced from Rs.15.60 to Rs.21.53 per sq. mtr. Following all those statutory provisions, the Government of Maharashtra finally accorded sanction for the scheme in exercise of powers conferred under Section 86 of the MRTP Act. The effect and consequence of the final scheme has been provided under Section 88 of the MRTP Act. Therefore, once the final Town Planning Scheme has been in force and vesting of the land on the Town Planning authority takes place as provided under Section 88(a) of the Act.

37. We find that all the above-mentioned procedures have already been followed in the instant case resulting in vesting of the plot in question in the Planning Authority under Section 88(a) of the MRTP Act and the amount of compensation was also paid. The appellant contends that in spite of the fact that the plot stood vested in the Government or Town Planning Authority under Section 88(a) of the MRTP Act, even then the procedure prescribed under Chapter VII will have to be followed including Section 126 of the MRTP Act.

38. Appellant submits that even though there can be a provision of reservation and/or compensation under the Town Planning Scheme of any portion of the land vested on the Town Planning Authority, for the purposes of determining compensation, the State Government has to follow the procedure prescribed under Section 126(2) of the Act and proper compensation be paid under provisions of the Land Acquisition Act. It was further submitted that the vesting provided under Section 88(a) on final scheme being sanctioned by State Government, would be subject to computation of compensation as contemplated under Sections 126(2) and (3) of the Act. Even though, in the earlier part of the judgment, we have referred to Sections 125 and 126, it would be appropriate to extract both the sections in its entirety to appreciate the contentions raised by the appellant.

Section 125 - Compulsory acquisition of land, needed for purposes of Regional plan, Development plan or Town planning schemes, etc.:-

Any land required, reserved or designated in a Regional plan, Development plan or Town Planning Scheme for a public purpose or purposes including plans for any area of comprehensive development or for any new town shall be deemed to be land needed for a public purpose within the meaning of the Land Acquisition Act, 1894 (I of 1894).

Section 126 - Acquisition of land required for public purposes specified in plans:-

(1) Where after the publication of a draft Regional Plan, a Development or any other plan or Town Planning Scheme, any land is required or reserved for any of the public purposes specified in any plan or scheme under this Act at any time the planning Authority, Development Authority, or as the case may be, any Appropriate Authority may, expect as otherwise provided in section 113A acquire the land,--

(a) by agreement by paying an amount agreed to, or

(b) in lieu of any such amount, by granting the land-owner or the lessee, subject, however, to the lessee paying the lessor or depositing with the Planning Authority, Development Authority or Appropriate Authority, as the case may be, for payment to the lessor, an amount equivalent to the value of the lessor's interest to be determined by any of the said Authorities concerned on the basis of the principles laid down in the Land Acquisition Act, 1894 (I of 1894), Floor Space Index (FSI) or Transferable Development Rights (TDR) against the area of land surrendered free of cost and free from all encumbrances, and also further additional Floor Space Index or Transferable Development Rights against the development or construction of the amenity on the surrendered land at his cost, as the Final Development Control Regulations prepared in this behalf provide, or

(c) by making an application to the State Government for acquiring such land under the Land Acquisition Act, 1894 (I of 1894), and the land (together with the amenity, if any so developed or constructed) so acquired by agreement or by grant of Floor Space Index or additional Floor Space Index or Transferable Development Rights under this section or under the Land Acquisition Act, 1894 (I of 1890), as the case may be, shall vest absolutely free from all encumbrances in the Planning Authority, Development Authority, or as the case may be, any Appropriate Authority.

(2) On receipt of such application, if the State Government is satisfied that the land specified in the application is needed for the public purpose therein specified, or if the State Government (except in cases falling under section 49 and except as provided in section 113A) itself is of opinion) that any land included in any such plan is needed for any public purpose, it may make a declaration to that

effect in the Official Gazette, in the manner provided in section 6 of the Land Acquisition Act, 1894 (I of 1894), in respect of the said land. The declaration so published shall, notwithstanding anything contained in the said Act, be deemed to be a declaration duly made under the said section:

Provided that, subject to the provisions of sub-section (4), no such declaration shall be made after the expiry of one year from the date of publication of the draft Regional Plan, Development Plan or any other Plan, or Scheme, as the case may be.

(3) On publication of a declaration under the said section 6, the collector shall proceed to take order for the acquisition of the land under the said Act; and the provisions of that Act shall apply to the acquisition of the said land with the modification that the market value of the land shall be,-

(i) where the land is to be acquired for the purposes of a new town, the market value prevailing on the date of publication of the notification constituting or declaring the Development Authority for such town;

(ii) where the land is acquired for the purposes of a Special Planning Authority the market value prevailing on the date of publication of the notification of the area as undeveloped area; and

(iii) in any other case the market value on the date of publication of the interim development plan, the draft development plan or the plan for the area or areas for comprehensive development, whichever is earlier, or as the case may be, the date or publication of the draft Town Planning Scheme:

Provided that, nothing in this sub-section shall affect the

date for the purpose of determining the market value of land in respect of which proceedings for acquisition commenced before the commencement of the Maharashtra Regional and Town Planning (Second Amendment) Act, 1972 (Mah. XI of 1973):

Provided further that, for the purpose of clause (ii) of this sub-section, the market value in respect of land included in any undeveloped area notified under sub-section (1) of section 40 prior to the commencement of the Maharashtra Regional and Town Planning (Second Amendment) Act, 1972 (Mah. XI of 1973), shall be the market value prevailing on the date of such commencement.

(4) Notwithstanding anything contained in the proviso to sub-section (2) and sub-section (3), if a declaration, is not made, within the period referred to in sub-section (2) (or having been made, the aforesaid period expired on the commencement of the Maharashtra Regional and Town Planning (Amendment) Act, 1993 (Mah. X of 1994))], the State Government may make a fresh declaration for acquiring the land under the Land Acquisition Act, 1894 (I of 1894), in the manner provided by sub-sections (2) and (3) of this section, subject to the modification that the market value of the land shall be the market value at the date of declaration in the Official Gazette, made for acquiring the land afresh.

39. This Court had occasion to consider the scope of provisions of the *Bombay Town Planning Act in State of Gujarat v. Shantilal Mangaldas and Others* AIR 1969 SC 634. Though there was no provision similar to Section 126 prescribing for payment of compensation following the Land Acquisition Act in the Bombay Town Planning Act, Section 53 of the Bombay Town Planning Act is in pari materia with Section 88 of the MRTP Act. In that case, placing reliance on judgment of this Court in *P. Vajravelu Mudaliar v. Special Deputy Collector, Madras and Another* [(1965) 1 SCR 614],

it was contended that Section 53 (similar to Section 88 of the MRTP Act) and Section 67, in any event, infringed Article 14 of the Constitution of India and were on that account void. Repealing the contention, the court in Shantilal Mangaldas held as follows:

> "There is no option under that Act to acquire the land either under the Land Acquisition Act or under the Town Planning Act. Once the draft town planning scheme is sanctioned, the land becomes subject to the provisions of the Town Planning Act, and on the final town planning scheme being sanctioned by statutory operation the title of the various owners is readjusted and the lands needed for a public purpose vest in the local authority. Land required for any of the purposes of a town planning scheme cannot be acquired otherwise than under the Act, for it is a settled rule of interpretation of statutes that when power is given under a statute to do a certain thing in a certain way, the thing must be done in that way or not. Taylor Vs. Taylor, (1875) 1 ChD 426. Again it cannot be said that because it is possible for the State, if so, minded, to acquire lands for a public purpose of a local authority, the statutory effect given to a town planning scheme results in discrimination between persons similarly circumstanced. In P. Vajravelu Mudaliar's case (1965) 1 SCR 614, the Court struck down the acquisition on the ground that when the lands are acquired by the State Government for a housing scheme under the Madras Amending Act, the claimant gets much smaller compensation than the compensation he would get if the land or similar lands were acquired for the same public purpose under the Land Acquisition Act, 1894. It was held that the discrimination between persons whose lands were acquired for housing schemes and those whose lands were acquired for other public purposes could not be sustained on any principle of reasonable classification founded on intelligible differentia which a rational relation to the object sought to be achieved. One

> broad ground of distinction between P. Vajravelu Mudaliar's case (1965) 1 SCR 614 and this case is clear, the acquisition was struck down in P. Vajravelu Mudaliar's case (1965) 1 SCR 614 because the State Government could resort to one of the two methods of acquisition the Land Acquisition Act, 1894 and the Land Acquisition (Madras Amendment) Act, 1961 and no guidance was given by the Legislature about the statute which should be resorted to in a given case of acquisition for a housing scheme. Power to choose could, therefore, be exercised arbitrarily. Under the Bombay Town Planning Act, 1955, there is no acquisition by the State Government of land needed for a town planning scheme. When the Town Planning Scheme comes into operation the land needed by a local authority vests by virtue of S.53(a) and that vesting for purposes of the guarantee under Article 31(2) is deemed compulsory acquisition for a public purpose. To lands which are subject to the scheme, the provisions of Sections 53 and 67 apply, and the compensation is determined only in the manner prescribed by the Act. There are therefore two separate provisions, one for acquisition by the State Government, and the other in which the statutory vesting of land operates as acquisition for the purpose of town planning by the local authority. The State Government can acquire the land under the Land Acquisition Act, and the local authority only under the Bombay Town Planning Act. There is no option to the local authority to resort to one or the other of the alternative methods which result in requisition. The contention that the provisions of Sections 53 and 67 are invalid on the ground that they deny the equal protection of the laws or equality before the laws must, therefore, stand rejected."

40. It was also urged in that case that 'vesting' under Section 53 (section 88 of the present Act) is not a valid vesting because the Government cannot expropriate property of a

citizen without providing compensation in respect thereof. The Court held as follows:

> "26. The principal argument which found favour with the High Court in holding Section 53 ultra vires, is that when a plot is reconstituted and out of that plot a smaller area is given to the owner and the remaining is utilized vests in the local authority for a public purpose, and since the Act does not provide for giving compensation which is a just equivalent of the land expropriated at the date of extinction of interest the guaranteed right under Article 31(2) is infringed. While adopting that reasoning, counsel for the first respondent adopted another line of approach also. Counsel contended that under the scheme of the Act the entire area of the land belonging to the owner vests in the local authority, and when the final scheme is framed in lieu of the ownership of the original plot, the owner is given a reconstituted plot by the local authority and compensation in money is determined in respect of the land appropriated to public purposes according to the rules contained in Secs. 67 and 71 of the Act. Such a scheme for compensation is, it was urged, inconsistent with the guarantee under Article 31(2) for two reasons – (1) that compensation for the entire land is not provided; and (2) that payment of compensation in money is not provided even in respect of land appropriated to public use. The second branch of the argument is not sustainable for reasons already set out, and the first branch of the argument is wholly without substance. Section 53 does not provide that the reconstituted plot is transferred or is to be deemed to be transferred from the local authority to the owner of the original plot. In terms Section 53 provides for statutory re-adjustment of the rights of the owners of the original plots of land. When the scheme comes into force all rights in the original plots are extinguished and simultaneously therewith ownership springs in the reconstituted plots. There is no vesting of the original plots

> in the local authority nor transfer of the rights of the local authority in the reconstituted plots. A part or even the whole plot belonging to an owner may go to form a reconstituted plot which may be allotted to another person, or may be appropriated to public purposes under the scheme. The source of the power to appropriate the whole or part of the original plot in forming a reconstituted plot is statutory. It does not predicate ownership of the plot in the local authority and no process – actual or notional – of transfer is contemplated in that appropriation. The lands covered by the scheme are subjected by the Act to the power of the local authority to readjust titles, but no reconstituted plot vests at any stage in the local authority unless it is needed for a purpose of the authority. Even under clause (a) of section 53 the vesting in a local authority of land required by it is on the coming into force of the scheme. The concept that lands vest in the local authority when the intention to a make a scheme is notified is against the plain intendment of the Act."

41. The provisions of Bombay Town Planning Act again came up for consideration before this Court in *Prakash Amichand Shah v. State of Gujarat and Others;* 1986 (1) SCC 581 wherein this Court again examined the provisions of the Bombay Town Planning Act, particularly the provisions of Sections 53 and 67 to 71, which deal with the Scheme and consequential acquisition. The Court held that the acquisition of land under the Town Planning Scheme by the local authority under Section 53 cannot be said to be discriminatory or offending the equality clause on the ground that the local authority has an option to acquire the land under the Land Acquisition Act, 1894 which is a more favourable method of acquisition as regards the land owner. In *Zandu Pharmaceutical Works Ltd. v. G.J. Desai* [1969 UJ (SC) 575] the Court, while dealing with the provisions of the above-mentioned Act, observed as follows:

"When the Town Planning Scheme comes into operation the land needed by a local authority vests by virtue of Section 53(a) and that vesting for purposes of the guarantee under Art. 31(2) is deemed compulsory acquisition for a public purpose. To lands which are subject to the scheme, the provisions of Sections 53 and 67 apply, and the compensation is determined only in the manner prescribed by the Act. There are therefore two separate provisions one for the acquisition by State Government and the other in which the statutory vesting of land operates as acquisition for the purpose of town planning by the local authority. The State Government can acquire the land under the Land Acquisition Act, and the local authority only under the Bombay Town Planning Act. There is no option to the local authority to resort to one or the other of the alternative methods which result in acquisition. Hence the provisions of Sections 53 and 67 are not invalid on the ground that they deny equal protection of the loss or equality before laws."

19. In order to appreciate the contentions of the appellant it is necessary to look at the object of the legislation in question as a whole. The object of the Act is not just acquiring a bit of land here or a bit of land there for some public purpose. It consists of several activities which have as their ultimate object the orderly development of an urban area. It envisages the preparation of a development plan, allocation of land for various private and public uses, preparation of a Town Planning Scheme and making provisions for future development of the area in question. The various aspects of a Town Planning Scheme have already been set out. On the final Town Planning Scheme coming into force under section 53 of the Act there is an automatic vesting of all lands required by the local authority unless otherwise provided, in the local authority. It is not a case where the provisions of the Land Acquisition

Act,1894 have to be set in motion either by the Collector or by the Government."

42. In this connection, we may also refer to the judgment of this Court in *Nagpur Improvement Trust and Another v. Vithal Rao and Others* [AIR 1973 SC 689]. In that case this Court held that the Government can acquire the land for a housing accommodation scheme either under the Land Acquisition Act or under the Improvement Act. The Court held that it enables the State Government to discriminate between one owner equally situated from another owner.

43. The scope of various provisions in Chapter VII of the MRTP Act itself came up for consideration before this Court in *Laxminarayan R. Bhattad and Others v. State of Maharashtra and Another* [(2003) 5 SCC 413]. In that case, the petitioner claimed an entitlement of TDR in lieu of compensation which he was claiming under the provision of Section 126 of the MRTP Act. Rejecting the contention, this Court held as follows:

"61. The State while granting sanction could have modified the Scheme prepared by the Arbitrator. While doing so it was permissible for the State to make any modification with the Arbitrator's Scheme stating that TDR in lieu of compensation would be granted. Having not said so it is not for the appellant to contend that the State would be bound by its purported directives despite statutory interdicts contained in Section 86 and 88 of the Act.

62. In view of our findings aforementioned the third reason assigned by the Corporation must also be upheld. We may notice that the appellant herein has given up the question of applicability of Rule 10(2) before the High Court. The High Court in its impugned judgment recorded "we may add that under Rule 10(2) of the D.C. Rules of 1967, additional FSI in lieu of the compensation was provided in certain cases. There, is however, no dispute that petitioners were not eligible for grant of additional FSI

under the said Rule 10(2) inasmuch as the original plot belonging to the petitioners or any part thereof did not form part of the final plots which were allotted to them nor were the plots allotted to the petitioners affected by the road."

63. A legal right to have an additional FSI or TDR can be claimed only in terms of a statute or statutory regulations and not otherwise.

64. By reason of the provisions contained in Section 88 of the Act, original plot No. 433 vested in the State whereas the final plots Nos. 694 and 713 became the property of the appellants. Title on the land having been conferred under a statute, it is idle to contend that there is no automatic vesting.

65. Reliance placed by Mr. Devarajan on State of Gujarat (supra) is misplaced. In that case the question which arose for consideration related to a draft Scheme sanctioned by the Government on 17th August, 1942 under the Bombay Town Planning Act, 1915. The Scheme which had commenced under the 1915 Act continued under the Bombay Town Planning Act, 27 of 1955. The Respondents' land was acquired under the Scheme where after the plot was reconstituted into two, one each reserved for the respondent and the local authority respectively. A compensation was awarded for reservation of the said land in the local authority on the basis of market value as on 18th April, 1927. The said order having been questioned, construction of Section 53 of the Bombay Town Planning Act came up for consideration. This Court held:

"27. The principal argument which found favour with the High Court in holding Section 53 ultra vires is that when a plot is reconstituted and out of that plot a smaller area is given to the owner and the remaining area is utilised for public purpose, the area so utilised vests in the local

authority for a pubic purpose, and since the Act does not provide for giving compensation which is a just equivalent of the land expropriated at the date of extinction of interest, the guaranteed right under Article 31(2) is infringed. While adopting that reasoning counsel for the first respondent adopted another line of approach also. Counsel contended that under the scheme of the Act the entire area of the land belonging to the owner vests in the local authority, and when he final scheme is framed, in lieu of the ownership of the original plot, the owner is given a reconstituted plot by the local authority, and compensation in money is determined in respect of the land appropriated to public purposes according to the rules contained in Sections 67 and 71 of the Act. Such a scheme for compensation is, it was urged, inconsistent with the guarantee under Article 31(2) for two reasons - (1) that compensation for the entire land is not provided; and (2) that payment of compensation in money is not provided even in respect of land appropriated to public use. The second branch of the argument is not sustainable for reasons already set out, and the first branch of the argument is wholly without substance. Section 53 does not provide that the reconstituted plot is transferred or is to be deemed to be transferred from the local authority to the owner of the original plot. In terms Section 53 provides for statutory re-adjustment of the rights of the owners of the original plots of land. When the scheme comes into force all rights in the original plots are extinguished and simultaneously therewith ownership springs in the reconstituted plots. There is no vesting of the original plots in the local authority nor transfer of the rights of the local authority in the reconstituted plots. A part of even the whole plot belonging to an owner may go to from a reconstituted plot which may be allotted to another person, or may be appropriated to public purposes under the scheme. The source of the power to appropriate the whole or a part of the original plot in forming a reconstituted plot is statutory. It does not predicate

ownership of the plot in the local authority, and no process - actual or notional - of transfer is contemplated in that appropriation. The lands covered by the scheme are subjected by the Act to the power of the local authority to re-adjust titles, but no reconstituted plots vests at any stage in the local authority unless it is needed for a purpose of the authority. Even under Clause (a) of Section 53 the vesting in a local authority of land required by it is on the coming into force of the scheme. The concept than lands vest in the local authority when the intention to make a scheme is notified is against the plain intendment of the Act."

66. The observations of this Court to the effect that there was no vesting of the original plots in the local authority nor was there any question of transfer of the rights in the reconstituted plots, were made having regard to the arguments made therein that the entire original plot as such vested in the local authority. This Court held that right in the original plot extinguished and the ownership in the reconstituted plot stood transferred only with the coming into force the Scheme and not prior thereto. In that case, the Scheme was held to be intra vires Article 31 of the Constitution.

67. Furthermore in this case the original plot and the reconstituted plot is not the same as was the case in the *State of Gujarat v. Shantilal Mangaldas* (1969) 1 SCC 509.

68. In terms of the provisions of the Act, the statutory vesting took place only upon sanctioning of the Scheme in terms of Section 88 thereof and not prior thereto, wherefor the amount of compensation as determined by the Arbitrator would be payable to the appellants".

(Emphasis supplied)

44. Judgments referred to above as well as the judgment in *Laxminarayan* (supra) would clearly indicate that the scheme of town planning under the MRTP Act is a code by itself, which has a provision for determination of compensation, right of appeal, dispute resolution mechanism etc. On a detailed survey of the provisions of the MRTP Act and the related judgments interpreting the provisions of the Bombay Town Planning Act and the MRTP Act, it may be noted that the provisions of scheme contained in Chapter V of the Act is a self operative scheme by itself.

45. The Town Planning Scheme, as per the Act, is meant for planned developments of certain local areas depending on various factors in order to make available utilities and facilities to the general public in the said area. For the purpose of said Town Planning Schemes, various facilities, utilities and services are required to be provided for which certain lands are required. These Town Planning Schemes are for immediate need of the community and not for acquisition on deferred basis and therefore these sections under Chapter V provide a machinery to prepare and develop the area and implement such schemes in presenti. These schemes are not for future projections but for making available resources at the immediate time. In view of these circumstances, the lands required for implementation of various utilities and facilities, services of any public need and requirement would be for a public purpose and therefore the same have to be made available the Government immediately so as to implement the scheme.

46. Once the town planning scheme is finally sanctioned under Section 86, compensation is finally determined by the Arbitrator, the property vests under Section 88 in the State Government, then there is no question of resorting to further acquisition under Section 126(2) of the Act. The words "town planning scheme" used in Section 126(2) is in respect of the town planning scheme which is yet to be finalized and sanctioned under Section 86 by the State Government as a

final scheme for inviting objections under Section 67 of the Act. Provisions of Section 126(2) providing for acquisition of land, therefore will apply only prior to the town planning scheme is finally sanctioned under the provision of Section 86 of the Act.

47. We therefore hold that the provisions of Section 126 can apply only when the scheme is not sanctioned and the amount of compensation has not been determined by the Arbitrator. Therefore, in cases where town planning scheme is already sanctioned and the property vests in the State Government under Section 88 (a) of the Act, the question of resorting to Section 126(2) of the Act does not arise.

