STATE TR. P.S. LODHI COLONY NEW DELHI

v.

SANJEEV NANDA

(Criminal Appeal No. 1168 of 2012)

AUGUST 3, 2012

[DEEPAK VERMA AND K.S. RADHAKRISHNAN, JJ.]

Penal Code, 1860 – s. 304 (Part II) – Motor accident – Causing death of 6 and injury to one – As per medical evidence accused-driver under influence of liquor at the time of accident – Injured witness and eye-witness turning hostile – Trial court relying on one other witness convicting the accused u/s. 304 (Part II) IPC and sentenced him to five years imprisonment – High Court altered the conviction to that u/s. 304A and reduced the sentence to two years imprisonment – In appeal, held: Accused is liable to be convicted u/s. 304 (Part II) as he had sufficient knowledge that his act was likely to cause death – Sentence awarded by High Court is maintained – In addition accused is directed to pay Rs. 50 lakhs to the Union Government to be utilized for providing compensation to the motor accident victims in hit and run cases and in default to undergo one year SI; and further directed to do community service for two years to be arranged by Ministry of Social Justice and Empowerment and in default to undergo imprisonment for two years.

Witness – Hostile witness – Evidentiary value – Held: If a witness turns hostile to subvert the judicial process, the courts should not stand as mute spectators and every effort should be made to bring home the truth – Criminal judicial system cannot be overturned by the gullible witnesses who act under pressure, inducement and intimidation.

Motor Accident – Hit and run case – Duty of the driver of

offending vehicle, duty of bystander – Discussed – Motor Vehicles Act, 1988 – ss. 134 and 187.

The respondent-accused was prosecuted u/ss. 201, 304(I), 308 r/w s. 34 IPC. The prosecution case was that at about 4.00 a.m. on the day of occurrence, the respondent-accused was driving his car rashly and negligently at a high speed, hitting seven persons and thereafter he ran away. In the accident, 6 of the victims were killed while the 7th victim (PW-2) survived. PW-1 was the eye-witness to the incident. In medical examination of the accused, it was found that he had consumed alcohol the previous night. During trial, eye-witness as well as the injured witness turned hostile. Trial court relying on one other witness convicted the accused u/s. 304 (Part II) IPC and imposed upon him a jail sentence of five years. In appeal, High Court found the accused guilty of the offence u/s. 304A IPC and reduced the sentence to two years. Hence the present appeal.

Partly allowing the appeal,

HELD:

Per Court:

1. The judgment and order of conviction passed by the High Court u/s.304A IPC is set aside and the order of conviction of trial court u/s. 304 (Part II) I.P.C. is restored and upheld. However, it is appropriate to maintain the sentence awarded by the High Court, which the accused has already undergone. [Para 3] [946-C]

2. In addition, the accused is put to the following terms: (1) Accused has to pay an amount of Rs.50 lakhs (Rupees Fifty lakhs) to the Union of India within six months, which will be utilized for providing compensation to the victim of motor accidents, where the vehicle owner,

driver etc. could not be traced, like victims of hit and run cases. On default, he will have to undergo simple imprisonment for one year. This amount would be kept in a different head to be used for the aforesaid purpose only. (2). The accused would do community service for two years which will be arranged by the Ministry of Social Justice and Empowerment within two months. On default, he will have to undergo simple imprisonment for two years. [Para 4] [946-D-G]

PER DEEPAK VERMA, J:

HELD: 1.1 Accident means an unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated. Thus, if the injury/death is caused by an accident, that itself cannot be attributed to an intention. If intention is proved and death is caused, then it would amount to culpable homicide. [Para 33] [940-G-H; 941-A]

Black's Law Dictionary **– referred to.**

1.2. In the case at hand, looking to the nature and manner in which accident had taken place, it can safely be held that respondent-accused had no intention to cause death but certainly had the knowledge that his act may result in death. There is nothing to prove that he knew that a group of persons was standing on the road he was going to pass through. If that be so, there cannot be an intention to cause death or such bodily injury as is likely to cause death. Thus, respondent had committed an offence u/s.304 (Part II) IPC. [Paras 39 and 40] [944-E-H]

Kulwant Rai vs. State of Punjab **(1981) 4 SCC 245;** *Dalbir Singh vs. State of Haryana* **(2000) 5 SCC 82: 2000 (3) SCR 1000;** *State of Maharashtra vs. Salman Salim Khan* **(2004) 1 SCC 525;** *Alister Anthony Pareira vs. State of*

Maharashtra **(2012) 2 SCC 648;** *State of Gujarat vs. Haiderali Kalubhai* **(1976) 1 SCC 889: 1976 (3) SCR 303;** *Naresh Giri vs. State of M.P* **2008 (1) SCC 791: 2007 (11) SCR 987 – referred to.**

1.3. The accident had occurred solely and wholly on account of rash and negligent driving of BMW car by the respondent, at a high speed, who was also intoxicated at that point of time. This fact has been admitted by the respondent-accused at the appellate stage in the High Court. For the simple reason that he had already driven almost 16 kms from the place where he had started, to the point where he actually met with the accident without encountering any untoward incident would not go absolutely in favour of the respondent. There is no evidence on record that he had consumed more liquor on their way also. It is extremely difficult to assess or judge when liquor would show its effect or would be at its peak. It varies from person to person. The prosecution failed to use either the Breath Analyser or Alco Meter to record a definite finding in this regard. Evidence of the doctors P.W.10 and P.W.16 shows that certain amount of alcoholic contents was still found on examination of his blood next day. It is a settled principle of law that if something is required to be done in a particular manner, then that has to be done only in that way or not at all. [Paras 26, 27, 28 and 29] [938-G-H; 939-A-G]

Nazir Ahmad v. King Emperor **AIR 1936 PC 253 (2) – referred to.**

1.4. Soon after hitting one of the victims, accused did not apply the brakes so as to save at least some of the lives. Since all the seven of them were standing in a group, he had not realized that impact would be so severe that they would be dragged for several feet. Possibility also cannot be ruled out that soon after hitting

them, respondent, a young boy of 21 years then, might have gone into trauma and could not decide as to what to do until vehicle came to a halt. He must have then realized the blunder he committed. [Para 31] [940-C-D]

2. Even though in the facts and circumstances of the case, jail sentence awarded to him may not be just and appropriate the mitigating circumstances tilt heavily in favour of the accused. Therefore, it is appropriate, to maintain the sentence awarded by the High Court, which he has already undergone. No useful purpose would be served by sending the accused to jail once again. However, this has been held so, looking to very peculiar facts and features of this particular case and it may not be treated as a precedent of general proposition of law on the point, for other cases. [Paras 44 and 45] [945-D-G]

PER K.S. RADHAKRISHNAN, J. (Partly dissenting and Supplementing):

HELD: 1.1. Section 304A IPC carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide not amounting to murder u/s. 299 IPC or murder u/s. 300 IPC. Section 304A excludes all the ingredients of Section 299 or Section 300. [Para 44] [919-A]

State of Gujarat v. Haidarali Kalubhai **(1976) 1 SCC 889: 1976 (3) SCR 303;** *Naresh Giri v. State of M.P.* **(2008) 1 SCC 791: 2007 (11) SCR 987;** *Alister Anthony Pareira v. State of Maharashtra* **(2012) 2 SCC 648;** *Jagriti Devi v. State of Himachal Pradesh* **(2009) 14 SCC 771: 2009 (10) SCR 167 – relied on.**

Andhra Pradesh v. Rayavarapu Punnayya and Anr. **(1976) 4 SCC 382: 1977 (1) SCR 601 – referred to.**