48. We also reject the contention that under the scheme, if any property is acquired by the Planning Authority and if it is required for the beneficial use of the persons, it is only then that the Arbitrator can fix the compensation and pass the award. If the property is taken over by the Planning Authority for the construction of its office and all civic amenities can be provided by the Planning Authority and if the office of the authority is located in an area where the scheme has been framed then it would be beneficial to the public as well. Since, it is also for a public purpose covered by the scheme, the contention that the area earmarked for the Town Planning Authority can be acquired only by following Section 126 of the Act, has no basis.

49. We find from the facts of the case that after completing the procedure under Chapter V, compensation was offered and paid to the appellant and the appeal preferred by the appellant was also dismissed by the Tribunal and therefore further acquisition of land under Section 126 does not arise. The High Court in our view has correctly interpreted the provisions of the Act which calls for no interference. The appeals are, therefore, dismissed without any order as to costs.

B.B.B. Appeals dismissed.

SRI BHAGWAN

v.

STATE OF U.P.

(Criminal Appeal No. 1709 of 2009)

DECEMBER 6, 2012

[SWATANTER KUMAR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Penal Code, 1860 – ss.302 and 326 – Acid sprinkled on victim causing him extensive burn injuries – FIR registered u/s.326 IPC – Statement of victim u/s.161 CrPC – Death of the victim one day thereafter – Case altered to that u/s.302 IPC – Conviction of accused-appellant u/s.302 by Courts below – Justification – Held: Justified – Testimony of PWs-1 and 3 was convincing and natural – Moreover, they were total strangers and their presence was justified in every respect – Statement of victim u/s.161 CrPC was truthful which subsequent to his death assumed the character of dying declaration falling within the four corners of s.32(1) of Evidence Act – Recovery memo disclosed recovery of rubber gloves which were apparently used by the appellant while carrying out the offence of pouring acid on the victim – Since appellant took every precaution to ensure that while throwing acid on victim, he was not injured in any manner, thus, absence of any such injury on the appellant did not affect the prosecution case which was otherwise established by abundant legal evidence – Code of Criminal Procedure, 1973 – ss. 161 and 162 – Evidence Act, 1872 – s.32.

The prosecution case was that PWs 1 and 3 saw the accused-appellant sprinkling acid on the body of 'Y' who suffered extensive burn injuries. FIR was registered against the appellant under Section 326 IPC. PW-4 recorded the statement of 'Y' under Section 161 CrPC. 'Y'

died one day after the incident. Thereafter the case was altered to that under Section 302 IPC. The trial Court convicted the appellant under Section 302, IPC and sentenced him to life imprisonment. The conviction was affirmed by the High Court, and therefore the instant appeal.

The substantial contention made on behalf of the appellant was that PW1 and 3 could not have witnessed the incident and that having regard to the nature of the injuries sustained by the deceased 'Y', he could not have made a statement under Section 161 Cr.P.C. It was further contended on behalf of the appellant that even if the statement can be said to have been made by the deceased, the same cannot be treated as a dying declaration for non-fulfillment of the statutory requirements and that absence of the acid marks on the accused belied the case of the prosecution. One other submission made on behalf of the appellant was that PWs -1 and 3 were stock witnesses and, therefore, their version could not have been relied upon.

Dismissing the appeal, the Court

HELD: 1. It can be stated that as per the version of PWs-1 and 3 while they were guarding the area as responsible residents of a nearby colony they heard the cries of the deceased 'Y' and they rushed to the place of occurrence to help the deceased when they were able to witness the act of the appellant in sprinkling acid on the deceased and the attempt of the appellant to flee from the scene of occurrence which was successfully thwarted by the witnesses alongwith others standing nearby. Their statement in narrating the incident in such a sequence was really convincing and that it was quite natural and acceptable in every respect without giving room for any doubt. Moreover, as rightly pointed out by the respondent, they were not interested in any manner in the

deceased. Nothing was put in cross examination to state that these witnesses had either tendered evidence at the instance of the police in any other criminal case or even a suggestion that they were stock witnesses of the police. There is nothing on record to show that these witnesses had earlier deposed in any other criminal case in order to even remotely suggest that they were being used as stock witnesses by the police authorities. They were total strangers and their presence as claimed by them was justified in every respect and, therefore, there was no room to doubt their version in having stated that it was the appellant who was responsible for causing acid injury on the deceased. [Paras 8, 10] [784-A-B, F-H; 785-A-B]

Babudas v. State of M.P. **2003 (9) SCC 86 and** *Baldev Singh v. State of Punjab* **2009 (6) SCC 564: 2009 (7) SCR 855 – held inapplicable.**

Jai Prakash and Others v. State of Haryana **1998 (7) SCC 284 – cited.**

2.1. A conspectus consideration of the injury report (Exhibit Ka-17) with post-mortem report (Exhibit Ka-13) [as issued by PW5] and the oral evidence of PW-5 amply show that the deceased was fully conscious immediately after the attack on him and that such conscious position remained for at least half-an-hour to one hour. As per the evidence available on record, while the occurrence took place at 10.45 p.m. the deceased along with the accused were brought to the police station by 11.10 p.m. PW-4 the ASI who recorded the statement of the deceased made it clear that having regard to the condition of the deceased, he quickly recorded the statement within 10 minutes in order to send him to the hospital to get him treated. The above factors go to show that the statement as recorded by PW-4 of the deceased was true and, therefore, it cannot be said that the deceased was not in

a position to make the statement. In fact PWs1 and 3 in one voice stated that they heard the cries of the deceased after the attack. If the deceased was in a position to make a long cry after the acid attack, it can be safely concluded that he would have definitely be in a condition to explain to the police officer the manner in which the occurrence took place. Therefore, it cannot be said that the statement of the deceased as recorded by PW-4 was not true. [Para 13] [786-E-H; 787-A-B]

2.2. Going by Section 32(1) Evidence Act, it is quite clear that a statement (of relevant facts made by a person who is dead) would be relevant even if the person who made the statement was or was not at the time when he made it was under the expectation of death. Once a statement though recorded under Section 161 Cr.P.C. assumes the character of dying declaration falling within the four corners of Section 32(1) of Evidence Act, then whatever credence that would apply to a declaration governed by Section 32 (1) should automatically deemed to apply in all force to such a statement. A purported recorded statement under Section 161 of a victim having regard to the subsequent event of the death of the person making the statement who was a victim would enable the prosecuting authority to rely upon the said statement having regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under Section 32(1) of Evidence Act and thereby commend all the credence that would be applicable to a dying declaration recorded and claimed as such. [Para 21] [791-B-F]

2.3. In the instant case, having regard to the manner in which the statement in question was recorded at the time when the crime was registered originally under Section 326 IPC within the shortest time possible within which it could be recorded by PW-4 in order to provide

proper medical treatment to the deceased by sending him to the hospital, with no other intention pointed out at the instance of the appellant to discredit contents of the said statement, the reliance placed upon the said statement as the dying declaration of the deceased was perfectly justified. [Para 22] [792-A-C]

3. The recovery memo Exhibit Ka-1 disclose recovery of gloves which were marked as exhibit 4 before the trial Court. The chemical report marked as Ka-18 discloses the rubber gloves apparently used by the appellant while carrying out the offence of pouring acid on the deceased. Exhibit Ka-18 discloses that the burnt pieces of rubber gloves had the content of acid on it. Therefore, when the appellant had taken every precaution to ensure that while throwing acid on the deceased, he was not injured in any manner, the absence of any such injury on him can have no effect in the case of the prosecution. [Para 23] [792-D-F]

4. Once the Court is satisfied that the declaration is true and voluntary, it undoubtedly, can base its conviction on the dying declaration without any further corroboration. The rule requiring corroboration is merely the rule of prudence. In the case on hand the statement under Section 161 Cr.P.C. which was relied upon as dying declaration, fulfilled the requirement, every provision of the law and fact. Not sending of the clothes of the deceased for chemical examination is an isolated factor which should not cause any dent in the case of the prosecution when the case of the prosecution was otherwise established by abundant legal evidence. [Paras 26, 27 and 30] [793-C-E; 794-F]

Ravikumar alias Kutti Ravi v. State of T.N. **2006 (9) SCC 240 – relied on.**

Suresh Chaudhary v. State of Bihar **2003 (4) SCC 128 – held inapplicable.**

Case Law Reference

1998 (7) SCC 284	**cited**	**Para 6**
2003 (9) SCC 86	**held inapplicable**	**Para 8, 9**
2009 (7) SCR 855	**held inapplicable**	**Para 8, 9**
2006 (9) SCC 240	**relied on**	**Para 26**
2003 (4) SCC 128	**held inapplicable**	**Para 28**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1709 of 2009.

From the Judgment & Order dated 28.11.2008 of the High Court of Judicature at Allahabad in Criminal Appeal No. 2520 of 1982.

M.P. Shorawala, Jyoti Saxena, Ranbir Yadav, Anzu K. Varkey and Shashi Kiran for the Appellant.

Ratnakar Dash, Alka Sinha and Anuvrat Sharma for the Respondent.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. This appeal by the sole accused is directed against the judgment of the Division Bench of the High Court of Allahabad dated 28.11.2008 passed in Criminal Appeal No.2520 of 1982 by which the High Court confirmed the conviction and sentence of life imposed on the appellant for the offence under Section 302, Indian Penal Code (IPC) by the Sessions Judge Agra in ST 457 of 1981 in the judgment and order dated 06.09.1982.

2. Shorn of unnecessary details, the case of the prosecution was that on 26.05.1980 at 10.45 p.m. on hearing the cries of the deceased Yogender Nath Bhargava, Gurvanta Singh (PW-1) and Lalji Prasad-first informant (PW-3) rushed to the place of occurrence which was Dayalbagh bus stand where they witnessed the action of the accused in pouring acid on the body of the deceased. It was also stated that while committing the said offence, the accused was heard saying "I will pay your Rs.1,300/- today". It was the further case of the

prosecution that on seeing the witnesses, the accused attempted to escape from the spot. However, he was caught by the persons who were present at the spot.

3. Both the deceased and the accused were stated to have been then brought to the police station by 11.10 p.m. where PW-3's report (Exhibit Ka-2) was lodged based on which Exhibit Ka-3 FIR was prepared by H.M. Shivraj Singh (PW-6) wherein the crime under Section 326, IPC was registered in the General diary (Exhibit Ka-14). ASI Raghu Nath Singh (PW-4) recorded the statement of the deceased who was injured at that point of time under Section 161, Criminal Procedure Code (Cr.P.C). Thereafter the injured was stated to have been sent to the District Hospital where he was examined by Dr. S.P. Mishra (PW-5) at 11.45 p.m. and the injury report was marked as Exhibit Ka-17. The injured stated to have breathed his last at 9.40 p.m. on 27.5.1980 due to extensive burn injuries sustained by him. Dr. S.P. Mishra (PW-5) who conducted the post-mortem on the body of the deceased issued Exhibit Ka-15, the report. Thereafter, the crime was altered as one under Section 302, IPC. Raghu Nath Singh (PW-4) ASI inspected the place of occurrence, prepared a site plan (Exhibit Ka-5), collected materials such as acid bottle (Exhibit-1), Nausadar (Exhibit-2), gloves (Exhibit-4), and bag (Exhibit-3) from the spot under memo (Exhibit Ka-17). The inquest memo was marked as (Exhibit Ka-6). Investigation was stated to have been subsequently taken over by S.H.O. Raj Pal Singh on 28.05.1980.

4. Charge-sheet was thereafter laid as E-xhibit Ka-5. The articles recovered were sent for chemical examination and the chemical examination report was marked as Exhibit Ka-18. The trial Court, on consideration of the evidence placed before it, both oral and documentary and the material objects, found the appellant guilty of the offence under Section 302, IPC and imposed upon him the sentence for life. The appellant's appeal before the High Court having been dismissed, he has come forward with the present appeal before us.

5. Mr. M.P. Shoravala, learned counsel for the appellant in his submission contended that PWs-1 and 3 could not have witnessed the incident inasmuch as, in their version before the Court they stated that they only heard the deceased saying that the accused sprinkled acid on him. According to the learned counsel, since the deceased had severe burn injuries in his tongue, he was incapable of making any statement and, therefore, the alleged dying declaration in the form of Section 161 statement recorded by Raghu Nath Singh (PW-4) ASI cannot be true. Learned counsel contended that as per para 115 of Police Regulations, the 161 statement, if were to be treated as a dying declaration, the same should have been done in the presence of two respectable witnesses in which the signature or mark of the declarant and the witnesses at the foot of the declaration should have been obtained. Since the said requirement was not fulfilled, the said statement could not have been relied upon by the trial Court as well as the High Court. It was then contended that absence of acid mark on the accused belied the case of the prosecution. It was also contended that the arrest of the accused was suppressed. According to the learned counsel for the appellant, PW-3 was a stock witness and, therefore, his version could not have been relied upon. He also contended that on 25.05.1980, the death ceremony of the appellant's father was held and, therefore, in that situation the appellant would not have been in a mood at all to commit a heinous crime of murder of the deceased. According to the learned counsel, if the deceased had suffered such extensive burn injuries due to acid attack, he would not have been in a position to make such a long statement as was recorded by PW-4. The learned counsel also argued that since in the site plan, no light post was marked and since the occurrence had taken place at 10.45 p.m., there would have been no scope at all for PWs-1 and 3 to have witnessed any incident as stated by them. Learned counsel contended that the so-called dying declaration recorded by PW-4 was not admissible in evidence. The learned counsel, therefore, contended that the evidence does not confirm the offence alleged against the appellant.

6. As against the above submissions, Mr. Ratnakar Dash, learned senior counsel submitted that the very fact that the FIR was lodged at 11.10 p.m. at the instance of PWs 1, 2 and 3 who brought accused as well as the deceased to the police station were all factors relevant to show that the case of the prosecution was truly projected before the Court. Learned senior counsel submitted that PWs-1 and 2 were guarding the area in the night and when they happened to hear the cries of the deceased to which they responded by rushing to the spot which was just 30 steps ahead of their way and with the aid of the street lights, they were able to witness the occurrence as narrated by PW-3 in his report pursuant to which the FIR came to be registered. Learned senior counsel also submitted that when the appellant attempted to escape from the spot, he was caught by the persons standing nearby and thereafter brought to the police station along with the deceased. Learned counsel contended that such natural course of events having been accepted by the Court with the aid of the evidence of the eye witnesses and the declaration made by the deceased who was in the injured state at that point of time before PW-4 and having regard to the exceptional circumstances stipulated under Section 161 (2) Cr.P.C., the said statement was validly relied upon as the dying declaration of the deceased himself falling under Section 32 (1) of the Evidence Act and, therefore, the reliance placed upon the said dying declaration of the deceased was unquestionable. The learned senior counsel submitted that PWs-1, 2 and 3 were all strangers and they had no reason to implicate the accused to the offence. He also pointed out that PW-3 was working as a Peon in the District Court and his statement was fully reliable. According to the learned senior counsel, both the Courts accepted the version of PWs1 to 3 inasmuch as they had no axe to grind against the accused and they were also not related to the deceased in order to state that they were interested witnesses. Learned senior counsel relied upon the decision reported in *Jai Prakash and Others v. State of Haryana* - 1998 (7) SCC 284 in support of his submission.

7. Having heard learned counsel for the appellant as well as learned counsel for the respondent and having bestowed our serious consideration to the respective submissions and the materials placed on record and the impugned judgments, we find the substantial contention made on behalf of the appellant was that PW1 and 3 could not have witnessed the incident and that having regard to the nature of the injuries sustained by the deceased, he could not have made a statement under Section 161 Cr.P.C. It is the further contention that even if the statement can be said to have been made by the deceased, the same cannot be treated as a dying declaration for non-fulfillment of the statutory requirements and that the absence of the acid marks on the accused belied the case of the prosecution. One other submission made on behalf of the appellant which also requires to be considered is that PWs -1 and 3 were stock witnesses and, therefore, their version could not have been relied upon.

8. When we consider the said submission of the appellant in seriatim, in support of the submission that PWs1 and 3 were stock witnesses, the learned counsel relied upon the decisions reported in *Babudas v. State of M.P.* - 2003 (9) SCC 86, *Baldev Singh v. State of Punjab* --- 2009 (6) SCC 564. At the very outset, it will have to be stated that except submitting that PWs-1 and 3 were stock witnesses, nothing more was pointed out by learned counsel to support the said contention. Further when we examine the deposition of the said witnesses it disclose that they were actually guarding the area as members of the residential colony. According to them, the place of occurrence, namely, the bus stand of Dayalbagh is at a distance of about 250 yards from their colony. They also stated that when they heard the pathetic cries of the deceased, they could notice the accused assaulting the deceased which they were able to see from the street light brightness and that when they rushed towards the deceased, the accused who was throwing acid on the deceased started fleeing and that as they shouted at him, the passersby caught hold of the accused and that is how they

were able to bring the deceased as well as the accused to the police station. Nothing was put in cross examination to state that these witnesses had either tendered evidence at the instance of the police in any other criminal case or even a suggestion that they were stock witnesses of the police. There is nothing on record to show that these witnesses had earlier deposed in any other criminal case in order to even remotely suggest that they were being used as stock witnesses by the police authorities.

9. Keeping the above factors in mind, when we examine the decision relied upon reported as *Babudas* (supra), this Court has noted that PW-17 in that case was a stock witness who was appearing as witness for recovery on behalf of the prosecution even as far back as in the year 1965 and that admittedly the prosecution was using him as a stock witness and it was in those circumstances that this Court held that there should be a cautious approach in relying upon the testimony of such a stock witness. In the decision reported in *Baldev Singh* (supra) it was noted that PW-22 in that case was examined by the police authorities in some other case and that a suggestion was put to him that he was a police tout. It was, therefore, held that his evidence cannot be relied upon.

10. In the light of the said peculiar facts involved in those two cases, we find no scope to apply those decisions to the facts of this case. It can be stated that as per the version of PWs-1 and 3 while they were guarding the area as responsible residents of a nearby colony they heard the cries of the deceased and they rushed to the place of occurrence to help the deceased when they were able to witness the act of the appellant in sprinkling acid on the deceased and the attempt of the appellant to flee from the scene of occurrence which was successfully thwarted by the witnesses along with others standing nearby. Their statement in narrating the incident in such a sequence was really convincing and that it was quite natural and acceptable in every respect without giving room for

any doubt. Moreover, as rightly pointed out by learned counsel for the respondent, they were not interested in any manner in the deceased. They were total strangers and their presence as claimed by them was justified in every respect and, therefore, there was no room to doubt their version in having stated that it was the appellant who was responsible for causing acid injury on the deceased. The said submission of the learned counsel for the appellant, therefore, does not merit acceptance.

11. It was also submitted by learned counsel for the appellant that PWs1 and 3 could not have witnessed the incident inasmuch as they stated that they only heard the cries of the deceased about inflicting of the injury by pouring acid by the accused on him and did not see the act of pouring acid on the deceased by the appellant. Even here we find that the said statement made by PWs-1 and 3 does not in any way dilute their earlier statement that on hearing the cries of the deceased, they rushed to the place of occurrence when they noticed the accused attacking the deceased by sprinkling acid on him. After reaching the spot they also heard from the deceased that the accused sprinkled acid on him. The reference to such statement of the deceased by the witnesses only strengthened their earlier version of having seen the appellant throwing acid on the deceased. Therefore, the version of PWs1 and 3 about the statement of the deceased on this aspect in no way contradict their statement of having seen the appellant assaulting the deceased by sprinkling acid. The said submission also, therefore, does not merit any consideration.

12. The next submission of the learned counsel for the appellant was that since the deceased suffered acid injury in his tongue, he was incapable of making any statement and, therefore, the alleged statement under Section 161 Cr.P.C. stated to have been recorded by PW-4 cannot be true. In this context, it will be worthwhile to refer to the post-mortem report Exhibit Ka-13. The said report mentioned the ante-mortem injuries as under:-

> "superficial burn on whole face, neck, front of cheeks, abdomen, whole back of both bottocks, both upper extremities right front of hip, whole tongue, undersurface of cheeks and orphornex, leather marks appearance (illegible)"

13. While referring to the said report and the injuries, it is also necessary to refer to the evidence of the doctor who issued Ka-13, namely, Dr. S.P. Mishra (PW-5). In the chief examination, PW-5 stated that even after sustaining the above mentioned injuries, the injured could have lived in consciousness for half an hour to an hour. In the cross examination, though PW-5 stated that the deceased might have suffered grave and severe agonies, nothing was suggested to him that he was not in a position to speak or make any statement. In the injury report Exhibit Ka-17 also it is noted that superficial burn injuries were found among other parts of the body as well as in the tongue. It was also mentioned therein that the burnt areas where in multiple patches and it was mentioned that they were of leather appearance with a distinct demarcation between burnt and normal skin. A conspectus consideration of the injury report (Exhibit Ka-17) with post-mortem report (Exhibit Ka-13) and the oral evidence of Dr. S.P. Mishra (PW-5) amply show that the deceased was fully conscious immediately after the attack on him and that such conscious position remained for at least half-an-hour to one hour. As per the evidence available on record, while the occurrence took place at 10.45 p.m. the deceased along with the accused were brought to the police station by 11.10 p.m. PW-4 the ASI who recorded the statement of the deceased made it clear that having regard to the condition of the deceased, he quickly recorded the statement within 10 minutes in order to send him to the hospital to get him treated. The above factors go to show that the statement as recorded by PW-4 of the deceased was true and, therefore, the submission that the deceased was not in a position to make the statement cannot be accepted. In fact PWs1 and 3 in one voice stated that they heard the cries of the deceased after the

attack. If the deceased was in a position to make a long cry after the acid attack, it can be safely concluded that he would have definitely be in a condition to explain to the police officer the manner in which the occurrence took place. We, therefore, reject the said submission of the learned counsel for the appellant that the statement of the deceased as recorded by PW-4 was not true.

14. Once we steer clear of the said hurdle then the question arises as to whether the said statement can be accepted as a dying declaration as has been done by the trial Court and as approved by the Division Bench of the High Court. The trial Court while dealing with the contention made on behalf of the appellant for not to rely upon the 161 statement of the deceased as a dying declaration rejected the said argument in so many words:

> "30. Regarding the dying declaration of the deceased I have already mentioned that there are two sets of dying declaration, one which was made by the deceased before the witnesses immediately after the incident and the other recorded by the investigating officer at the police station u/s 161 Cr.P.C. The learned counsel for the defence criticised the dying declaration on the point that the investigating officer himself introduced certain facts in it while recording the statement u/s 161 Cr.P.C. by adding the names and the addresses of the assailant and the victim on the basis of the written report, Ex.Ka2 due to which he argued that the same was not at all reliable. In this regard I find that 1979 Cr.L.J 1031, Tihari Singh vs. State of Punjab, is contrary, in which it has been held that the Head Constable who recorded the dying declaration had stated in his evidence that he put the question to the deceased and recorded his answers. He also added that he recorded what the deceased stated "in his own way". It does not mean that he recorded something other than what the deceased stated. All that it meant was that the

> language was his, but the substance was that of the deceased. In the circumstances, no infirmity was attached to the dying declaration on that account. I also find that the dying declaration alleged to have been made by the deceased in presence of the witnesses, remains still unaffected by the argument of the defence counsel, and in any case, the presence of the witnesses of fact at the place of the incident immediately after its occurrence, can not be doubted for the reasons mentioned above."

15. The High Court also rejected the said submission for not relying upon the 161 statement which otherwise turned out to be the dying declaration of the deceased. Before us, for the first time it was contended on behalf of the appellant that the said statement cannot be accepted as a dying declaration for the reason that it was not attested by two respectable witnesses as is required in para 115 of the police regulations. The said paragraph 115 reads as under:

> "115.The officer investigating a case in which a person has been so seriously injured that he is likely to die before he can reach a dispensary where his dying declaration can be recorded should himself record the declaration at once in the presence of two respectable witnesses, obtaining the signature or mark of the declarant and witnesses at the foot of the declaration."
>
> [emphasis supplied]

16. A reading of the said paragraph appears to be a guideline issued to the investigating officers as to the precautions to be taken while recording a dying declaration. It was stated therein that such declaration can be recorded by the investigating officer himself in the presence of two respectable witnesses and obtain the signature or mark of the declarant and the witnesses at the foot of the declaration. In the first place, such a guideline in the form of police regulation can have no impact on any superior statutory prescription. Leaving

aside such a proposition which does not require to be considered in this case, the said para 115 will apply only in a grave situation where the victim is seriously injured and it would be impossible compliance of Section 32 (1) of the Evidence Act in its full rigour. Such guidelines have been issued to insure that at least the basic requirement of recording such a dying declaration in the presence of two respectable persons as witnesses while obtaining the signature or mark of the victim himself. It is relevant to note that the said paragraph 115 makes a specific reference to the recording of the dying declaration in which event alone such precautions have to be ensured by the investigating officers and not when Section 161 statement is recorded which does not require the signature of the author of the statement

17. While keeping the above prescription in mind, when we test the submission of the learned counsel for the appellant in the case on hand at the time when 161 Cr.P.C. statement of the deceased was recorded, the offence registered was under Section 326, IPC having regard to the grievous injuries sustained by the victim. PW-4 was not contemplating to record the dying declaration of the victim inasmuch as the victim was seriously injured and immediately needed medical aid. Before sending him to the hospital for proper treatment PW-4 thought it fit to get the version about the occurrence recorded from the victim himself that had taken place and that is how Exhibit Ka-2 came to be recorded. Undoubtedly, the statement was recorded as one under Section 161 Cr.P.C. Subsequent development resulted in the death of the victim on the next day and the law empowered the prosecution to rely on the said statement by treating it as a dying declaration, the question for consideration is whether the submission put forth on behalf of the respondent counsel merits acceptance.

18. Mr. Ratnakar Dash, learned senior counsel made a specific reference to Section 162 (2) Cr.P.C. in support of his submission that the said section carves out an exception and

credence that can be given to a 161 statement by leaving it like a declaration under Section 32(1) of the Evidence Act under certain exceptional circumstances. Section 162 (2) Cr.P.C. reads as under:

> "162. (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act."

19. Under Section 32(1) of the Evidence Act it has been provided as under:-

> **"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant-**Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-
>
> **(1) When it relates to cause of death.-** When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
>
> Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

20. Going by Section 32(1) Evidence Act, it is quite clear that such statement would be relevant even if the person who made the statement was or was not at the time when he made it was under the expectation of death. Having regard to the

extraordinary credence attached to such statement fall under Section 32(1) of the India Evidence Act, time and again this Court has cautioned as to the extreme care and caution to be taken while relying upon such evidence recorded as a dying declaration.

21. As far as the implication of 162 (2) of Cr.P.C. is concerned, as a proposition of law, unlike the excepted circumstances under which 161 statement could be relied upon, as rightly contended by learned senior counsel for the respondent, once the said statement though recorded under Section 161 Cr.P.C. assumes the character of dying declaration falling within the four corners of Section 32(1) of Evidence Act, then whatever credence that would apply to a declaration governed by Section 32 (1) should automatically deemed to apply in all force to such a statement though was once recorded under Section 161 Cr.P.C. The above statement of law would result in a position that a purported recorded statement under Section 161 of a victim having regard to the subsequent event of the death of the person making the statement who was a victim would enable the prosecuting authority to rely upon the said statement having regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under Section 32(1) of Evidence Act and thereby commend all the credence that would be applicable to a dying declaration recorded and claimed as such.

22. Keeping the above principle in mind, it can be stated without any scope for contradiction that when we examine the claim made on the statement recorded by PW-4 of the deceased by applying Section 162 (2), we have no hesitation in holding that the said statement as relied upon by the trial Court as an acceptable dying declaration in all force was perfectly justified. We say so because no other conflicting circumstance was either pointed out or demonstrated before the trial Court or the High Court or before us in order to exclude

the said document from being relied upon as a dying declaration of the deceased. We reiterate that having regard to the manner in which the said statement was recorded at the time when the crime was registered originally under Section 326 IPC within the shortest time possible within which it could be recorded by PW-4 in order to provide proper medical treatment to the deceased by sending him to the hospital, with no other intention pointed out at the instance of the appellant to discredit contents of the said statement, we hold that the reliance placed upon the said statement as the dying declaration of the deceased was perfectly justified. Having regard to our above conclusion, the said submission of the learned counsel for the appellant also stands rejected.

23. The other submission of learned counsel for the appellant was that the absence of the acid marks on the body of the accused belies the case of the prosecution. At the very outset, it will be relevant to note that the recovery memo Exhibit Ka-1 disclose recovery of gloves which were marked as exhibit 4 before the trial Court. The chemical report marked as Ka-18 discloses the rubber gloves apparently used by the appellant while carrying out the offence of pouring acid on the deceased. Exhibit Ka-18 discloses that the burnt pieces of rubber gloves had the content of acid on it. Therefore, when the appellant had taken every precaution to ensure that while throwing acid on the deceased, he was not injured in any manner, the absence of any such injury on him can have no effect in the case of the prosecution.

24. The other argument was that the appellant lost his father and that on the day of occurrence he attended the ceremony in memory of his father and that when he was in such a distress situation, he would not have committed the offence of murder. We do not find any substance in the said feeble submission in order to deal with the same in very many details.

25. The other discrepancies pointed out such as the street light was not shown in the site plan and, therefore, PWs 1, 2

and 3 could not have witnessed the incident, that the gloves were not seized and that the appellant was a small grocery shop owner and there was previous criminal background and, therefore, the appellant could not indulge in such a crime to pour acid on the face of the deceased are all arguments of desperation. Further some such submissions are all trivial factors submitted before us which we find do not in any way affect the case of the prosecution which was fully established by legally acceptable evidence placed before the Courts below.

25. Reliance was placed upon *Ravikumar alias Kutti Ravi v. State of T.N.* -- 2006 (9) SCC 240 for the proposition that fully supports the case of the prosecution wherein this Court held *"once the Court is satisfied that the declaration is true and voluntary, it undoubtedly, can base its conviction on the dying declaration without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis unless it is corroborated. The rule requiring corroboration is merely the rule of prudence".*

27. As in th-e case on hand we have found that the statement under Section 161 Cr.P.C. which was relied upon as dying declaration, fulfilled the requirement, every provision of the law and fact. We, therefore, find that the said judgment fully supports the case of the prosecution in affirming the conviction imposed on the appellant.

28. Reliance was placed upon the decisio-n in *Suresh Chaudhary v. State of Bihar* - 2003 (4) SCC 128 for the proposition that though IO seized certain mattresses and durries from the place of the incident which were bloodstained, and the same were not sent to the chemical examiner and this failure added to the list of suspicions pointed out by the defence.

29. The relevant conclusion in para 12 of the said decision is to the following effect:

"12……..Then again we notice, though PW 13, the IO stated in his evidence that he has seized certain mattresses and durries from the place of the incident which

were bloodstained, the same were not sent to the Chemical Examiner for establishing the fact that these durries seized from the place of the incident were actually used by the victims which might have supported the prosecution case if the bloodstains were to be proved to be that of the victims. This failure also adds to the list of suspicions pointed out by the defence. All these omissions and contradictions also add to the list of doubtful circumstances pointed out by the defence in the prosecution case."

(Emphasis added)

30. In the said decision the version of the sole eye witness was not relied upon inasmuch as he was found to be an interested witness and the other evidence also did not support the case of the prosecution. There was also inordinate delay in sending report to the Magistrate under Section 157 (1) Cr.P.C. The failure on the part of the prosecution to recover the weapons was one other relevant factor which was referred to in order to set aside the conviction. Therefore, apart from not sending the recovered blood stained material for chemical examination, there were various other serious infirmities in that case which all put together persuaded this Court to interfere with the conviction. We, therefore, do not find any support from the said decision. Not sending of the clothes of the deceased for chemical examination is an isolated factor which should not cause any dent in the case of the prosecution when the case of the prosecution was otherwise established by abundant legal evidence. Therefore, the said decision also does not persuade us to interfere with the conviction and sentence imposed on the appellant.

31. Having regard to our above conclusion, we do not find any merit in the appeal. The appeal fails and the same is dismissed.

B.B.B. Appeal dismissed.

DIRECTOR GENERAL OF POSTS & ORS.
v.
K. CHANDRASHEKAR RAO
(Civil Appeal No. 9049 of 2012 etc.)

DECEMBER 13, 2012

[SWATANTER KUMAR AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Service Law:

Compassionate Appointment Scheme of 1998 – Candidates appointed in 2002 – Some of them found in excess of quota in January 2005, in terms of O.M. dated 16.5.2001, as clarified subsequently – Accordingly, notice for termination of their services issued – Held: From the Scheme and Office Memorandum, it is clear that, on the one hand, Government had formulated a welfare scheme for compassionate appointments, on the other, because of limitations of its financial resources it decided to take economic measures by reducing the extent of appointment by direct recruitment from the financial year 2001-2002 – Both these matters falling in the domain of the Government and being matters of policy, do not call for any judicial interference – However, the instructions which specifically dealt with compassionate appointments were issued by Office Memorandum dated 4-7-2002 – Office Memorandums dated 16-05-2001and 04-07-2002 were expected to operate prospectively and thus the rights which had been settled could not be re-settled – There is some ambiguity created by issuance of Office Memorandums dated 16-05-2001 and 14-06-2006 and the enforcement of the former by Office Memorandum dated 04-07-2002 in relation to the implementation of Compassionate Appointment Scheme of 1998 – Thus, it is not only desirable but also necessary that

the competent authority should issue comprehensive guidelines squarely covering the issue – However, the authorities cannot tamper with the existing rights of the appointees – Appointments of respondents will not be interfered with on the basis of O.M. dated 04.07.2002 – Further directions issued – Administrative Law – Policy decision – Judicial review.

In terms of the Compassionate Appointment Scheme of 1998, issued by the Government of India, 69 names were approved on 13-15 of March, 2002 for compassionate appointment to fill up 5% of the existing vacancies occurring in the years 2000, 2001 and 2002. On 06-08-2002, the respondent in C.A. No. 9049 of 2012 was communicated the approval of his name for appointment and he joined a Group D post on 22-08-2002. On 04-07-2002, the DoPT issued a clarificatory Memorandum that 5% quota for compassionate appointment was to be calculated not on the basis of the total vacancies, but on the basis of direct recruitment vacancies finally cleared by the Screening Committee in terms of DoPT Office Memorandum dated 16-05-2001, according to which direct recruitment was not to exceed 1% of total strength of the department. On 12-01-2005, it was noticed that out of the candidates whose names had been cleared for compassionate appointment on 13-15 of March, 2002, names 48 such appointees were in excess of quota and, as all such candidates were still temporary, a notice under r. 5 of the Central Civil Services (Temporary Services) Rules, 1965 was issued terminating their services. The appointees, including the respondent, approached the Central Administrative Tribunal, which upheld their appointments. The High Court having upheld the order of the Tribunal, the department filed the appeals.

Dismissing the appeals, the Court

HELD: 1.1. The Ministry of Personnel, Public

Grievances and Pension, Government of India had issued a circular on 09-10-1998 declaring its policy in the form of a Scheme for Compassionate appointment under the Central Government. The compassionate appointments can be made upto a maximum of 5% of vacancies falling under direct recruitment quota in any group 'C' or 'D' post. The appointing authority may hold back upto 5% of the vacancies in the aforesaid categories to be filled by direct recruitment through Staff Selection Commission or otherwise so as to fill such vacancies by appointment on compassionate grounds. The Scheme of 1998 for compassionate appointment is a welfare activity carried out by the Government of India. It is a benevolent and a voluntary act of generosity on the part of the State. The generosity once extended in the form of exercise of a subordinate legislative power by formulating the said Scheme, will have the force of law. It is enforceable to its limited extent and within its prescribed parameters. The purpose of the 1998 Scheme was to provide employment and preferably as part of the regular cadre subject to availability of vacancies. [Para 13, 17 and 19] [808-C-D; 811-B-C; 811-E-G]

1.2. Office Memorandum dated 16-05-2001 did not refer to the circular of 1998 as such. However, in furtherance to Memorandum dated 16-05-2001, the Government of India, DoPT issued a clarification on the guidelines for compassionate appointment to Group 'C' and 'D' posts on 04-07-2002, clarifying that 5 per cent quota for compassionate appointment is to be worked out with reference to DR vacancies in each recruitment year finally approved for filling up by the Screening Committee under the optimisation policy of the Government contained in Office Memorandum dated 16-05-2001. Finally on 14-06-2006, 'Scheme for Compassionate Appointment under the Central Government Determination of Vacancies' was clarified. In light of this,

the earlier instructions including the instructions dated 09-10-1998 stood modified to the extent mentioned therein. [Paras 19-21] [811-H; 812-D-G; 813-A]

1.3. From the Scheme and Office Memorandum, it is clear that, on the one hand, the State had formulated a welfare scheme for compassionate appointments, on the other, because of limitations of its financial resources it decided to take economic measures by reducing the extent of appointment by direct recruitment from the financial year 2001-2002. Both these matters falling in the domain of the Government and being matters of policy, do not call for any judicial interference. [Paras 22] [813-B-D]

1.4. The respondents were admittedly appointed during the period of 2001-2003. The instructions which specifically dealt with the compassionate appointments were issued by office memorandum dated 04-07-2002. Neither the Memorandum dated 16-05-2001 nor Memorandum dated 04-07-2002 stated that the restrictions sought to be imposed were applicable retrospectively or even retroactively. The rights of these persons had been settled, the respondent and others had been appointed to the posts and they had already worked in their respective posts before the notice of termination were issued to them at the end of year 2004. No data or material has been placed by the government even to support the contention that under the effect of the instructions of the year 1998, these persons were appointed in excess of the posts provided under the Scheme. Both these Office Memorandums were expected to operate prospectively and thus the rights which had been settled could not be re-settled. It is also undisputed that the appointments of the respondents were made on the basis of the vacancies existing against the year 2000 when the instructions of 1998 were in operation, free of any restriction. [Para 23] [813-G-H; 814-A-D]

1.5. Further, it will be a contradictory stand, if on the one hand, the appellants are permitted to treat office memorandums including office memorandum dated 16-05-2001 as retrospective while, on the other, they treat office memorandum dated 14-06-006 as prospectively. The High Court in the operative part of its judgment has clearly observed that the authorities have to reconsider the matter in the light of instructions issued in the memorandum dated 14-06-2006. There is no error of jurisdiction or otherwise in the said finding returned by the High Court. The spirit of the Scheme was to provide relief to the family members of the deceased persons and thus on the yardstick of social justice, such relief cannot be withdrawn on the ground of some alleged discrepancy which has not been supported by any data, is unreasonable and, therefore, even unsustainable. The appellants must state appropriate reasons and provide the expected data on record if they expect the court to come to a different conclusion. The appellants have miserably failed to place any such data on the basis of the Memorandum dated 14-06-2006. [Para 24 and 29] [814-F-H; 816-G-H; 817-A]

Balbir Kaur and Anr. v. Steel Authority of India Ltd. And Others etc. etc. **2000 (3) SCR 1053 = (2000) 6 SCC 493 - relied on.**

Union of India and Others v. K. P. Tiwari **(2003) 9 SCC 129 – referred to.**

1.6. In the instant case, there is some ambiguity created by issuance of Office Memorandums dated 16-05-2001 and 14-06-2006 and the enforcement of the former by Office Memorandum dated 04-07-2002 in relation to the implementation of Compassionate Appointment Scheme of 1998. Thus, it is not only desirable but necessary that the competent authority should issue comprehensive guidelines squarely

covering the issue. However, the authorities cannot tamper with the existing rights of the appointees. It is, therefore, directed:

(A) The appointments of the respondents will not be interfered with by the appellants on the strength of the memorandum dated 04-07-2002.

(B) Office Memorandums dated 16-05-2001, 14-06-2006 and 04-07-2002 have in relation to the 1998 Scheme for Compassionate Appointment caused some confusion on the one hand and while on the other they have prejudicially affected the rights of large number of heirs of the employees who died in harness. Thus, the appellants will issue comprehensive, certain and unambiguous directions which shall put an end to such unnecessary controversies. [Paras 25 and 30] [815-C-D; 817-B-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9049 of 2012.

From the Judgment & Order dated 01.09.2008 of the High Court of Judicature at Hyderabad in Writ Petition No. 20655 of 2008.

WITH

C.A. No. 9050, 9051, 9053, 9054, 9055, 9056, 9057, 9058, 9059, 9060 and 9061 of 2012.

Rakesh Khanna, ASG, J.S. Attri, R.K.. Rathore, Vikas Bansal, D.S. Mahra, Priyanka Bharihoke (for Arvind Kumar Sharma) for the Appellants.

Satya Siddiqui, S.K. Mishra, Sarafraz A. Siddiqui, D.S. Mahra, S. Udaya Kumar Sagar, Bina Madhavan, Anindita Pujari

(for Lawyer's Knit & Co.) Sridhar Potaraju, Gaichangpou Gangmei, Abhishek R. Shkula, A. Subba Rao, Naveen R. Nath for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave granted in all the SLPs.

2. By this common judgment we shall dispose of all the above mentioned appeals which are directed against the judgments of the High Court of Andhra Pradesh at Hyderabad passed on different dates vide which the Court, while relying upon its judgment dated 23rd July, 2008 passed in Writ Petition (C) No. 15820/2008, has dismissed the writ petitions filed by the concerned government authority.

3. Thus, it is not necessary for us to notice the facts of each appeal separately. Though, the judgments are of different dates, they are primarily based upon the judgment of the High Court dated 23rdJuly, 2008. For the purpose of convenience, we would be referring to the facts of SLP(C) No.19871/2009.

FACTS:

4. The Department of Personnel and Training (for short 'DoPT'), Ministry of Personnel, Public Grievances and Pension, Government of India, issued a memorandum dated 9th October, 1998 containing the scheme for compassionate appointment with an object to give a source of employment to the dependent family members of the government servant dying in harness or one who has retired on medical grounds. This scheme was declared on 9th October, 1998. The scheme stipulated that the compassionate appointment could be made upto a maximum of 5 per cent of the vacancies falling under Direct Recruitment Quota in Group 'C' or 'D' post.

5. According to the appellants, the scheme of

compassionate appointment is always treated as an exception to the general rule of recruitment.

6. The father of the respondent was employed with the appellants in a Group 'D' post. Unfortunately, the father of the respondent died on 19th April, 2000.

7. On 16th May, 2001, the DoPT issued an office memorandum in view of the policy of the Government of India that fresh recruitment should be limited to one per cent of the total strength of civilian staff. The basis for the same appeared to be that about three per cent of the staff retired every year and thus, the reduction in manpower would reduce to 2% p.a. if fresh recruitment is limited to 1% p.a. This would achieve a deduction of ten percent in five years. It was decided that each Ministry and Department would formulate an Annual Direct Recruitment Plan through the mechanism of Screening Committee. Para 2.2 of this memorandum provided that while preparing the Annual Recruitment Plan, the concerned Screening Committee was to ensure that the direct recruitment did not exceed one per cent of the total sanctioned strength of the Department. Since three per cent of the staff retired every year, this would translate only to one-third of the Direct Recruitment vacancies occurring in each year being filled. Thus, the recruitment would be limited to filling one-third of the vacancies of Direct Recruitment arising in the year, subject to a further ceiling, that it does not exceed one percent of the total sanctioned strength of the Department. In terms of Para 2.4 of the memorandum, it was further stated that the vacancies so cleared by the Screening Committee will be filled up by applying rules for reservation, handicapped, compassionate quota therein.

8. However, the Special Circle Relaxation Committee, approved the names of the candidates in the category of compassionate appointment on the basis of 5 per cent of the existing vacancies occurring in the year 2000, 2001 and 2002. In face of the memorandum dated 16thMay, 2001, on or about

13th March, 2002, 69 names were approved. On 4th July, 2002, the DoPT issued a clarificatory memorandum that the five per cent quota for compassionate appointment was to be calculated on the basis of direct recruitment vacancies finally cleared by the Screening Committee and not on the basis of the total vacancies occurring in the Department. The respondent, on 6th August, 2002 was communicated the intimation with regard to the approval of his name for appointment to Group 'D' post, which he joined on 22nd August, 2002.

9. It is the case of the appellants now that the mistake of appointment in excess of the prescribed quota was detected and vide letter dated 12th March, 2003 it was communicated that it was not possible to adjust the candidates who were recommended in excess of the quota because the recommendation for compassionate appointment was to be made on the basis of five per cent of the approved vacancies cleared by the Screening Committee. In furtherance to this, a decision was taken on 17th May, 2004 to select only the most indigent persons against the available vacancies within the prescribed ceiling of 5 per cent of the vacancies finally cleared by the Screening Committee. In furtherance to the decision taken by the competent authority, a meeting of the Special Circle Relaxation Committee was convened and appointment of total 21 candidates on the basis of five per cent approved vacancies cleared by the Screening Committee was approved. The remaining 48 candidates were terminated/not permitted to continue/dropped on 12th October, 2004. On 12th January, 2005, the appellants noticed that the candidates, whose names had been cleared for compassionate appointment on 13-15th March, 2002 or in the year 2002 were still temporary servants. 48 names were in excess of the quota, therefore, a notice of termination under Rule 5 of the Central Civil Services (Temporary Services) Rules, 1965 was issued and as already noticed, the services of the 48 persons, whose names were recommended in excess of the quota, were terminated. These

appointees, including the respondent in the present appeal, challenged the said order of termination before the Central Administrative Tribunal (for short 'CAT'). The CAT granted an interim stay during the pendency of the hearing of the application vide its order dated 8th February, 2005. The present appellants also point out that two other applications, being OA No. 434/2005 and OA No. 761/2005 filed by similarly situated employees, came to be dismissed vide orders of the CAT dated 20th October, 2005 and 19th April, 2007 respectively.

10. The application filed by the present respondent came up before the CAT for hearing on 31st October, 2007. While allowing the application of the respondent, the CAT held that the appointment of the respondent-applicant before it, was not liable to be terminated *inter alia*, but primarily for the following reasons:-

> "17. Therefore, it has been proved and established that the instructions dated 16.05.2001 in so far as it relates to compassionate appointment, frustrate the very object of the scheme for compassionate appointment. The scheme for compassionate appointment is a rehabilitation scheme. Therefore, the subsequent instructions, the application/ operation of which frustrates the very object of the scheme or make the scheme not practically applicable, cannot be said to be valid instruction(s). Therefore, even if there had been any instructions of 2001 to consider the cases for compassionate appointment to the extent of 5% of the approved vacancies cleared by the screening committee (which could not be produced by the respondents before us), any appointment made without following such instructions cannot be said to be irregular appointment. More over, the administration should be more particular while considering the cases of compassionate appointment so that the persons appointed will not be terminated for any irregularity in the appointment. In no case, the family which has been provided with

compassionate appointment to enable the family to meet with the indigent conditions caused due to the death of the employee would be put to distress again due to the fault of the administration. We may, at the cost of repetition, mention that (i) when the very instruction dated 16.05.2001 in so far as it relates to compassionate appointment, has been proved to be frustrating the very object of the scheme which is a rehabilitation scheme, even if any appointment is made without following such instruction, cannot or does not make the appointment irregular. (ii) The applicants who have been given appointment against 2000 vacancies following the instructions/scheme of 1998, their appointments do not, in any way, come within the purview of the DOPT instructions of 2001. Therefore, their appointments can in no way be terminated by applying the instructions of 2001. (iii) All the applicants who were considered and approved and were given compassionate appointments in 2002 cannot be terminated after they have worked for a considerable period. More particularly, when the scheme is a rehabilitation scheme and the 2001 instructions in so far it relates to compassionate appointments frustrates the very object of the scheme and make the scheme practically inapplicable as mentioned vide instructions cannot be said to be valid. For the reasons mentioned above, it will not be out of place to mention that in the case of *Union of India and Others vs. K.P. Tiwari* [2003 SCC (L&S) 1233] Hon'ble Supreme Court declined to interfere with the appointment made 5 years back and said that:

> "It is unnecessary in the present case to examine either questions of law or fact arising in the matter. Suffice to say that the respondent was appointment and has been in service for more than five years. It would not be appropriate to disturb that state of affairs by making any other order resulting in uprooting the respondent from his livelihood."

Since the appropriate instructions dated 14.06.2006 have already been issued to consider the cases for compassionate appointment to the extent of 5% of total vacancies against the direct recruitment quota, no further order is necessary to that effect. Therefore, such appointment which is made without following the said instructions cannot be terminated for the reasons mentioned above.

18. Therefore, in view of the above discussion, we hold that the respondents are not justified in issuing the impugned notice of termination/order of notice to delete the names of the applicants from the list of approved candidates. The applicants are entitled to continue in service on the strength of the appointment given to them. We, therefore, quash and set aside the impugned orders/ notices issued by the respondents in all the applications. Interim order granted by this Tribunal stands absolute."

11. Being aggrieved from the judgment of the Tribunal, the appellant filed a writ petition, being W.P.(C) No. 20655/2008 before the High Court. The High Court by that time had already disposed of Writ Petition (C) No. 15820 of 2008 filed by the Government Department entitled Superintendent of Post Offices, Anantpur Division, Anantpur vs. R.S. Madan Lal vide its judgment dated 23rd July, 2008, the subject matter in SLP(C) No. 19872/2009 which is also listed along with the present bunch of matters. While the High Court upheld the order of the CAT, it not only accepted its reasoning but in addition thereto held as under:-

> "We do not find any error in the above reasoning adopted by the Tribunal. The respondent and others who were given appointments against vacancies arising in 2000 ignoring the scheme-1998 cannot be removed from service, pursuant to the instructions issued in 2001. Therefore, the candidates who were considered and given compassionate appointment in 2002 cannot be removed

from service. At this stage, it is pat (*sic*-apt) to note that the Government taking into consideration the difficulties being faced by various Ministries in implementing the scheme for compassionate appointment issued certain instructions in memo dated, 14.6.2006. Para-3 of the said instructions reads thus:

> "On a demand raised by Staff Side in the Standing Committee of the National Council (JCM) for review of the compassionate appointment policy, the matter has been carefully examined and taking into account the fact that the reduction in the number of vacancies for Group 'C' and 'D' posts (excluding technical pots) that have arisen in the year. Total vacancies available for making direct recruitment would be calculated by deducting the vacancies to be filled on the basis of compassionate appointment form the vacancies available for direct recruitment in terms of existing orders on optimization."

From the above, it is clear that the vacancies meant for direct recruitment shall have to be calculated only after earmarking the vacancies required for compassionate appointment. In words, the direct recruitment vacancies shall have to be arrived at only after deducting the vacancies required for compassionate appointment under the scheme. The Tribunal while allowing the O.As, has also taken into consideration, the aforementioned instructions issued by the Government of India.

Admittedly, the notice of termination was issued on 24.11.2005, i.e., prior to the instructions of the Government of India, dated 14.6.2006. Therefore, the authorities have to reconsider the matter in the light of the instructions issued I memo, dated 14.5.2006. The Tribunal on a careful consideration of the relevant material on record has rightly come to the conclusion that the persons appointment in the

year 2002 cannot be terminated from service. We find no error in the order of the Tribunal warranting interference by this Court in exercise of power of judicial review under Article 226 of the Constitution of India.

The writ petition fails and the same is accordingly dismissed, at the admission stage. No costs."

12. As is clear from the above factual matrix of the case that the issue revolves around the scope, interpretation and applicability of the office memorandums issued by the DoPT and other concerned authorities from time to time.

13. The Ministry of Personnel, Public Grievances and Pension, Government of India had issued a circular on 9th October, 1998 declaring its policy in the form of a Scheme for Compassionate appointment under the Central Government. This Scheme provided that the policy shall be applicable to the family members of a government servant who dies while in service including death by suicide or is retired on medical grounds, but subject to fulfilment of the conditions stated therein. It is not necessary for us to go into other clauses of this Scheme inasmuch as there is no dispute to other clauses except the clause relating to prescription of percentage in relation to direct recruitment for the purposes of compassionate appointment. It may be noticed that this Scheme of Compassionate Appointment can be applied only to the following;

(i) The post should be falling in Group 'C' and 'D' posts,

(ii) It should be in relation to direct recruitment as specified.

14. The Scheme provided for power of relaxation with the authorities in regard to age etc. Clause 7 of the Scheme is the relevant clause with which we are concerned. The same reads as under:-

"7. Determination/Availability of Vacancies

(a) Appointment on compassionate grounds should be made only on regular basis and that too only if regular vacancies meant for that purpose are available.

(b) Compassionate appointments can be made upto a maximum of 5% of vacancies falling under direct recruitment quota in any Group 'C' or 'D' post. The appointing authority may hold back upto 5% of vacancies in the aforesaid categories to be filled by direct recruitment through Staff Selection Commission or otherwise so as to fill such vacancies by appointment on compassionate grounds. A person selected for appointment on compassionate grounds should be adjusted in the recruitment roster against the appropriate category viz. SC/ST/OBC/General depending upon the category to which he belongs. For example, if he belongs to SC category he will be adjusted against the SC reservation point, if he is ST/OBC he will be adjusted against ST/OBC point and if he belongs to General category he will be adjusted against the vacancy point meant for General category.

(c) While the ceiling of 5% for making compassionate appointment against regular vacancies should not be circumvented by making appointment of dependent family member of Government servant on casual/daily wage/ad-hoc/contract basis against regular vacancies, there is no bar to considering him for such appointment if he is eligible as per the normal rules/orders governing such appointments.

(d) The ceiling of 5% of direct recruitment vacancies for making compassionate appointment should not be exceeded by (sic) any other vacancy e.g. sports quota vacancy.

(e) Employment under the scheme is not confined to the Ministry/Department/Office in which deceased/ medically retired Government servant had been working. Such an appointment can be given anywhere under the Government of India depending upon availability of a suitable vacancy meant for the purpose of compassionate appointment.

(f) If sufficient vacancies are not available in any particular office to accommodate the persons in the waiting list for compassionate appointment, it is open to the administrative Ministry/Department/ Office to take up the matter with other Ministries/ Departments/ Offices of the Government of India to provide at any early date appointment on compassionate grounds to those in the waiting list."

15. Before, we proceed to analyse the above clause as well as examine its impact in view of the amended OMs of the Government of India, we must notice that under clause 16(c) of this Scheme, it was specifically noticed that Scheme of Compassionate Appointment was conceived by the Government of India as far back as 1958. Since then, a number of welfare schemes have been introduced by the Government which has made a significant difference in the financial position of the families of the government servants dying in harness/ retired on medical grounds.

16. Clause 16(d) further provides that a compassionate appointment should not be denied or delayed merely on the ground that there is re-organisation in the office of the Ministry. The post should be made available to the person concerned if there is a vacancy meant for compassionate appointment and he or she is found eligible and suitable under the Scheme. Not only this, under clause 16(f), a compassionate appointment will have precedence on absorption of surplus employees and reorganisation of daily wage/casual worker with or without temporary status.

17. Reverting to clause 7 of the Scheme, it is stipulated under the Scheme that appointment on compassionate grounds should be made only on regular basis and that too if regular vacancies meant for that purpose are available. The compassionate appointments can be made upto a maximum of 5% of vacancies falling under direct recruitment quota in any group 'C' or 'D' post. The appointing authority may hold back upto 5% of the vacancies in the aforesaid categories to be filled by direct recruitment through Staff Selection Commission or otherwise so as to fill such vacancies by appointment on compassionate grounds.

18. Clause 7(f) needs to be emphasised as it contemplates that even if sufficient vacancies are not available in any particular office to accommodate the persons in the waiting list for compassionate appointment, it is open to the administrative Ministry/Department/Office to take up the matter with other Ministries/Departments/Offices of the Government of India to provide at an early date appointment on compassionate grounds to those in the waiting list.

19. The above clauses clearly show that the Scheme of 1998 for compassionate appointment is a welfare activity carried out by the Government of India. It is a benevolent act on the part of the State. Keeping in view the dire economic and social crisis to which the family of a deceased government employee in Class 'C' or 'D' is exposed, the government through this Scheme offers a helping hand. This is a voluntary act of generosity on the part of the State. The generosity once extended in the form of exercise of a subordinate legislative power by formulating the said Scheme, will have the force of law. It is enforceable to its limited extent and within its prescribed parameters. The purpose of the 1998 Scheme was to provide employment and preferably as part of the regular cadre subject to availability of vacancies. Then the Central Government issued Office Memorandum dated 16th May, 2001. This Memorandum did not refer to the circular of 1998 as such, however, the essence of this memorandum was that

while presenting the Budget for the year 2001-2002, the Finance Minister stated that "all requirements of recruitment will be scrutinized to ensure that fresh recruitment is limited to 1 per cent of total civil staff strength. As about 3 per cent of the staff retire every year, this will reduce the manpower by 2 per cent per annum achieving a deduction of 10 per cent in five years as announced by the Prime Minister." Under clause 2.2 of this Memorandum, it was further stated that while preparing the Annual Recruitment Plans, the concerned screening committees would ensure that direct recruitment does not in any case exceed 1 per cent of the sanctioned strength of the department and accordingly direct recruitment would be limited to 1/3rd of the direct recruitment vacancies arising in the year subject to further restriction that this will not exceed 1 per cent of the total sanctioned strength of the department.

20. In furtherance to this Memorandum, the Government of India, DoPT issued a clarification on the guidelines for compassionate appointment to Group 'C' and 'D' posts on 4th July, 2002. It clarified that 5 per cent quota for compassionate appointment is to be worked out with reference to DR vacancies in each recruitment year finally approved for filling up by the Screening Committee under the optimisation policy of the Government contained in Office Memorandum dated 16th May, 2001. In other words, this Memorandum merely reiterated the applicability of the Office Memorandum dated 16th May, 2001.

21. Finally on 14th June, 2006, 'Scheme for Compassionate Appointment under the Central Government Determination of Vacancies' was clarified. In this Office Memorandum, an attempt was made to clarify the optimisation of direct recruitment to civilian posts as contained in the Office Memorandum dated 16th May, 2001 to say that the recruitment does not exceed 1% of the total sanctioned strength of the department. It noticed that there had been a continuous reduction in the number of vacancies for direct recruitment, thus,

very few vacancies or, in fact, no vacancies were available for compassionate appointment. In light of this, the earlier instructions including the instructions dated 9th October, 1998 stood modified to the extent mentioned therein.

22. From the above Scheme and Office Memorandum, it is clear that where on the one hand, the State had formulated a welfare scheme for compassionate appointments, there on the other, because of limitations of its financial resources it decided to take economic measures by reducing the extent of appointment by direct recruitment from the financial year 2001-2002. Both these matters falling in the domain of the Government and being matters of policy, the Court is hardly called upon to comment upon either of them. These are the acts which fall in the domain of the State and do not call for any judicial interference. All that we propose to hold is that State has to abide by the Scheme it has floated for compassionate appointment. The 1998 Scheme floated by the Government should receive a liberal construction and application as it is stated to be a social welfare scheme and largely tilted in favour of the members of the family of the deceased employee. The purpose appears to be to provide them with recruitment on a regular basis rather than circumvent the same by adopting any other measure. That is the reason why the Government specifically states in its Scheme that efforts should be made to appoint the members of a distressed family to the post provided he/she satisfies the other parameters stated in the Scheme.

23. The appellant was admittedly appointed to the post, in furtherance to the 1998 Scheme, in the year 2002 (while other appellants were appointed during the period of 2001-2003). The instructions which specifically dealt with the compassionate appointments were issued by office memorandum dated 4th July, 2002. Neither the Memorandum dated 16th May, 2001 nor Memorandum dated 4th July, 2002 stated that the restrictions sought to be imposed were

applicable retrospectively or even retroactively. The rights of these persons had been settled, the respondent and others had been appointed to the posts and they had already worked in their respective posts before the notice of termination were issued to them at the end of year 2004. No data or material has been placed by the government before us even to support the contention that under the effect of the instructions of the year 1998, these persons were appointed in excess of the posts provided under the Scheme. Both these office memorandums were expected to operate prospectively and thus the rights which had been settled could not be re-settled. The stand of the appellant that it was a discrepancy or an error does not stand to any reason and must be rejected. It is also undisputed before us that the appointments of the respondent and others were made on the basis of the vacancies existing against the year 2000 when the instructions of 1998 were in operation, free of any restriction.

24. In the meanwhile and as already noticed, another office memorandum came to be issued on 14th June, 2006 amending the restrictions placed by the office memorandum dated 16th May, 2001. The memorandum of 14th June, 2006 in fact requires as to how the vacancies available for making direct recruitment are to be calculated. It is not even the case of the appellants before us that in face of the memorandums, this exercise in terms of this memorandum was ever undertaken by the appellants. It will be a contradictory stand, if on the one hand, the appellants are permitted to treat office memorandums including office memorandum dated 16th May, 2001 as retrospective while on the other they treat office memorandum dated 14th June, 2006 as prospectively. The High Court in the operative part of its judgment has clearly observed that the authorities have to reconsider the matter in the light of instructions issued in the memorandum dated 14th June, 2006. We are unable to find any error of jurisdiction or otherwise in the said finding returned by the High Court.

25. Despite the fact that the judgment of the Central Administrative Tribunal (for short "the Tribunal") has been upheld by the High Court, we are unable to contribute and sustain the view taken by the Tribunal that the Memorandum dated 16th May, 2001 frustrated the very object of the Scheme for Compassionate Appointment and on that ground alone, it was liable to be declared invalid. As already noticed, both the matters are policy matters of the State and for valid and proper reasons, without infringing the spirit of Article 14 and 16 of the Constitution. The State can frame its policy, where it is for economic reasons, least such decision would be open to judicial review to that extent. In the present case, there is some ambiguity created by issuance of office memorandums dated 16th May, 2001 and 14th June, 2006 and the enforcement of the former vide office memorandum dated 4th July, 2002 in relation to the implementation of Compassionate Appointment Scheme of 1998. Thus, it is not only desirable but necessary that the competent authority should issue comprehensive guidelines squarely covering the issue, but they cannot tamper with the existing rights of the appointees.

26. To contend that the existing status should not be disturbed by this Court, the learned counsel appearing for the respondent heavily relied upon the judgment of this Court in *Union of India and Others v. K.P. Tiwari* [(2003) 9 SCC 129], where the Court noticed in para 4 of the judgment that "it is unnecessary in this case to examine either questions of law or fact arising in the matter. Suffice to say that the respondent has been appointed now and has been in service for more than five years. We do not think, it would be appropriate to disturb that state of affairs by making any other order resulting in uprooting the respondent from his livelihood".

27. As is evident from this judgment, no law has been stated by the Court, however it was stated that in the facts of that case, it was not appropriate to disturb the appointment at that stage. We may usefully refer to another judgment of this

Court in the case of *Balbir Kaur and Anr. v. Steel Authority of India Ltd. and Others* etc. etc. [(2000) 6 SCC 493], where this Court held as under:-

> "19. Mr Bhasme further contended that family members of a large number of the employees have already availed of the Family Benefit Scheme and as such it would be taken to be otherwise more beneficial to the employee concerned. We are not called upon to assess the situation but the fact remains that having due regard to the constitutional philosophy to decry a compassionate employment opportunity would neither be fair nor reasonable. The concept of social justice is the yardstick to the justice administration system or the legal justice and as Roscoe Pound pointed out the greatest virtue of law is in its adaptability and flexibility and thus it would be otherwise an obligation for the law courts also to apply the law depending upon the situation since the law is made for the society and whatever is beneficial for the society, the endeavour of the law court would be to administer justice having due regard in that direction."

28. In the above case, the Court has placed emphasis upon the concept of socio-economic justice and granted relief to the appellant and, in addition, directed employment of one of the family members.

29. In view of the above settled position of law and the fact that the memorandums could not be given retrospective effect, we do not consider it appropriate to interfere with the judgment of the High Court. The spirit of the Scheme was to provide relief to the family members of the deceased persons and thus on the yardstick of social justice, such relief cannot be withdrawn on the ground of some alleged discrepancy which has not been supported by any data, is unreasonable and therefore, even unsustainable. The appellants must state appropriate reasons and provide the expected data on record if they expect the Court to come to a different conclusion. As already noticed, the

appellants have miserably failed to place any such data on the basis of the Memorandum dated 14th June, 2006.

30. For the reasons afore-stated, we dismiss all these appeals and further issue the following directions;

(A) The appointments of the respondents will not be interfered with by the appellants on the strength of the memorandum dated 4th July, 2002.

(B) The Office Memorandum dated 16th May, 2001, 14th June, 2006 and 4th July, 2002 have in relation to the 1998 Scheme for Compassionate Appointment caused some confusion on the one hand and while on the other they have prejudicially affected the rights of large number of heirs of the employees who died in harness. Thus, we direct the appellants to issue comprehensive, certain and unambiguous directions which shall put an end to such unnecessary controversies.

31. However, there shall be no orders as to costs.

R.P. Appeals dismissed.

PRIYA GUPTA AND ANR.

v.

ADDL. SECY. MINISTRY OF HEALTH AND FAMILY WELFARE AND ORS.

Suo Motu Contempt Petition Nos.195-196 of 2012

In

Civil Appeal Nos.4318 and 4319 of 2012

DECEMBER 13, 2012

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

Contempt of Courts Act, 1971:

s.12 – Apology tendered by contemnor – Consideration of – Held: Consideration of an apology as contemplated under Explanation to s.12(1) is not a panacea to avoid action in law universally – While considering the apology and its acceptance, the Court inter alia considers a) the conduct of the contemnor prior and subsequent to the tendering of apology – If the conduct is contemptuous, prejudicial and has harmed the system and other innocent persons as a whole, it would be a factor which would weigh against the contemnor; and b) the stage and time when such apology is tendered – An apology which is not bonafide and has been tendered to truncate the process of law with the ulterior motive of escaping the consequences of flagrant violation of orders of the Court and causes discernible disrespect to the course of administration of justice, cannot be permitted – The Court has to draw a balance between cases where tendering of an apology is sufficient, and cases where it is necessary to inflict punishment on the contemnor – Words and Phrases – "bonafide".

s.12 – Plea of contemnor that directions or guidelines issued by Supreme Court for general implementation cannot invite proceedings under the Act – Held: Not tenable –

Violation of general directions issued by Supreme Court would attract the rigours of the provisions of the Act – Law declared by Supreme Court whether in the form of a substantive judgment inter se a party or directions of a general nature intended to achieve constitutional goals of equality and equal opportunity must be adhered to and there cannot be an artificial distinction drawn in between such class of cases – Whichever class they may belong to, a contemnor cannot build an argument to the effect that the disobedience was of a general direction and not of a specific order issued inter se parties – Such distinction, if permitted, shall be opposed to the basic rule of law – Once the essentials for initiation of contempt proceedings are satisfied, the Court would initiate action uninfluenced by the nature of the directions i.e. as to whether the directions were specific in a lis pending between the parties or were of general nature or were in rem.

While disposing of the Civil Appeal No. 4318 of 2012 titled *Priya Gupta v. State of Chhatisgarh & Ors*., **this Court not only noticed breach of time schedule as well as various other irregularities that were committed by the various stakeholders, but also returned a finding as to failure of the performance of duties and obligations by the authorities in accordance with law as stated by this Court. The Court noticed that there was calculated tampering with the schedule specified under the regulations, and the judgments of the Court with a clear intention to grant admission to less meritorious candidates over candidates of higher merit and a case of favouritism and arbitrariness and thus the career of the students of higher merit was jeopardised by the abuse and manipulation of provided procedure. Consequently, direction was given for initiation of proceedings under the provisions of the Contempt of Courts Act, 1971 against the defaulting persons and for issuance of notice.**

On behalf of the contemnor Dr. S.L. Adile, it was pleaded that the Court may take a lenient view and discharge the notice of contempt against the contemnor in view of his unconditional, unqualified apology being tendered at the very first instance; that the apology tendered was bona fide and, thus, should be accepted by the Court; that Explanation to Section 12(1) places an obligation upon the Court to consider apology in a very objective manner and further provides that the Court shall not reject the same merely on the ground of it being qualified or conditional if it is made bonafidely. Without prejudice to the above and in the alternative, the contemnor raised contention that every contempt, whether initiated on application of a party or *suo motu* by the Court, has to be a result of wilful disobedience of the orders of the Court; that wilful disobedience must be proved as a matter of fact; that directions or guidelines issued by this Court for general implementation cannot invite proceedings under the Act, if they are not strictly adhered to; that such guidelines may not be within the knowledge of a party and, thus, their non-compliance may not necessarily be a wilful disobedience of the order of the Court bringing the case of a contemnor within the rigours of Section 12 of the Act and that Contempt proceedings can be initiated when an action is between the parties to a *lis* and not where the Court issues general directions.

Discharging the notice of contempt, the Court

HELD: 1.1. Tendering an apology is not a satisfactory way of resolving contempt proceedings. An apology tendered at the very initial stage of the proceedings being bona fide and preferably unconditional would normally persuade the Court to accept such apology, if this would not leave a serious scar on the dignity/authority of the

Court and interfere with the administration of justice under the orders of the Court. [Para 5] [832-D]

1.2. 'Bona fide' is an expression which has to be examined in the context of a given case. It cannot be understood in the abstract. The attendant circumstances, behaviour of the contemnor and the remorse or regret on his part are some of the relevant considerations which would weigh with the Court in deciding such an issue. Where, persistently, a person has attempted to over-reach the process of Court and has persisted with the illegal act done in wilful violation to the orders of the Court, it will be difficult for the Court to accept unconditional apology even if it is made at the threshold of the proceedings. [Para 6] [832-E-G]

1.3. The facts which will weigh with the Court while considering acceptance of an apology are the contemptuous conduct, the extent to which the order of the Court has been violated, irresponsible acts on the part of the contemnor and the degree of interference in the administration of justice, which thereby cause prejudice to other parties. An apology tendered, even at the outset, has to be bona fide and should be demonstrative of repentance and sincere regret on the part of the contemnor, lest the administration of justice be crudely interfered with by a person with impunity. The basic ingredients of the rule of law have to be enforced, whatever be the consequence and all persons are under a fundamental duty to maintain the rule of law. An apology which is not bonafide and has been tendered to truncate the process of law with the ulterior motive of escaping the consequences of such flagrant violation of orders of the Court and causes discernible disrespect to the course of administration of justice, cannot be permitted. The Court has to draw a balance between cases where tendering of an apology is sufficient, and

cases where it is necessary to inflict punishment on the contemnor. An attempt to circumvent the orders of the Court is derogatory to the very dignity of the Court and administration of justice. A person who attempts to salvage himself by showing ignorance of the Court's order, of which he quite clearly had the knowledge, would again be an attempt on his part to circumvent the process of law. Tendering a justification would be inconsistent with the concept of an apology. An apology which is neither sincere nor satisfactory and is not made at the appropriate stage may not provide sufficient grounds to the Court for the acceptance of the same. It is also an accepted principle that one who commits intentional violations must also be aware of the consequences of the same. One who tenders an unqualified apology would normally not render justification for the contemptuous conduct. In any case, tendering of an apology is a weapon of defence to purge the guilt of offence by contemnor. It is not intended to operate as a universal panacea to frustrate the action in law, as the fundamental principle is that rule of law and dignity of the Court must prevail. [Para 7] [833-A-H; 834-A]

1.4. Consideration of an apology as contemplated under explanation to Section12(1) of the Act is not a panacea to avoid action in law universally. While considering the apology and its acceptance, the Court inter alia considers a) the conduct of the contemnor prior and subsequent to the tendering of apology. If the conduct is contemptuous, prejudicial and has harmed the system and other innocent persons as a whole, it would be a factor which would weigh against the contemnors; and b) the stage and time when such apology is tendered. [Para 11] [836-D-F]

Re: Sanjeev Datta & Ors. **(1995) 3 SCC 619: 1995 (3) SCR 450;** *All Bengal Excise Licensees' Association v. Raghabendra Singh & Ors.* **(2007) 11 SCC 374: 2007 (3)**

SCR 816; Ref. *East India Commercial Companies Ltd. v. Collector of Customs* **AIR 1962 SC 1893: 1963 SCR 338 and** *Official Liquidator v. Dayanand & Ors* **(2008) 10 SCC 1: 2008 (15) SCR 331 – referred to.**

2.1. It is true that Section 12 of the Act contemplates disobedience of the orders of the Court to be wilful and further that such violation has to be of a specific order or direction of the Court. The contention that there cannot be an initiation of contempt proceedings where directions are of a general nature as it would not only be impracticable, but even impossible to regulate such orders of the Court, is not acceptable. With the development of law, the Courts have issued directions and even spelt out in their judgments, certain guidelines, which are to be operative till proper legislations are enacted. The directions of the Court which are to provide transparency in action and adherence to basic law and fair play must be enforced and obeyed by all concerned. The law declared by this Court whether in the form of a substantive judgment inter se a party or are directions of a general nature which are intended to achieve the constitutional goals of equality and equal opportunity must be adhered to and there cannot be an artificial distinction drawn in between such class of cases. Whichever class they may belong to, a contemnor cannot build an argument to the effect that the disobedience is of a general direction and not of a specific order issued *inter se* parties. Such distinction, if permitted, shall be opposed to the basic rule of law. [Para 16] [838-D-H; 839-A-B]

2.2. The directions which have been issued in the cases referred to in the main judgment clearly provide for admission to medical courses in order of merit, for the process of admission to be transparent and fair, and that there must be strict adherence to the time schedule specified in the judgments. The purpose of this is to ensure that arbitrariness and discrimination do not creep

into this process, and equal opportunity is ensured to the eligible candidates applying to the medical courses in a just and fair manner. These directions are intended to serve a greater public purpose and are expected to be within the knowledge of all concerned persons besides the fact that the law declared by this Court is deemed to be known to all concerned. The violation of general directions issued by this Court would attract the rigours of the provisions of the Act. Whether for such violation or non-compliance, the Court would punish a person or persons, would always depend upon the facts and circumstances of a given case. It is not possible to provide any straight jacket formula that is universally applicable to all cases. [Paras 17, 18] [839-C-F]

2.3. The provisions of the Act do not admit any discretion for the initiation of proceedings under the Act with reference to an order being of general directions or a specific order *inter se* the parties. The *sine qua non* to initiation of proceedings under the Act is an order or judgment or direction of a Court and its wilful disobedience. Once these ingredients are satisfied, the machinery under the Act can be invoked by a party or even by the Court *suo motu*. The power to punish for contempt is inherent in the very nature and purpose of the Court of justice. In our country, such power is codified. It serves at once a dual purpose, namely, as an aid to protect the dignity and authority of the Court and also in aiding the enforcement of civil remedies. Once the essentials for initiation of contempt proceedings are satisfied, the Court would initiate an action uninfluenced by the nature of the direction i.e. as to whether these directions were specific in a *lis* pending between the parties or were of general nature or were *in rem.* [Para 20] [840-C-D, F-H; 841-A]

2.4. Contempt proceedings are intended to ensure

compliance of the orders of the Court and adherence to the rule of law. The directions are binding and must be obeyed by the parties and all concerned *stricto sensu*. In fact, the directions of the present kind are to be placed at a higher pedestal as compared to cases where the matter is *inter se* between two parties to the *lis* as they are intended to attain a greater purpose and ensure adherence to rule of law in a particular process which otherwise would be arbitrary and violative of constitutional mandate. [Para 23] [842-C-D]

Mohd Aslam v. Union of India **(1994) 6 SCC 442: 1994 (5) Suppl. SCR 104; Re.** *M.P. Dwivedi & Ors.* **(1996) 4 SCC 152: 1996 (1) SCR 347;** *Prem Shankar Shukla v. Delhi Adminsitration* **(1980) 3 SCC 526: 1980 (3) SCR 855;** *Packraft (India) Pvt. Ltd. through its Director V.S. Mann v. U.P.F.C. through its M.D. R.M. Sethi and Others* **(1996) 1 SCC 304: 1995 (5) Suppl. SCR 179 and** *Asha Sharma v. Pt B.D. Sharma University of Health Sciences* **(2012) 7 SCC 389 – referred to.**

3.1. In the case at hand, if one examines the conduct of the contemnor Dr. S.L. Adile, he is a person who cannot plead ignorance to the directions of this Court inasmuch as he was the officiating Director and responsible for making admissions not only to the college in question, but to all the medical colleges in the State of Chhattisgarh. It was expected of him to conduct the admissions strictly on merit, transparently and in adherence to the schedule and directions contained in the judgments of this Court. He attempted to violate the same with impunity. He manipulated the entire process of admission and directed his subordinates to manage admissions of appellants, including his daughter, and on the other hand misguided the Ministry of Health, Government of India. There was flagrant violation of the orders of the Court which has proved prejudicial not only to the system of admission, but even to the deserving

students who in the order of merit were entitled to get those seats. The tendering of apology by him, though at the initial stage of the hearings, cannot be accepted by the Court inasmuch as violation of the orders of the Court is wilful, intentional, and prejudicial. Such conduct, not only has the adverse effect on the process of admissions and disturbs the faith of people in the administration of justice, but also lowers the dignity of the Court by unambiguously conveying that orders of this Court, its directions and prescribed procedure can be manipulated or circumvented so as to frustrate the very object of such orders and directions, thereby undermining the dignity of the Court.Thus, it is not a case where the Court should extend mercy of discharging the accused by acceptance of apology, as it would amount to encouraging similar behaviour. The contemnor, Dr. S.L. Adile (Director, Medical Education) wilfully violated the directions of this Court and has manipulated the process of selection laid down by this Court so as to gain personal advantage for admission of his daughter and the other appellant thereby causing serious prejudice to other candidates of higher merit. He is guilty of the offence of civil contempt in terms of Section 12 of the Act, and directed to pay Rs.2,000/- as fine. [Paras 12, 13 and 24] [836-F-H; 837-A-B, C-E; 843-E-G]

3.2. Four other contemnors- the three former Assistant Professors, Amrita Banerjee, Dr. Sanjivani Wanjari, Dr. P.D. Agrawal and one former Demonstrator Mr. Padmakar Sasane, also violated the orders of the Court and circumvented the process of selection and defeated the very object of the directions issued by this Court. They lowered the dignity and authority of the Court and, thus, are liable to be punished for violating the orders of this Court. Consequently, they are also punished and directed to pay a fine of Rs.2,000/-. [Para 28] [847-A-C]

3.3. The remaining two contemnors– namely Special Secretary in the Ministry of Health and Family Welfare and the Director General, Health Services, Ministry of Health and Family Welfare, Government of India were not directly responsible for violating any order or direction of the Court. However, there was apparent lack of proper supervision and enforcement of the directions issued by this Court on the part of these contemnors. The ends of justice would be met by issuing a warning to both these contemnors and not to punish them with fine or imprisonment. They should be more careful in discharge of their functions and duties in accordance with the judgment of this Court and are further directed to ensure circulation of this judgment as well as the judgment of *Priya Gupta's* case to all the Directors, Health Services of the respective States, Deans of the Universities holding the selection/examination or admission process for MBBS/ BDS courses as well as to the Dean of all the colleges. [Paras 29, 31 and 32] [847-C-D; 848-G-H; 849-A-B]

D.P. Gupta v. Parsuram Tiwari **(2004) 13 SCC 746 – distinguished.**

Case Law Reference:

1995 (3) SCR 450	**referred to**	**Para 8**
2007 (3) SCR 816	**referred to**	**Para 8**
1963 SCR 338	**referred to**	**Para 9**
2008 (15) SCR 331	**referred to**	**Para 9**
1994 (5) Suppl. SCR 104	**referred to**	**Para 19**
1996 (1) SCR 347	**referred to**	**Para 21**
1980 (3) SCR 855	**referred to**	**Para 21**
1995 (5) Suppl. SCR 179	**referred to**	**Para 22**

(2012) 7 SCC 389	**referred to**	**Para 23**
(2004) 13 SCC 746	**distinguished**	**Paras 25,26, 27**

CIVIL APPELLATE JURISDICTION : Sou Motu Conmt. Pet. (C) Nos. 195-196 of 2012.

IN

Civil Appeal Nos. 4318 & 4319 of 2012.

By Court Motion (for petitoner).

Mukul Rohtagi, Sanjeeb Panigrahi, Siddhartha Chowdhury, L. Nidhiram Sharma, Subash Acharya, Purushotham Sharma Tripathy, Filza Moonia, Ravi Chandra Prakash, Mukesh Kumar Singh, Atul Jha, Sandeep Jha, Dharmendra Kumar Sinha, D.L. Chidananda, Sunil Roy, Sushma Suri for the appearing parties.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. While disposing of the Civil Appeal No. 4318 of 2012 titled *Priya Gupta v. State of Chhatisgarh & Ors*., the Court not only noticed breach of time schedule as well as various other irregularities that were committed by the various stakeholders, but also returned a finding as to failure of the performance of duties and obligations by the authorities in accordance with law as stated by this Court. The Court noticed that the case in hand was a clear example of calculated tampering with the schedule specified under the regulations, and the judgments of the Court with a clear intention to grant admission to less meritorious candidates over candidates of higher merit. To put it simply, it was a case of favouritism and arbitrariness. The case in hand also demonstrates how either way the career of the students of higher merit has been jeopardised by the abuse and manipulation of provided procedure. While directing initiation

of proceedings under the provisions of the Contempt of Courts Act, 1971 (for short "the Act") held as under:-

> 4. "We have categorically returned a finding that all the relevant stakeholders have failed to perform their duty/obligation in accordance with law. Where the time schedules have not been complied with, and rule of merit has been defeated, there nepotism and manipulation have prevailed. The stands of various authorities are at variance with each other and none admits to fault. Thus, it is imperative for this Court to ensure proper implementation of judgments of this Court and the regulations of the Medical Council of India as well as not to overlook the arbitrary and colourable exercise of power by the concerned authorities/colleges.
>
> 5. Therefore, we hereby direct initiation of proceedings against the following under the provisions of the Contempt of Courts Act, 1971. Let notice be issued to the following, to show cause why they be not punished in accordance with law.
>
> a. Additional Secretary, Ministry of Health & Family Welfare, Union of India.
>
> b. Dr. S.L. Adile, Director, Medical Education.
>
> c. Dean of the Jagdalpur College.
>
> d. Dr. M.S. Banjan, Member of the Selection Committee.
>
> e. Dr. P.D. Agarwal, Member of the Selection Committee.
>
> f. Shri Padmakar Sasane, Member of the Selection Committee.
>
> g. Director General, Directorate of Health Services, Union of India.
>
> 5. Notice be issued returnable in two weeks, on which day the matter shall be listed before this Court. Registry shall maintain separate file for that purpose.
>
> 6. All concerned authorities are hereby directed to carry out the directions and orders contained in this judgment, particularly paragraphs 30 and 31 of the judgment forthwith. The directions shall be applicable for the academic year 2012-2013 itself.
>
> 54. A copy of this judgment shall be sent to all concerned authorities, forthwith, for strict compliance and adherence, without demur and default.
>
> 55. Both the appeals are disposed of with the above directions."

2. In furtherance to the judgment dated 8th May, 2012, the Court initiated proceedings against the above defaulting persons under the Act and directed issuance of notice. Upon appearance, time was prayed for on behalf of the contemnors to file their reply affidavits and after they were filed, the contemnors were heard at some length by the Court. The stand taken by the respective contemnors is distinct and independent. However, the stand of contemnors "C" to "F" is somewhat common, therefore, it would be appropriate for the Court to deal with the case of these contemnors together. The case of contemnors 'A' and 'G' is to be considered together and finally that of contemnor 'B' will be dealt with separately. First and foremost, we would deal with the case of Dr. S.L. Adile, whose daughter Akansha Adile is the direct beneficiary of this entire process. In the affidavit filed by Dr. Adile, it has been averred that he was working as a Professor of Ophthalmology in the Medical College, Raipur till 1st August, 2006 and Dean

thereafter in the same college. The Director of Medical Education, Chhatisgarh (Dr. Bhola) retired on 31st August, 2006 and being the senior, Dr. Adile was asked to relieve Dr. Bhola, on 8th September, 2006 temporarily. This is how he came to be appointed as the Director of Medical Education. The findings recorded in the order against him which includes violation of schedule, moulding the process of selection to select his daughter and actually providing her a seat in the Medical College, Raipur has not been disputed. However, it is stated that he tenders an unconditional apology to the Court for all the acts of omission and commission mentioned in the order dated 8th May, 2012. He prays for the mercy of the Court on the ground that he was under suspension for last two years i.e. since 23rd July, 2010 and has suffered already. His daughter was also asked to pay Rs. 5 lakhs, if she was to continue her course in terms of the order dated 8th May, 2012, and therefore, he prays for discharge.

3. Mr. Mukul Rohtagi, the learned senior counsel appearing for Dr. S.L. Adile argued in principle that the Court may take a lenient view and discharge the notice of contempt against the contemnor in view of his unconditional, unqualified apology being tendered at the very first instance. The apology tendered is bona fide and, thus, should be accepted by the Court. Explanation to Section 12(1) places an obligation upon the Court to consider apology in a very objective manner and further provides that the Court shall not reject the same merely on the ground of it being qualified or conditional if it is made bonafidely. It is also to be noticed that the Secretary, Ministry of Health has specifically disputed that the letter dated 8th August, 2006 was not issued by the Ministry and is a manipulated one. This is the letter that has been relied upon by Dr. Adile. Of course, subsequently the said stand was given up by him

4. Without prejudice to the above and in the alternative, the contention raised is that every contempt, whether initiated on

application of a party or *suo motu* by the Court, has to be a result of wilful disobedience of the orders of the Court. Wilful disobedience must be proved as a matter of fact. The directions or guidelines issued by this Court for general implementation cannot invite proceedings under the Act, if they are not strictly adhered to. Such guidelines may not be within the knowledge of a party and, thus, their non-compliance may not necessarily be a wilful disobedience of the order of the Court bringing the case of a contemnor within the rigours of Section 12 of the Act. Contempt proceedings can be initiated when an action is between the parties to a *lis* and not where the Court issues general directions.

5. Tendering an apology is not a satisfactory way of resolving contempt proceedings. An apology tendered at the very initial stage of the proceedings being bona fide and preferably unconditional would normally persuade the Court to accept such apology, if this would not leave a serious scar on the dignity/authority of the Court and interfere with the administration of justice under the orders of the Court.

6. 'Bona fide' is an expression which has to be examined in the context of a given case. It cannot be understood in the abstract. The attendant circumstances, behaviour of the contemnor and the remorse or regret on his part are some of the relevant considerations which would weigh with the Court in deciding such an issue. Where, persistently, a person has attempted to over-reach the process of Court and has persisted with the illegal act done in wilful violation to the orders of the Court, it will be difficult for the Court to accept unconditional apology even if it is made at the threshold of the proceedings. It is not necessary for us to examine in any greater detail the factual matrix of the case since the disobedience, manipulation of procedure and violation of the schedule prescribed under the orders of the Court is an admitted position. All that we have to examine is whether the apology tendered is *bona fide* when examined in light of the attendant circumstances and whether it will be in the interest of justice to accept the same.

7. The facts which will weigh with the Court while considering acceptance of an apology are the contemptuous conduct, the extent to which the order of the Court has been violated, irresponsible acts on the part of the contemnor and the degree of interference in the administration of justice, which thereby cause prejudice to other parties. An apology tendered, even at the outset, has to be bona fide and should be demonstrative of repentance and sincere regret on the part of the contemnor, lest the administration of justice be crudely interfered with by a person with impunity. The basic ingredients of the rule of law have to be enforced, whatever be the consequence and all persons are under a fundamental duty to maintain the rule of law. An apology which is not bonafide and has been tendered to truncate the process of law with the ulterior motive of escaping the consequences of such flagrant violation of orders of the Court and causes discernible disrespect to the course of administration of justice, cannot be permitted. The Court has to draw a balance between cases where tendering of an apology is sufficient, and cases where it is necessary to inflict punishment on the contemnor. An attempt to circumvent the orders of the Court is derogatory to the very dignity of the Court and administration of justice. A person who attempts to salvage himself by showing ignorance of the Court's order, of which he quite clearly had the knowledge, would again be an attempt on his part to circumvent the process of law. Tendering a justification would be inconsistent with the concept of an apology. An apology which is neither sincere nor satisfactory and is not made at the appropriate stage may not provide sufficient grounds to the Court for the acceptance of the same. It is also an accepted principle that one who commits intentional violations must also be aware of the consequences of the same. One who tenders an unqualified apology would normally not render justification for the contemptuous conduct. In any case, tendering of an apology is a weapon of defence to purge the guilt of offence by contemnor. It is not intended to operate as a universal panacea to frustrate the action in law, as the

fundamental principle is that rule of law and dignity of the Court must prevail.

8. In the case of *In Re Sanjeev Datta & Ors.* [(1995) 3 SCC 619], this Court while declining to accept an apology tendered by the contemnor observed that any conduct that is designed to or is suggestive of challenging the crucial balance of power devised by the Constitution, is an attempt to subvert the rule of law and is an invitation to anarchy. The institution entrusted with the task of interpreting and administering the law is the judiciary, whose view on the subject is made legally final and binding on all till it is changed by a higher Court or by permissible legislative measures. Under a constitutional government, such final authority has to vest in some institution otherwise there will be a chaos. With these observations, the Court declined to accept the apology where statements had been made with a malicious attempt to cast aspersions and attribute motives to the Court and the same were made knowingly by the contemnor. At this stage, we may also notice another judgment of this Court in the case of *All Bengal Excise Licensees' Association v. Raghabendra Singh & Ors.* [(2007) 11 SCC 374], where the Court while declining to accept an apology, punished the contemnors for disobeying the orders of the Court. The Court noticed that the respondents were senior officers and were expected to know that under the constitutional scheme of the country, the orders of the Court have to be obeyed implicitly and that orders of this Court and of any Court cannot be trifled with. The Court returned a finding that the officers had acted deliberately to subvert the orders of the High Court evidently and observed :-

> "41. All Respondents 1-4 are senior and experienced officers and must be presumed to know that under the constitutional scheme of this country orders of the High Court have to be obeyed implicitly and that orders of this Court—for that matter any court should not be trifled with. We have already found hereinabove that they have acted

deliberately to subvert the orders of the High Court evidently. It is equally necessary to erase an impression which appears to be gaining ground that the mantra of unconditional apology is a complete answer to violations and infractions of the orders of the High Court or of this Court. We, therefore, hold them guilty of contempt of court and do hereby censure their conduct. Though a copy of this order could be sent which shall form part of the annual confidential record of service of each of the said officers, we refrain from doing so by taking a lenient view of the matter considering the future prospects of the officers. As already stated, the officers shall not indulge in any adventurous act and strictly obey the orders passed by the courts of law. The civil appeal stands allowed. Though this is a fit case for awarding exemplary costs, again taking a lenient view, we say no costs."

9. The government departments are no exception to the consequences of wilful disobedience of the orders of the Court. Violation of the orders of the Court would be its disobedience and would invite action in accordance with law. The orders passed by this Court are the law of the land in terms of Article 141 of the Constitution of India. No Court or Tribunal and for that matter any other authority can ignore the law stated by this Court. Such obedience would also be conducive to their smooth working, otherwise there would be confusion in the administration of law and the respect for law would irretrievably suffer. There can be no hesitation in holding that the law declared by the higher court in the State is binding on authorities and tribunals under its superintendence and they cannot ignore it. This Court also expressed the view that it had become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have a grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty are important hallmarks of judicial jurisprudence developed in this country, as discipline is *sine qua non* for

effective and efficient functioning of the judicial system. If the Courts command others to act in accordance with the provisions of the Constitution and to abide by the rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law. [Ref. *East India Commercial Companies Ltd. v. Collector of Customs* [AIR 1962 SC 1893] and *Official Liquidator v. Dayanand & Ors* [(2008) 10 SCC 1].

10. These very principles have to be strictly adhered to by the executive and instrumentalities of the State. It is expected that none of these institutions should fall out of line with the requirements of the standard of discipline in order to maintain the dignity of institution and ensure proper administration of justice.

11. From the above principle, it is clear that consideration of an apology as contemplated under explanation to Section12(1) of the Act is not a panacea to avoid action in law universally. While considering the apology and its acceptance, the Court inter alia considers a) the conduct of the contemnor prior and subsequent to the tendering of apology. If the conduct is contemptuous, prejudicial and has harmed the system and other innocent persons as a whole, it would be a factor which would weigh against the contemnors; and b) the stage and time when such apology is tendered.

12. In light of the above principles, if one examines the conduct of Dr. S.L. Adile, he is a person who cannot plead ignorance to the directions of this Court inasmuch as he was the officiating Director and responsible for making admissions not only to the college in question, but to all the medical colleges in the State of Chhattisgarh. It was expected of him to conduct the admissions strictly on merit, transparently and in adherence to the schedule and directions contained in the judgments of this Court. He attempted to violate the same with impunity. He manipulated the entire process of admission and directed his subordinates to manage admissions of appellants,

including his daughter, and on the other hand misguided the Ministry of Health, Government of India. There was flagrant violation of the orders of the Court which has proved prejudicial not only to the system of admission, but even to the deserving students who in the order of merit were entitled to get those seats. No advertisement was effected. There is nothing on record to show that any other candidate had been informed of the date of admission. At the eleventh hour on 30th September, 2006, the last date for admission, very cleverly admission of the two appellants was managed by him.

13. As already noticed, the violations are admitted on the part of this contemnor. The tendering of apology by him, though at the initial stage of the hearings, cannot be accepted by the Court inasmuch as violation of the orders of the Court is wilful, intentional, and prejudicial. Such conduct, not only has the adverse effect on the process of admissions and disturbs the faith of people in the administration of justice, but also lowers the dignity of the Court by unambiguously conveying that orders of this Court, its directions and prescribed procedure can be manipulated or circumvented so as to frustrate the very object of such orders and directions, thereby undermining the dignity of the Court. Administration of justice is a matter which cannot be ignored by the Court and the acceptance of apology tendered by the contemnor would amount to establishing a principle that such serious violations would not entail any consequences in law. This would, thus encourage repetition of such offences, rather than discouraging or preventing others from committing offences of similar nature as it would have no preventive or deterrent effect on persons for committing such offences in future. Thus, it is not a case where the Court should extend mercy of discharging the accused by acceptance of apology, as it would amount to encouraging similar behaviour.

14. The contemnor, Dr. Adile, while heavily relying upon the factum of his having been placed under suspension by the disciplinary authority as well as the direction to his daughter to

pay Rs.5 lacs for continuing with the medical course to which she was admitted, has argued that the Court should take a lenient view and accept the apology. We are of the view that such a contention cannot be of much advantage to the contemnor. These are not the relevant factors for acceptance of an apology, however, they may be of some consideration while imposing the punishment.

15. Now, we shall proceed to discuss the legal issues raised on behalf of the contemnor that in such cases, the proceedings under the Act cannot be taken recourse to.

16. It is true that Section 12 of the Act contemplates disobedience of the orders of the Court to be wilful and further that such violation has to be of a specific order or direction of the Court. To contend that there cannot be an initiation of contempt proceedings where directions are of a general nature as it would not only be impracticable, but even impossible to regulate such orders of the Court, is an argument which does not impress the Court. As already noticed, the Constitution has placed upon the judiciary, the responsibility to interpret the law and ensure proper administration of justice. In carrying out these constitutional functions, the Courts have to ensure that dignity of the Court, process of Court and respect for administration of justice is maintained. Violations which are likely to impinge upon the faith of the public in administration of justice and the Court system must be punished, to prevent repetition of such behaviour and the adverse impact on public faith. With the development of law, the Courts have issued directions and even spelt out in their judgments, certain guidelines, which are to be operative till proper legislations are enacted. The directions of the Court which are to provide transparency in action and adherence to basic law and fair play must be enforced and obeyed by all concerned. The law declared by this Court whether in the form of a substantive judgment inter se a party or are directions of a general nature which are intended to achieve the constitutional goals of equality

and equal opportunity must be adhered to and there cannot be an artificial distinction drawn in between such class of cases. Whichever class they may belong to, a contemnor cannot build an argument to the effect that the disobedience is of a general direction and not of a specific order issued *inter se* parties. Such distinction, if permitted, shall be opposed to the basic rule of law.

17. The directions which have been issued in the cases referred to in the main judgment clearly provide for admission to medical courses in order of merit, for the process of admission to be transparent and fair, and that there must be strict adherence to the time schedule specified in the judgments. The purpose of this is to ensure that arbitrariness and discrimination do not creep into this process, and equal opportunity is ensured to the eligible candidates applying to the medical courses in a just and fair manner.

18. These directions are intended to serve a greater public purpose and are expected to be within the knowledge of all concerned persons besides the fact that the law declared by this Court is deemed to be known to all concerned. The violation of general directions issued by this Court would attract the rigours of the provisions of the Act. Whether for such violation or non-compliance, the Court would punish a person or persons, would always depend upon the facts and circumstances of a given case. It is not possible to provide any straight jacket formula that is universally applicable to all cases. All that we have to examine is whether the apology tendered is *bona fide*, when examined in light of the attendant circumstances and that it will be in the interest of justice to accept the same.

19. This Court in the case of *Mohd Aslam v. Union of India* [(1994) 6 SCC 442] observed that when we speak of the rule of law as a characteristic of our country, no man is above the law but that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to jurisdiction of the ordinary tribunals. Respect for law and its

institutions is the only assurance that can hold a pluralist nation together. One should ensure respect for law as its breach will demolish public faith in accepted constitutional institutions and weaken the peoples' confidence in the rule of law. It will destroy respect for the rule of law and the authority of Courts and will thus seek to place individual authority and strength of principles above the wisdom of law.

20. The provisions of the Act do not admit any discretion for the initiation of proceedings under the Act with reference to an order being of general directions or a specific order *inter se* the parties. The *sine qua non* to initiation of proceedings under the Act is an order or judgment or direction of a Court and its wilful disobedience. Once these ingredients are satisfied, the machinery under the Act can be invoked by a party or even by the Court *suo motu*. If the contention raised on behalf of the contemnor is accepted, it will have inevitable consequences of hurting the very rule of law and, thus, the constitutional ethos. The essence of contempt jurisprudence is to ensure obedience of orders of the Court and, thus, to maintain the rule of law. History tells us how a State is protected by its Courts and an independent judiciary is the cardinal pillar of the progress of a stable government. If over-enthusiastic executive attempts to belittle the importance of the Court and its judgments and orders, and also lowers down its prestige and confidence before the people, then greater is the necessity for taking recourse to such power in the interest and safety of the public at large. The power to punish for contempt is inherent in the very nature and purpose of the Court of justice. In our country, such power is codified. It serves at once a dual purpose, namely, as an aid to protect the dignity and authority of the Court and also in aiding the enforcement of civil remedies. Looked at from a wider perspective, contempt power is also a means for ensuring participation in the judicial process and observance of rules by such participants. Once the essentials for initiation of contempt proceedings are satisfied, the Court would initiate an action uninfluenced by the

nature of the direction i.e. as to whether these directions were specific in a *lis* pending between the parties or were of general nature or were *in rem.*

21. The reliance by the contemnor upon the judgment of In Re. *M.P. Dwivedi & Ors.* [(1996) 4 SCC 152], does not further the cause of the contemnor. On the contrary, it supports the view that we are taking. In this case, despite the judgment of this Court, the accused persons were handcuffed and brought in the court of learned Magistrate who was a young judicial officer. Upon initiation of contempt proceedings, it was contended that the officer was not aware of the directions issued by this Court. Rejecting the plea of ignorance of law, the Court returned a clear finding that there was default on the part of the contemnor and disapproval of such conduct was ordered to be placed on their personal files. However, the Court did not punish them primarily on the ground that they were young judicial officers and had ignored the order of the Court. The directions of this Court in the case of *Prem Shankar Shukla v. Delhi Adminsitration* [(1980) 3 SCC 526] issuing guidelines prohibiting such handcuffing itself were, in that sense, of a general nature and this Court clearly held that they were required to be obeyed without exception.

22. Equally, the contemnor cannot draw any advantage from the judgment of this Court in the case of *Packraft (India) Pvt. Ltd. through its Director V.S. Mann v. U.P.F.C. through its M.D. R.M. Sethi and Others* [(1996) 1 SCC 304] as that was a judgment on its own facts and the Court did not state any absolute proposition of law. We may notice that in that case, the applicant had participated in the sale of the property which was alleged to have been sold contrary to the guidelines issued by the Court and had not taken any steps during that period. Since, such steps could be corrected by adopting the procedure of judicial review, the Court did not initiate the contempt proceedings. The law is well settled that mere availability of another legal proceeding does not debar

invocation of the provisions of the Contempt of Courts Act. Even where execution petitions are filed or an order of injunction is issued and if during the course of the proceedings, the act or conduct of a non-applicant may be such which would invite the proceedings under the Act then such proceedings would not be debarred.

23. As already noticed, contempt proceedings are intended to ensure compliance of the orders of the Court and adherence to the rule of law. The directions are binding and must be obeyed by the parties and all concerned *stricto sensu*. In fact, the directions of the present kind are to be placed at a higher pedestal as compared to cases where the matter is *inter se* between two parties to the *lis* as they are intended to attain a greater purpose and ensure adherence to rule of law in a particular process which otherwise would be arbitrary and violative of constitutional mandate. In the case of *Asha Sharma v. Pt B.D. Sharma University of Health Sciences* [(2012) 7 SCC 389], this Court held as under :

> "25. Strict adherence to the time schedule has again been a matter of controversy before the courts. The courts have consistently taken the view that the schedule is sacrosanct like the rule of merit and all the stakeholders including the authorities concerned should adhere to it and should in no circumstances permit its violation. This, in our opinion, gives rise to dual problem. Firstly, it jeopardises the interest and future of the students. Secondly, which is more serious, is that such action would be ex facie in violation of the orders of the court, and therefore, would invite wrath of the courts under the provisions of the Contempt of Courts Act, 1971. In this regard, we may appropriately refer to the judgments of this Court in *Priya Gupta*, *State of Bihar v. Sanjay Kumar Sinha*, *Medical Council of India v. Madhu Singh*, *GSF Medical and Paramedical Assn. v. Assn. of Self Financing Technical Institutes* and *Christian Medical College v. State of Punjab*.

26. The judgments of this Court constitute the law of the land in terms of Article 141 of the Constitution and the regulations framed by the Medical Council of India are statutorily having the force of law and are binding on all the parties concerned. Various aspects of the admission process as of now are covered either by the respective notifications issued by the State Governments, prospectus issued by the colleges and, in any case, by the regulations framed by the Medical Council of India. There is no reason why every act of the authorities be not done as per the procedure prescribed under the Rules and why due records thereof be not maintained. This proposition of law or this issue is no more res integra and has been firmly stated by this Court in its various judgments which may usefully be referred at this stage. (Ref.: *State of M.P. v. Gopal D. Tirthani*, *State of Punjab v. Dayanand Medical College & Hospital*, *Bharati Vidyapeeth v. State of Maharashtra, Chowdhury Navin Hemabhai v. State of Gujarat* and *Harish Verma v. Ajay Srivastava*.)"

24. In view of the above established principle, we have no hesitation in rejecting even the other contention raised on behalf of the contemnor. Having dealt with both the contentions raised on behalf of the contemnor, we conclude that the contemnor, Dr. S.L. Adile, has wilfully violated the directions of this Court and has manipulated the process of selection laid down by this Court so as to gain personal advantage for admission of his daughter and the other appellant thereby causing serious prejudice to other candidates of higher merit. Having held him guilty of the offence of civil contempt in terms of Section 12 of the Act, we refrain from awarding him civil imprisonment for the reasons aforenoticed and award him a penalty of Rs.2,000/- as fine.

Contemnors (C) to (F) : Ms. Amrita Banerjee Mitra, former Assistant Prof. Physiology, Medical College Jagdalpur. Chhattisgarh; Dr. Sanjivani Wanjari, former Associate Prof. Obstetrics and Gynaecology, Medical

College Jagdalpur, Chhattisgarh; Dr. P.D. Agrawal, former Associate Prof. Radiology medical College, Jagdalpur, Chhattisgarh and Mr. Padmakar Sasane, former Demonstrator Biophysics in the Department of Physiology, Medical College Jagdalpur, Chhattisgarh

25. The stand taken by these contemnors in their reply affidavit is that Ms. Amrita Banerjee had taken over as acting Dean on 1st November, 2006 and she had acted in furtherance to the letters issued by the Director. While Dr. Sanjivani Wanjari, Dr. P.D. Agrawal and Mr. Padmakar Sasane have stated that they were members of the Selection Committee which had recommended admission of the two appellants, they also have taken up the stand that they had acted as per the directions of the Dean. It is further pointed out that the Dean had constituted the Committee and required it so as to make recommendations for admission. On behalf of Ms. Banerjee, it is stated that she had received a letter from the Director of Medical Education Office on 30th September, 2006 that the seats should be filled according to merit upon establishing contact with the candidates. On 30th September, 2006 itself, she had constituted the Committee consisting of the other three contemnors and, in fact, the Committee conducted its entire proceeding and recommended the names of the two candidates, i.e. Kumari Priya Gupta and Kumari Akanksha Adile and they were granted admission on that very day i.e. on 30th September, 2006. The same was intimated to the Director of Medical Education Office vide a letter of the same date. All these contemnors have relied upon a judgment of this Court in the case of *D.P. Gupta v. Parsuram Tiwari* [(2004) 13 SCC 746] to contend that if a person acts upon the directions of his superior, he is not liable to be punished for contempt. In the alternative, they have also tendered unconditional apology before this Court.

26. Firstly, we must deal with the case of *D.P. Gupta* (supra). In that case, the High Court had punished the Vice-

Chancellor for over-reaching the judgment of the High Court by exercising his power to condone the break in service for promotion to the post of Head of Department. The High Court also punished the Registrar of the University who was stated to have advised the Vice-Chancellor to act accordingly. The Supreme Court, while upholding the conviction of the Vice-Chancellor of the University noticed that the person concerned was not the acting Registrar who had advised the Vice-Chancellor but had merely carried out the order of the Vice-Chancellor by issuing the notification, which he was bound to carry out. Accordingly, the prayer of the appellant was allowed by this Court. It is obvious that the contemnor in that case had not done any act or advised the Vice-Chancellor on any count whatsoever. The Vice-Chancellor had issued an order condoning the break in service and required the Registrar to issue notification in furtherance thereto. In these circumstances, the Supreme Court found that he was not guilty of violating the order of the Court as he had merely issued notification as directed. Certainly, this case on facts has no application to the case in hand. The Dean of the College was expected to act in accordance with law. She not only abdicated her responsibilities and obligations in conducting a fair and transparent admission to the two remaining seats but, in fact, colluded with Dr. Adile, Director of the Health Services in ensuring manipulation of the process leading to admission of his daughter and deprived more meritorious students of those seats. In her entire affidavit or in the letter, she has not averred that any other candidate was informed or contacted on telephone in the entire State, which means that all other meritorious and eligible candidates were not even informed of availability of the two seats. It was her responsibility to ensure that the vacancy of such seats be duly intimated to the eligible candidates, which was not done, primarily with the intention to favour the two appellants who have been given admission in a most arbitrary manner. It is not even disputed before the Court that candidates, who were much higher in the order of merit than the two to whom seats were awarded, have not got admission to the medical course. It is

also surprising that within the working hours of the office on 30th September, 2006, the entire commotion of awarding seats to the two candidates was completed. The scrutinizing of the applications and documentation, the holding of the interview and even deposit of fees by the appellants was completed on that very day. All this could not have happened but for complete collusion between the Director, the Dean and the Selection Committee. It is also not clear as to why the vacancy position was informed by the Dean to the Director on 30th September, 2006 though the second counseling had been held between 22nd and 23rd August, 2006. It was expected of her to inform the vacancy position well in time. Intentionally withholding of this information does not speak well of the functioning of the Committee.

27. The members of the Selection Committee were to discharge the very onerous duty of ensuring that all the eligible candidates had been informed of the vacancy position and they were also expected to scrutinise the certificates of eligible candidates and recommend admission strictly in order of merit. They have not even averred in their affidavit that vacancy position was in the knowledge to the eligible persons. It is not only improbable but impossible to believe that in the entire State and even from the same town, no candidate would have come to take admission to the medical courses, had they been intimated of the vacancy position. The Committee has not only failed to discharge its onerous duty but has even kept all principles of fair selection aside and ensured selection of the daughter of the Director. In contradistinction to *D.P. Gupta's* case (supra), none of these persons were obliged to carry out the directions of the Director to give admission to these two candidates. In fact, there was no such direction. These persons were not subordinate to the Director or even the Dean while performing the duties for filling up the two vacancies as members of the Selection Committee. They cannot take shelter of bona fide exercise of power in obeying orders of the superior.

28. In addition to this and for the reasons recorded in the earlier part of the judgment, we have no hesitation in holding that all these four persons have also violated the orders of the Court and have circumvented the process of selection and defeated the very object of the directions issued by this Court. They have lowered the dignity and authority of the Court and, thus, are liable to be punished for violating the orders of this Court. Consequently, they are also punished and directed to pay a fine of Rs.2,000/- and copy of this order shall be placed on their personal file.

29. Now, we will deal with the case of Mr. Keshav Desiraju, Special Secretary in the Ministry of Health and Family Welfare and of Jagdish Prasad, director General, Health Services, Ministry of Health and Family Welfare, Government of India. Mr. Keshav Desiraju has stated in his affidavit that he has been very serious in maintaining the time Schedule for giving permission to new medical colleges taking admissions for MBBS/BDS courses under Section 10(a) of the Medical Council of India Act, 1956 by 15th July of every year. The permission was stated to be granted to the said college on 15th July, 2006 for the academic year 2006-2007. It is further stated that the State of Chhattisgarh has contributed only three seats of MBBS at JLN Medical College, Raipur, Chhattisgarh and no seat was contributed in the Government Medical College NMDS Jagdalpur towards Central Pool quota. Thus, the question of allotting of seat from the central pool quota did not arise. He further affirms that they shall strictly adhere to the schedule term provided under the judgment of the Court.

30. Dr. Jagdish Prasad in his affidavit has also stated that the Government Medical College, Jagdalpur was given approval on 15th July, 2006 as per Rules for the academic year 2006-07. Admission to 15% quota was completed by 8th August, 2006 and the unfilled seats were returned to the respective State Governments. According to this Affidavit, Kumari Akanksha and Kumari Priya Gupta did not belong to

All India quota. The Jagdalpur college was granted permission for starting the academic procedure for academic year 2006-07 by the Government of Chhattisgarh on 14th August, 2006. The fake admission of the two candidates came to be known to the Department when an application under the Right to Information Act was filed by one Dr. Anil Khakharia in September, 2009 upon which the action was taken. The letter dated 8th August, 2006 issued by the Director General's office was fake. The admission was cancelled vide letter dated 19th September, 2010. It is further averred that the Directorate strictly adheres to the schedule provided. It is also stated that no deviation has been made from the prescribed procedure, time schedule approved by the Supreme Court.

31. From these two affidavits, it is in fact clear that both these contemnors are not directly responsible for violating any order or direction of the Court. However, they are expected to exercise proper control and supervision over grant of recommendation, permission to give admission in the colleges and the admission process. The Director General of Health Services, Union of India is responsible for maintaining transparency in the process of admission to the medical colleges. Two things are clear that they ought to have checked that the State could not have permitted the college to grant admission to the students on or after August 14, 2006 as 15th of July, 2006 was the last date for grant of recognition and permission to run the medical college. Secondly, when the complaint was received, the Ministry as well as the Directorate was expected to act with greater expeditiousness and ought not to have permitted the wrongly granted admissions to continue. In fact, the Government or the Directorate both took no action against the institute, even till date. There is apparent lack of proper supervision and enforcement of the directions issued by this Court on the part of these contemnors.

32. Having considered the entire spectrum of the matter, we are of the considered view that the ends of justice would

be met by issuing a warning to both these contemnors and not to punish them with fine or imprisonment. They should be more careful in discharge of their functions and duties in accordance with the judgment of this Court and we further direct them to ensure circulation of this judgment as well as the judgment of *Priya Gupta's* case to all the Directors, Health Services of the respective States, Deans of the Universities holding the selection/examination or admission process for MBBS/BDS courses as well as to the Dean of all the colleges.

33. In result of the above discussion, contemnor Dr. S.L. Adile, Amrita Banerjee, Dr. Sanjivani Wanjari, Dr. P.D. Agrawal and Mr. Padmakar Sasane are hereby punished and awarded the sentence of fine of Rs.2,000/- each. The fine should be deposited within four weeks from today. In the event of default, they shall be liable to undergo civil imprisonment for a period of two weeks. The notice of contempt against them is discharged, however, subject to the observations aforemade.

B.B.B. Contempt Notice discharged.

MANOHAR S/O MANIKRAO ANCHULE
v.
STATE OF MAHARASHTRA AND ANR.
(Civil Appeal No. 9095 of 2012)

DECEMBER 13, 2012

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

Right to Information Act, 2005:

s.20 – Powers of the State Information Commission to impose penalty and take disciplinary action against the employees – Scope and ambit of – Held: State Information Commissions exercise quasi judicial powers – They are vested with wide powers including imposition of penalty or taking of disciplinary action against the employees – Provisions relating to penalty or to penal consequences have to be construed strictly.

s.20(2) – Recommending disciplinary action against the Central/State Public Information Officer u/s.20(2) – Applicability of principle of natural justice – Held: Power to recommend disciplinary action is a power, exercise of which may impose penal consequences – Recommendation itself vests the delinquent Public Information Officer with consequences which are of serious nature and can ultimately produce prejudicial results and invite minor and/or major penalty – Thus, principles of natural justice have to be read into the provisions of s.20(2) – Right of hearing, even if not provided under a specific statute, the rules of natural justice shall so demand, unless by specific law, it is excluded – Natural justice.

s.20(2) – Disciplinary action against the Public Information Officer – Validity – In the instant case, appeal was filed before the State Commission by the aggrieved applicant

that he was not provided information sought for by the appellant, the Public Information Officer – Appellant was informed about the hearing of appeal before the State Commission – Appellant sent a fax requesting for adjournment on account of official reasons – On the date of hearing, another officer represented the appellant, however, State Commission did not adjourn the case and rather decided the appeal and also ordered disciplinary action against the appellant u/s.20(2) – High Court upheld the order of State Commission – On appeal, held: The appellant was entitled to a hearing before an order could be passed against him u/s.20(2) – If the appellant was given an opportunity and had appeared before the Commission, he might have been able to explain that there was reasonable cause and he had taken all reasonable steps within his power to comply with the provisions – None of the grounds stated u/s.20(2) were satisfied which justified the recommendation by the Commission of taking disciplinary action against the appellant – Order of State Commission and High Court set aside.

s.20(2) – Requirement and scope of – Held: Central or the State Commission have no jurisdiction to add to the exhaustive grounds of default mentioned in the provisions of s.20(2) – The case of default must strictly fall within the specified grounds of the provisions of s.20(2) – This provision has to be construed and applied strictly – Its ambit cannot be permitted to be enlarged at the whims of the Commission – All the attributable defaults of a Central or State Public Information Officer have to be without any reasonable cause and persistently – Burden of forming an opinion in accordance with the provisions of s.20(2) and principles of natural justice lies upon the Commission – Interpretation of Statute.

The appellant was working as Superintendent in the State Excise Department. He was nominated under Section 5 of the Right to Information Act, 2005 and designated as the Public Information Officer. On 3rd

January, 2007, respondent no.2 filed an application under Section 6(1) of the Act seeking certain information. The appellant forwarded the said application to the concerned Department for collecting the information and on 19th January, 2007 informed respondent no.2 that his application was under process. As respondent no.2 did not receive information in furtherance to his application, he filed an appeal before the Collector, Nanded on 1st March, 2007, under Section 19(1) of the Act. By letter dated 11th April, 2007, another officer of the department further wrote to respondent No.2 that since he had not mentioned the period for which the information was sought, it was not possible to supply the information and requested him to furnish the period for which such information was required. However respondent No.2 did not reply back. Meanwhile on 4th April, 2007, the appellant was transferred from Nanded to Akola District.

Respondent No.2, without waiting for the decision of the Collector filed an appeal before the State Information Commission. The Commission directed issuance of the notice to the office of the State Excise at Nanded. The Nanded office informed the appellant of the notice and that the hearing was kept for 26th February, 2008 before the State Information Commission. On 25th February, 2008, the appellant informed the office of the State Information Commissioner that for official reasons he was unable to appear before the Commissioner on that date and requested for grant of extension of time for that purpose. The State Information Commission, without considering the application and the request made by the Officer present before the State Information Commission at the time of hearing, allowed the appeal on 26th February, 2008, directing the Commissioner for State Excise to initiate action against the appellant as per the Service Rules and asked for compliance report.

Aggrieved, the appellant filed writ petition the High Court. The High Court dismissed the writ petition, and therefore the instant appeal.

Allowing the appeal, the Court

HELD: 1.1. State Information Commissions exercise very wide and certainly quasi judicial powers. In fact their functioning is akin to the judicial system rather than the executive decision making process. Adherence to the principles of natural justice is mandatory for such Tribunal or bodies discharging such functions. The State Information Commission has been vested with wide powers including imposition of penalty or taking of disciplinary action against the employees. Exercise of such power is bound to adversely affect or bring civil consequences to the delinquent. Thus, the provisions relating to penalty or to penal consequences have to be construed strictly. It will not be open to the Court to give them such liberal construction that it would be beyond the specific language of the statute or would be in violation to the principles of natural justice. [Paras 14-16] [866-D-G]

1.2. The State Information Commission is performing adjudicatory functions where two parties raise their respective issues to which the State Information Commission is expected to apply its mind and pass an order directing disclosure of the information asked for or declining the same. Either way, it affects the rights of the parties who have raised rival contentions before the Commission. The adjudicatory process essentially has to be in consonance with the principles of natural justice, including the doctrine of *audi alteram partem*. Hearing the parties, application of mind and recording of reasoned decision are the basic elements of natural justice. It is not expected of the Commission to breach any of these

principles, particularly when its orders are open to judicial review. [Para 17] [866-H; 867-A-D]

1.3. The proviso to Section 20(1) of the Act specifically contemplates that before imposing the penalty contemplated under Section 20(1), the Commission shall give a reasonable opportunity of being heard to the concerned officer. However, there is no such specific provision in relation to the matters covered under Section 20(2). Section 20(2) empowers the Central or the State Information Commission, as the case may be, at the time of deciding a complaint or appeal for the reasons stated in that section, to recommend for disciplinary action to be taken against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the relevant service rules. Power to recommend disciplinary action is a power exercise of which may impose penal consequences. When such a recommendation is received, the disciplinary authority would conduct the disciplinary proceedings in accordance with law and subject to satisfaction of the requirements of law. It is a 'recommendation' and not a 'mandate' to conduct an enquiry. 'Recommendation' must be seen in contradistinction to 'direction' or 'mandate'. But recommendation itself vests the delinquent Public Information Officer or State Public Information Officer with consequences which are of serious nature and can ultimately produce prejudicial results including misconduct within the relevant service rules and invite minor and/or major penalty. Thus, the principles of natural justice have to be read into the provisions of Section 20(2). It is a settled canon of civil jurisprudence including service jurisprudence that no person be condemned unheard. Directing disciplinary action is an order in the form of recommendation which has far reaching civil consequences. It will not be permissible

to take the view that compliance with principles of natural justice is not a condition precedent to passing of a recommendation under Section 20(2). Thus, the principle is clear and settled that right of hearing, even if not provided under a specific statute, the principles of natural justice shall so demand, unless by specific law, it is excluded. It is more so when exercise of authority is likely to vest the person with consequences of civil nature. [Paras 21-23] [872-C-H; 873-A-B; 874-C]

A.K. Kraipak & Ors. v. Union of India & Ors. **(1969) 2 SCC 262: 1970 (1) SCR 457;** *Kranti Associates (P) Ltd. & Ors. v. Masood Ahmed Khan & Ors.* **(2010) 9 SCC 496: 2010 (10) SCR 1070;** *Mohinder Singh Gill v. Chief Election Commissioner* **(1978) 1 SCC 405: 1978 (2) SCR 272 and** *Namit Sharma v. Union of India* **2012 (8) SCALE 593 and** *Udit Narain Singh Malpharia v. Additional Member, Board of Revenue, Bihar* **AIR 1963 SC 786: 1963 Suppl. SCR 676 – relied on.**

2.1. It was not that the appellant had been avoiding appearance before the State Information Commission. It was the first date of hearing and in the letter dated 25th February, 2008, he had given a reasonable cause for his absence before the Commission on 25th February, 2008. However, on 26th February, 2008, the impugned order was passed. The appellant was entitled to a hearing before an order could be passed against him under the provisions of Section 20(2) of the Act. He was granted no such hearing. The State Information Commission not only recommended but directed initiation of departmental proceedings against the appellant and even asked for the compliance report. If such a harsh order was to be passed against the appellant, the least that was expected of the Commission was to grant him a hearing/ reasonable opportunity to put forward his case. The State Information Commission should have granted an

adjournment and heard the appellant before passing an order Section under 20(2) of the Act. On that ground itself, the impugned order is liable to be set aside. The appellant had a genuine case to explain before the State Information Commission and to establish that his case did not call for any action within the provisions of Section 20(2). It is clear from language of Section 20(2) that first of all an opinion has to be formed by the Commission. This opinion is to be formed at the time of deciding any complaint or appeal after hearing the person concerned. The opinion formed has to have basis or reasons and must be relatable to any of the defaults of the provision. The grounds stated in the Section are exhaustive and it is not for the Commission to add other grounds which are not specifically stated in the language of Section 20(2). The Central or the State Commission have no jurisdiction to add to the exhaustive grounds of default mentioned in the provisions of Section 20(2). The case of default must strictly fall within the specified grounds of the provisions of Section 20(2). This provision has to be construed and applied strictly. Its ambit cannot be permitted to be enlarged at the whims of the Commission. [Para 25-26] [874-F-H; 875-A-C; 876-B-G-H; 877-A]

2.2. If the appellant was given an opportunity and had appeared before the Commission, he might have been able to explain that there was reasonable cause and he had taken all reasonable steps within his power to comply with the provisions. It appears that the facts have not been correctly noticed and, in any case, not in their entirety by the State Information Commission. It had formed an opinion that the appellant was negligent and had not performed the duty cast upon him. 'Negligence' *per se* is not a ground on which proceedings under Section 20(2) of the Act can be invoked. The Commission must return a finding that such negligence, delay or

default is persistent and without reasonable cause. The Commission, in the present case, has erred in not recording such definite finding. The appellant had not failed to receive any application, had not failed to act within the period of 30 days (as he had written a letter calling for information), had not malafidely denied the request for information, had not furnished any incorrect or misleading information, had not destroyed any information and had not obstructed the furnishing of the information. On the contrary, he had taken steps to facilitate the providing of information by writing the stated letters. May be the letter dated 11th April, 2007 was not written within the period of 30 days requiring respondent No.2 to furnish details of the period for which such information was required but the fact remained that such letter was written and respondent No.2 did not even bother to respond to the said enquiry. He just kept on filing appeal after appeal. After April 4, 2007, the date when the appellant was transferred to Akola, he was not responsible for the acts of omissions and/or commission of the office at Nanded. [Paras 27, 28] [877-G-H; 878-C, E-H; 876-A-B]

3. Another aspect of this case is that the appeal itself was not decided though it was so recorded in the impugned order. The entire impugned order did not direct furnishing of the information asked for by respondent No.1. It did not say whether such information was required to be furnished or not or whether in the facts of the case, it was required of respondent No.2 to respond to the letter dated 11th April, 2007 written by the Department to him. All these matters were requiring decision of the Commission before it could recommend the disciplinary action against the appellant, particularly, in the facts of the present case. [Para 29] [879-B-D]

4. All the attributable defaults of a Central or State Public Information Officer have to be without any

reasonable cause and persistently. There could be cases where there is reasonable cause shown and the officer is able to demonstrate that there was no persistent default on his part either in receiving the application or furnishing the requested information. In such circumstances, the law does not require recommendation for disciplinary proceedings to be made. It is not the legislative mandate that irrespective of the facts and circumstances of a given case, whether reasonable cause is shown or not, the Commission must recommend disciplinary action merely because the application was not responded to within 30 days. Every case has to be examined on its own facts. The burden of forming an opinion in accordance with the provisions of Section 20(2) and principles of natural justice lies upon the Commission. [Para 30] [879-E, G-H; 880-A-C]

5. In the case at hand, the appellant had shown that the default, if any on his part, was not without reasonable cause or result of a persistent default on his part. On the contrary, he had taken steps within his power and authority to provide information to respondent No.2. It was for the department concerned to react and provide the information asked for. In the present case, some default itself is attributable to respondent No.2 who did not even care to respond to the letter of the department dated 11th April, 2007. The order passed by the State Information Commission dated 26th February, 2008 and the judgment of the High Court are set aside. It is further directed that the disciplinary action, if any, initiated by the department against the appellant shall be withdrawn forthwith. Further, the State Information Commission is directed to decide the appeal filed by respondent No.2 before it on merits and in accordance with law. It will also be open to the Commission to hear the appellant and pass any orders as contemplated under Section 20(2), in furtherance to the notice issued to the appellant. [Paras 31-32] [880-D-G]

Case Law Reference:

1970 (1) SCR 457	**relied on**	**Para 17**
2010 (10) SCR 1070	**relied on**	**Para 18**
1978 (2) SCR 272	**relied on**	**Para 19**
2012 (8) SCALE 593	**relied on**	**Para 20**
1963 Suppl. SCR 676	**relied on**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9095 of 2012.

From the Judgment & Order dated 18.12.2008 of the High Court of Bombay at Aurangabad in WP No. 5262 of 2008.

Nishant Ramakantrao Katneshwarkar, for the Appellant.

Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave granted.

2. The present appeal is directed against the judgment dated 18th December, 2008 of the High Court of Bombay at Aurangabad vide which the High Court declined to interfere with the order dated 26th February, 2008 passed by the State Information Commissioner under the provisions of the Right to Information Act, 2005 (for short 'the Act').

3. We may notice the facts in brief giving rise to the present appeal. One Shri Ram Narayan, respondent No.2, a political person belonging to the Nationalist Congress Party, Nanded filed an application on 3rd January, 2007, before the appellant who was a nominated authority under Section 5 of the Act and was responsible for providing the information sought by the applicants. This application was moved under Section 6(1) of the Act.

4. In the application, the said respondent No.2 sought the following information:

"a. The persons those who are appointed/selected through a reservation category, their names, when they have appointed on the said post.

b. When they have joined the said post.

c. The report of the Caste Verification Committee of the persons those who are/were selected from the reserved category.

d. The persons whose caste certificate is/was forwarded for the verification to the caste verification committee after due date. Whether any action is taken against those persons? If any action is taken, then the detail information should be given within 30 days."

5. The appellant, at the relevant time, was working as Superintendent in the State Excise Department and was designated as the Public Information Officer. Thus, he was discharging the functions required under the provisions of the Act. After receiving the application from Respondent No.2, the appellant forwarded the application to the concerned Department for collecting the information. Vide letter dated 19th January, 2007, the appellant had informed respondent No.2 that action on his application has been taken and the information asked for has been called from the concerned department and as and when the information is received, the application could be answered accordingly. As respondent No.2 did not receive the information in furtherance to his application dated 3rd January, 2007, he filed an appeal within the prescribed period before the Collector, Nanded on 1st March, 2007, under Section 19(1) of the Act. In the appeal, respondent No.2 sought the information for which he had submitted the application. This appeal was forwarded to the office of the appellant along with the application given by respondent No.2. No hearing was conducted by the office of the Collector at Nanded. Vide letter dated 11th April, 2007, the then Superintendent, State Excise, Nanded, also designated as Public Information Officer, further

wrote to respondent No.2 that since he had not mentioned the period for which the information is sought, it was not possible to supply the information and requested him to furnish the period for which such information was required. The letter dated 11th April, 2007 reads as under :

> "... you have not mentioned the period of the information which is sought by you. Therefore, it is not possible to supply the information. Therefore, you should mention the period of information in your application so that it will be convenient to supply the information."

6. As already noticed there was no hearing before the Collector and the appeal before the Collector had not been decided. It is the case of the appellant that the communication from the Collector's office dated 4th March, 2007 had not been received in the office of the appellant. Despite issuance of the letter dated 11th April, 2007, no information was received from respondent No.2 and, thus, the information could not be furnished by the appellant. On 4th April, 2007, the appellant was transferred from Nanded to Akola District and thus was not responsible for performance of the functions of the post that he was earlier holding at Nanded and so also the functions of Designated Public Information Officer.

7. Respondent No.2, without awaiting the decision of the First Appellate Authority (the Collector), filed an appeal before the State Information Commission at Aurangabad regarding non-providing of the information asked for. The said appeal came up for hearing before the Commission at Aurangabad who directed issuance of the notice to the office of the State Excise at Nanded. The Nanded office informed the appellant of the notice and that the hearing was kept for 26th February, 2008 before the State Information Commission at Aurangabad. This was informed to the appellant vide letter dated 12th February, 2008. On 25th February, 2008, the applicant forwarded an application through fax to the office of the State Information Commissioner bringing to their notice that for official reasons he was unable to appear before the Commissioner on

that date and requested for grant of extension of time for that purpose. Relevant part of the letter dated 25th February 2008 reads as under:

> "...hearing is fixed before the Hon'ble Minister, State Excise M.S.Mumbai in respect of licence of CL-3 of Shivani Tq. and Dist. Akola. For that purpose it is necessary for the Superintendent, State Excise, Akola for the said hearing. Therefore, it is not possible for him to remain present for hearing on 26.2.2008 before the Hon'ble Commissioner, State Information Commission, Aurangabad. Therefore, it is requested that next date be given for the said hearing."

8. The State Information Commission, without considering the application and even the request made by the Officer who was present before the State Information Commission at the time of hearing, allowed the appeal vide its order dated 26th February, 2008, directing the Commissioner for State Excise to initiate action against the appellant as per the Service Rules and that the action should be taken within two months and the same would be reported within one month thereafter to the State Information Commission. It will be useful to reproduce the relevant part of the order dated 26th February, 2008, passed by the State Information Commissioner:

> "The applicant has prefer First appeal before the Collector on 1.3.2007, the said application was received to the State Excise Office on 4.3.2007 and on 11.4.2007 it was informed to the applicant, that he has not mentioned the specific period regarding the information. The Public Information Officer, ought to have been informed to the applicant after receiving his first application regarding the specific period of information but, here the public information officer has not consider positively, the application of the applicant and not taken any decision. On the application given by the applicant, the public information officer ought to have been informed to the applicant on or before 28.1.2007 and as per the said Act, 2005 there is

delay 73 days for informing the applicant and this shows that, the Public Information Officer has not perform his duty which is casted upon him and he is negligent it reveals after going through the documents by the State Commission. Therefore, it is order that, while considering above said matter, the concerned Public Information Officer, has made delay of 73 days for informing to the applicant and therefore he has shown the negligence while performing his duty. Therefore, it is ordered to the Commissioner of State Excise Maharashtra State to take appropriate action as per the Service Rules and Regulation against the concerned Public Information Officer within the two months from this order and thereafter, the compliance report will be submitted within one month in the office of State Commission. As the applicant has not mentioned the specific period for information in his original application and therefore, the Public Information Officer was unable to supply him information. There is no order to the Public Information Officer to give information to the applicant as per his application. It is necessary for all the applicant those who want the information under the said Act, he should fill up the form properly and it is confirmed that, whether he has given detail information while submitting the application as per the proforma and this would be confirm while making the application, otherwise the Public Information Officer will not in position to give expected information to the applicant. At the time of filing the application, it is necessary for the applicant, to fill-up the form properly and it was the prime duty of the applicant.

As per the above mentioned, the second appeal filed by the applicant is hereby decided as follows:

O R D E R

1. The appeal is decided.

2. As the concern Public Information Officer has shown his negligence while performing his duty, therefore, the Commissioner of State Excise, State of Maharashtra has to take appropriate action as per the service rules within two months from the date of order and thereafter, within one month they should submit their compliance report to the State Commission."

9. The legality and correctness of the above order was challenged by the appellant before the High Court by filing the writ petition under Article 226 of the Constitution of India. The appellant had taken various grounds challenging the correctness of this order. However, the High Court, vide its order dated 18th December, 2008, dismissed the writ petition observing that the appellant ought to have passed the appropriate orders in the matter rather than keeping respondent No.2 waiting. It also noticed the contention that the application was so general and vague in nature that the information sought for could not be provided. However, it did not accept the same.

10. It is contended on behalf of the appellant that the order of the State Information Commission, as affirmed by the High Court, is in violation of the principles of natural justice and is contrary to the very basic provisions of Section 20 of the Act. The order does not satisfy any of the ingredients spelt out in the provisions of Section 20(2) of the Act. The State Information Commission did not decide the appeal, it only directed action to be taken against the appellant though the appeal as recorded in the order had been decided. It can, therefore, be inferred that there is apparent non-application of mind.

11. The impugned orders do not take the basic facts of the case into consideration that after a short duration the appellant was transferred from the post in question and had acted upon the application seeking information within the prescribed time. Thus, no default, much less a negligence, was attributable to the appellant.

12. Despite service, nobody appeared on behalf of the

State Information Commission. The State filed no counter affidavit.

13. Since the primary controversy in the case revolves around the interpretation of the provisions of Section 20 of the Act, it will be necessary for us to refer to the provisions of Section 20 of the Act at this stage itself. Section 20 reads as under:

"Section 20: Penalties:-(1) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees:

Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him:

Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be.

(2) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has without any reasonable cause and persistently, failed to receive an application for information or has not furnished information within the time specified under sub-section (1) of Section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in, furnishing the information, it shall recommend for disciplinary action against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the service rules applicable to him."

14. State Information Commissions exercise very wide and certainly quasi judicial powers. In fact their functioning is akin to the judicial system rather than the executive decision making process.

15. It is a settled principle of law and does not require us to discuss this principle with any elaboration that adherence to the principles of natural justice is mandatory for such Tribunal or bodies discharging such functions.

16. The State Information Commission has been vested with wide powers including imposition of penalty or taking of disciplinary action against the employees. Exercise of such power is bound to adversely affect or bring civil consequences to the delinquent. Thus, the provisions relating to penalty or to penal consequences have to be construed strictly. It will not be open to the Court to give them such liberal construction that it would be beyond the specific language of the statute or would be in violation to the principles of natural justice.

17. The State Information Commission is performing adjudicatory functions where two parties raise their respective issues to which the State Information Commission is expected to apply its mind and pass an order directing disclosure of the

information asked for or declining the same. Either way, it affects the rights of the parties who have raised rival contentions before the Commission. If there were no rival contentions, the matter would rest at the level of the designated Public Information Officer or immediately thereafter. It comes to the State Information Commission only at the appellate stage when rights and contentions require adjudication. The adjudicatory process essentially has to be in consonance with the principles of natural justice, including the doctrine of *audi alteram partem*. Hearing the parties, application of mind and recording of reasoned decision are the basic elements of natural justice. It is not expected of the Commission to breach any of these principles, particularly when its orders are open to judicial review. Much less to Tribunals or such Commissions, the Courts have even made compliance to the principle of rule of natural justice obligatory in the class of administrative matters as well. In the case of *A.K. Kraipak & Ors. v. Union of India & Ors.* [(1969) 2 SCC 262], the Court held as under :

> "17. … It is not necessary to examine those decisions as there is a great deal of fresh thinking on the subject. The horizon of natural justice is constantly expanding…
>
> The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it…. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely: (*1*) no one shall be a judge in his own case (*Nemo debet esse judex propria causa*) and (*2*) no decision shall be given against a party without affording him a reasonable hearing (*audi alteram partem*). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of

> natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in *Suresh Koshy George v. University of Kerala* the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case.

18. In the case of *Kranti Associates (P) Ltd. & Ors. v. Masood Ahmed Khan & Ors.* [(2010) 9 SCC 496], the Court dealt with the question of demarcation between the administrative orders and quasi-judicial orders and the requirement of adherence to natural justice. The Court held as under :

> "47. Summarising the above discussion, this Court holds:

(*a*) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(*b*) A quasi-judicial authority must record reasons in support of its conclusions.

(*c*) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(*d*) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(*e*) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(*f*) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(*g*) Reasons facilitate the process of judicial review by superior courts.

(*h*) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.

(*i*) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been

objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(*j*) Insistence on reason is a requirement for both judicial accountability and transparency.

(*k*) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(*l*) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.

(*m*) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in *Defence of Judicial Candor*.)

(*n*) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See *Ruiz Torija v. Spain* EHRR, at 562 para 29 and *Anya v. University of Oxford*, wherein the Court referred to Article 6 of the European Convention of Human Rights which requires,

"adequate and intelligent reasons must be given for judicial decisions".

(*o*) In all common law jurisdictions judgments play a vital role in setting up precedents for the future.

> Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of 'due process'."

19. The Court has also taken the view that even if cancellation of the poll were an administrative act that *per se* does not repel the application of the principles of natural justice. The Court further said that classification of functions as judicial or administrative is a stultifying shibboleth discarded in India as in England. Today, in our jurisprudence, the advances made by the natural justice far exceed old frontiers and if judicial creativity blights penumbral areas, it is also for improving the quality of Government in injecting fair play into its wheels. Reference in this regard can be made to *Mohinder Singh Gill v. Chief Election Commissioner* [(1978) 1 SCC 405].

20. Referring to the requirement of adherence to principles of natural justice in adjudicatory process, this Court in the case of *Namit Sharma v. Union of India* [2012 (8) SCALE 593], held as under:

> "97. It is not only appropriate but is a solemn duty of every adjudicatory body, including the tribunals, to state the reasons in support of its decisions. Reasoning is the soul of a judgment and embodies one of the three pillars on which the very foundation of natural justice jurisprudence rests. It is informative to the claimant of the basis for rejection of his claim, as well as provides the grounds for challenging the order before the higher authority/ constitutional court. The reasons, therefore, enable the authorities, before whom an order is challenged, to test the veracity and correctness of the impugned order. In the present times, since the fine line of distinction between the functioning of the administrative and quasi-judicial bodies is gradually becoming faint, even the administrative bodies are required to pass reasoned orders. In this regard, reference can be made to the judgments of this Court in the cases of *Siemens Engineering & Manufacturing Co.*

> *of India Ltd. v. Union of India & Anr.* [(1976) 2 SCC 981]; and *Assistant Commissioner, Commrcial Tax Department Works Contract and Leasing, Kota v. Shukla & Brothers* [(2010) 4 SCC 785]."

21. We may notice that proviso to Section 20(1) specifically contemplates that before imposing the penalty contemplated under Section 20(1), the Commission shall give a reasonable opportunity of being heard to the concerned officer. However, there is no such specific provision in relation to the matters covered under Section 20(2). Section 20(2) empowers the Central or the State Information Commission, as the case may be, at the time of deciding a complaint or appeal for the reasons stated in that section, to recommend for disciplinary action to be taken against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the relevant service rules. Power to recommend disciplinary action is a power exercise of which may impose penal consequences. When such a recommendation is received, the disciplinary authority would conduct the disciplinary proceedings in accordance with law and subject to satisfaction of the requirements of law. It is a 'recommendation' and not a 'mandate' to conduct an enquiry. 'Recommendation' must be seen in contradistinction to 'direction' or 'mandate'. But recommendation itself vests the delinquent Public Information Officer or State Public Information Officer with consequences which are of serious nature and can ultimately produce prejudicial results including misconduct within the relevant service rules and invite minor and/or major penalty.

22. Thus, the principles of natural justice have to be read into the provisions of Section 20(2). It is a settled canon of civil jurisprudence including service jurisprudence that no person be condemned unheard. Directing disciplinary action is an order in the form of recommendation which has far reaching civil consequences. It will not be permissible to take the view that compliance with principles of natural justice is not a condition precedent to passing of a recommendation under Section

20(2). In the case of *Udit Narain Singh Malpharia v. Additional Member, Board of Revenue, Bihar* [AIR 1963 SC 786], the Court stressed upon compliance with the principles of natural justice in judicial or quasi-judicial proceedings. Absence of such specific requirement would invalidate the order. The Court, reiterating the principles stated in the English Law in the case of *King v. Electricity Commissioner*, held as under :

> "The following classic test laid down by Lord Justice Atkin, as he then was, in *King v. Electricity Commissioners* and followed by this Court in more than one decision clearly brings out the meaning of the concept of judicial act:
>
> > "Wherever anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."
>
> Lord Justice Slesser in *King v. London County Council* dissected the concept of judicial act laid down by Atkin, L.J., into the following heads in his judgment: "Wherever any body of persons (*1*) having legal authority (*2*) to determine questions affecting rights of subjects and (*3*) having the duty to act judicially (*4*) act in excess of their legal authority — a writ of certiorari may issue." It will be seen from the ingredients of judicial act that there must be a duty to act judicially. A tribunal, therefore, exercising a judicial or quasi-judicial act cannot decide against the rights of a party without giving him a hearing or an opportunity to represent his case in the manner known to law. If the provisions of a particular statute or rules made thereunder do not provide for it, principles of natural justice demand it. Any such order made without hearing the affected parties would be void. As a writ of certiorari will be granted to remove the record of proceedings of an

> inferior tribunal or authority exercising judicial or quasi-judicial acts, *ex hypothhesi* it follows that the High Court in exercising its jurisdiction shall also act judicially in disposing of the proceedings before it."

23. Thus, the principle is clear and settled that right of hearing, even if not provided under a specific statute, the principles of natural justice shall so demand, unless by specific law, it is excluded. It is more so when exercise of authority is likely to vest the person with consequences of civil nature.

24. In light of the above principles, now we will examine whether there is any violation of principles of natural justice in the present case.

25. Vide letter dated 12th February, 2008, the appellant was informed by the Excise Department, Nanded, when he was posted at Akola that hearing was fixed for 25th February, 2008. He submitted a request for adjournment which, admittedly, was received and placed before the office of the State Information Commission. In addition thereto, another officer of the Department had appeared, intimated the State Information Commission and requested for adjournment, which was declined. It was not that the appellant had been avoiding appearance before the State Information Commission. It was the first date of hearing and in the letter dated 25th February, 2008, he had given a reasonable cause for his absence before the Commission on 25th February, 2008. However, on 26th February, 2008, the impugned order was passed. The appellant was entitled to a hearing before an order could be passed against him under the provisions of Section 20(2) of the Act. He was granted no such hearing. The State Information Commission not only recommended but directed initiation of departmental proceedings against the appellant and even asked for the compliance report. If such a harsh order was to be passed against the appellant, the least that was expected of the Commission was to grant him a hearing/ reasonable opportunity to put forward his case. We are of the considered view that the State Information Commission should

have granted an adjournment and heard the appellant before passing an order Section under 20(2) of the Act. On that ground itself, the impugned order is liable to be set aside. It may be usefully noticed at this stage that the appellant had a genuine case to explain before the State Information Commission and to establish that his case did not call for any action within the provisions of Section 20(2). Now, we would deal with the other contention on behalf of the appellant that the order itself does not satisfy the requirements of Section 20(2) and, thus, is unsustainable in law. For this purpose, it is necessary for the Court to analyse the requirement and scope of Section 20(2) of the Act. Section 20(2) empowers a Central Information Commission or the State Information Commission :

(a) at the time of deciding any complaint or appeal;

(b) if it is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has without any reasonable cause and persistently, failed to receive an application for information or has not furnished information within the time specified under sub-section (1) of Section 7 (i.e. 30 days);

(c) malafidely denied the request for information or intentionally given incorrect, incomplete or misleading information; or

(d) destroyed information which was the subject of the request or obstructed in any manner in furnishing the information;

(e) then it shall recommend for disciplinary action against the stated persons under the relevant servicerules.

26. From the above dissected language of the provision, it is clear that first of all an opinion has to be formed by the Commission. This opinion is to be formed at the time of

deciding any complaint or appeal after hearing the person concerned. The opinion formed has to have basis or reasons and must be relatable to any of the defaults of the provision. It is a penal provision as it vests the delinquent with civil consequences of initiation of and/or even punishment in disciplinary proceedings. The grounds stated in the Section are exhaustive and it is not for the Commission to add other grounds which are not specifically stated in the language of Section 20(2). The section deals with two different proceedings. Firstly, the appeal or complaint filed before the Commission is to be decided and, secondly, if the Commission forms such opinion, as contemplated under the provisions, then it can recommend that disciplinary proceedings be taken against the said delinquent Central Public Information Officer or State Public Information Officer. The purpose of the legislation in requiring both these proceedings to be taken together is obvious not only from the language of the section but even by applying the mischief rule wherein the provision is examined from the very purpose for which the provision has been enacted. While deciding the complaint or the appeal, if the Commission finds that the appeal is without merit or the complaint is without substance, the information need not be furnished for reasons to be recorded. If such be the decision, the question of recommending disciplinary action under Section 20(2) may not arise. Still, there may be another situation that upon perusing the records of the appeal or the complaint, the Commission may be of the opinion that none of the defaults contemplated under Section 20(2) is satisfied and, therefore, no action is called for. To put it simply, the Central or the State Commission have no jurisdiction to add to the exhaustive grounds of default mentioned in the provisions of Section 20(2). The case of default must strictly fall within the specified grounds of the provisions of Section 20(2). This provision has to be construed and applied strictly. Its ambit cannot be permitted to be enlarged at the whims of the Commission.

27. Now, let us examine if any one or more of the stated

grounds under Section 20(2) were satisfied in the present case which would justify the recommendation by the Commission of taking disciplinary action against the appellant. The appellant had received the application from respondent No.2 requiring the information sought for on 3rd January, 2007. He had, much within the period of 30 days (specified under Section 7), sent the application to the concerned department requiring them to furnish the requisite information. The information had not been received. May be after the expiry of the prescribed period, another letter was written by the department to respondent No.2 to state the period for which the information was asked for. This letter was written on 11th April, 2007. To this letter, respondent No.2 did not respond at all. In fact, he made no further query to the office of the designated Public Information Officer as to the fate of his application and instead preferred an appeal before the Collector and thereafter appeal before the State Information Commission. In the meanwhile, the appellant had been transferred in the Excise Department from Nanded to Akola. At this stage, we may recapitulate the relevant dates. The application was filed on 3rd January, 2007, upon which the appellant had acted and vide his letter dated 19th January, 2007 had forwarded the application for requisite information to the concerned department. The appeal was filed by respondent no.2 under Section 19(1) of the Act before the Collector, Nanded on 1st March, 2007. On 4th March, 2007, the appeal was forwarded to the office of the Excise Department. On 4th April, 2007, the appellant had been transferred from Nanded to Akola. On 11th April, 2007, other officer from the Department had asked respondent no.2 to specify the period for which the information was required. If the appellant was given an opportunity and had appeared before the Commission, he might have been able to explain that there was reasonable cause and he had taken all reasonable steps within his power to comply with the provisions. The Commission is expected to formulate an opinion that must specifically record the finding as to which part of Section 20(2) the case falls in. For instance,

in relation to failure to receive an application for information or failure to furnish the information within the period specified in Section 7(1), it should also record the opinion if such default was persistent and without reasonable cause.

28. It appears that the facts have not been correctly noticed and, in any case, not in their entirety by the State Information Commission. It had formed an opinion that the appellant was negligent and had not performed the duty cast upon him. The Commission noticed that there was 73 days delay in informing the applicant and, thus, there was negligence while performing duties. If one examines the provisions of Section 20(2) in their entirety then it becomes obvious that every default on the part of the concerned officer may not result in issuance of a recommendation for disciplinary action. The case must fall in any of the specified defaults and reasoned finding has to be recorded by the Commission while making such recommendations. 'Negligence' *per se* is not a ground on which proceedings under Section 20(2) of the Act can be invoked. The Commission must return a finding that such negligence, delay or default is persistent and without reasonable cause. In our considered view, the Commission, in the present case, has erred in not recording such definite finding. The appellant herein had not failed to receive any application, had not failed to act within the period of 30 days (as he had written a letter calling for information), had not malafidely denied the request for information, had not furnished any incorrect or misleading information, had not destroyed any information and had not obstructed the furnishing of the information. On the contrary, he had taken steps to facilitate the providing of information by writing the stated letters. May be the letter dated 11th April, 2007 was not written within the period of 30 days requiring respondent No.2 to furnish details of the period for which such information was required but the fact remained that such letter was written and respondent No.2 did not even bother to respond to the said enquiry. He just kept on filing appeal after appeal. After April 4, 2007, the date when

the appellant was transferred to Akola, he was not responsible for the acts of omissions and/or commission of the office at Nanded.

29. Another aspect of this case which needs to be examined by the Court is that the appeal itself has not been decided though it has so been recorded in the impugned order. The entire impugned order does not direct furnishing of the information asked for by respondent No.1. It does not say whether such information was required to be furnished or not or whether in the facts of the case, it was required of respondent No.2 to respond to the letter dated 11th April, 2007 written by the Department to him. All these matters were requiring decision of the Commission before it could recommend the disciplinary action against the appellant, particularly, in the facts of the present case.

30. All the attributable defaults of a Central or State Public Information Officer have to be without any reasonable cause and persistently. In other words, besides finding that any of the stated defaults have been committed by such officer, the Commission has to further record its opinion that such default in relation to receiving of an application or not furnishing the information within the specified time was committed persistently and without a reasonable cause. Use of such language by the Legislature clearly shows that the expression 'shall' appearing before 'recommend' has to be read and construed as 'may'. There could be cases where there is reasonable cause shown and the officer is able to demonstrate that there was no persistent default on his part either in receiving the application or furnishing the requested information. In such circumstances, the law does not require recommendation for disciplinary proceedings to be made. It is not the legislative mandate that irrespective of the facts and circumstances of a given case, whether reasonable cause is shown or not, the Commission must recommend disciplinary action merely because the application was not responded to within 30 days. Every case has to be examined on its own facts. We would

hasten to add here that wherever reasonable cause is not shown to the satisfaction of the Commission and the Commission is of the opinion that there is default in terms of the Section it must send the recommendation for disciplinary action in accordance with law to the concerned authority. In such circumstances, it will have no choice but to send recommendatory report. The burden of forming an opinion in accordance with the provisions of Section 20(2) and principles of natural justice lies upon the Commission.

31. We are of the considered opinion that the appellant had shown that the default, if any on his part, was not without reasonable cause or result of a persistent default on his part. On the contrary, he had taken steps within his power and authority to provide information to respondent No.2. It was for the department concerned to react and provide the information asked for. In the present case, some default itself is attributable to respondent No.2 who did not even care to respond to the letter of the department dated 11th April, 2007. The cumulative effect of the above discussion is that we are unable to sustain the order passed by the State Information Commission dated 26th February, 2008 and the judgment of the High Court under appeal. Both the judgments are set aside and we further direct that the disciplinary action, if any, initiated by the department against the appellant shall be withdrawn forthwith.

32. Further, we direct the State Information Commission to decide the appeal filed by respondent No.2 before it on merits and in accordance with law. It will also be open to the Commission to hear the appellant and pass any orders as contemplated under Section 20(2), in furtherance to the notice issued to the appellant. However, in the facts and circumstances of the case, there shall be no orders as to costs.

B.B.B. Appeal allowed.