1.2. In the instant case, it has been brought out in evidence that the accused-respondent was in an

inebriated state, after consuming excessive alcohol, he was driving the vehicle without licence, in a rash and negligent manner in a high speed which resulted in the death of six persons. The accused had sufficient knowledge that his action was likely to cause death and such an action would, in the facts and circumstances of this case fall under Section 304(II) of the IPC and the trial court has rightly held so and the High Court has committed an error in converting the offence to Section 304A of the IPC. [Para 52] [925-A-B]

2.1. The key prosecution witnesses PW1, PW2 and PW3 turned hostile. Even though the above mentioned witnesses turned hostile and PW3 was later examined as court witness, when their evidence is read with the evidence of others as disclosed and expert evidence, the guilt of the accused had been clearly established. [Para 39] [916-B-C]

2.2. Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law thereby, eroding people's faith in the system. The evidence of hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. If a court finds that in the process, the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole with due caution, accept, in the light of the

evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the High Court and they found the accused guilty. [Para 40] [916-E-H; 917-A-B]

State of U.P. v. Ramesh Mishra and Anr. **AIR 1996 SC 2766: 1996 (4) Suppl. SCR 631;** *K. Anbazhagan v. Superintendent of Police and Anr.* **AIR 2004 SC 524: 2003 (5) Suppl. SCR 610 – relied on.**

2.3. In the instant case even the injured witness, who was present on the spot, turned hostile. If a witness becomes hostile to subvert the judicial process, the courts shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 IPC imposes punishment for giving false evidence but is seldom invoked. [Para 41] [917-B-E]

Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi) **(2010) 6 SCC 1: 2010 (4) SCR 103;** *Zahira Habibullah Shaikh v. State of Gujarat* **AIR 2006 SC 1367: 2006 (2) SCR 1081 – relied on.**

3.1. The plea that if a particular procedure has been prescribed u/ss.185 and 203 of Motor Vehicles Act, 1988, then that procedure has to be followed, has no application to the facts of this case. Cumulative effect of the provisions of ss. 185, 203 and 205 of the Act would indicate that the Breath Analyzer Test has a different purpose and object. The language of the above Sections would indicate that the said test is required to be carried out only when the person is driving or attempting to drive the vehicle. The expressions "while driving" and "attempting to drive" in the above Sections have a

meaning "*in praesenti*". In such situations, the presence of alcohol in the blood has to be determined instantly so that the offender may be prosecuted for drunken driving. A Breath Analyzer Test is applied in such situations so that the alcohol content in the blood can be detected. The breath analyzer test could not have been applied in the present case since the accused had escaped from the scene of the accident and there was no question of subjecting him to a breath analyzer test instantaneously. The first accused was taken to the hospital at 12.29 PM on the next day of the incident, when his blood sample was taken by the Scientific Officer (PW16). While testing the alcohol content in the blood, she noticed the presence of 0.115% weight/volume ethyl alcohol. The report exhibited as PW16/A was duly proved by the Doctor. Over and above, in her cross-examination, she had explained that 0.115% would be equivalent to 115 mg per 100 ml of blood and deposed that as per traffic rules, if the person is under the influence of liquor and alcohol content in blood exceeds 30 mg per 100 ml of blood, the person is said to have committed the offence of drunken driving. Evidence of the experts clearly indicates the presence of alcohol in blood of the accused beyond the permissible limit, that was the finding recorded by the courts below. [Paras 26 and 28] [908-A-F; 909-A-B]

3.2. The plea that the accused was coming from a distance of 16 kms. before the accident, causing no untoward incident and hence it is to be presumed that he was in a normal state of mind is not relevant for the present case. First of all, that statement is not supported by evidence apart from the assertion of the accused. Assuming so, it is a weak defence, once it is proved that the person had consumed liquor beyond the prescribed limit on scientific evidence. [Para 29] [909-C-D]

Kurban Hussain v. State **AIR 1965 SC 1616: 1965 SCR 622 – relied on.**

3.3. The plea that the accused was not under the influence of liquor or beyond the limit prescribed under the Motor Vehicle Act and he was in his senses and the victims were at fault being on the middle of the road, is without any substance and only to be rejected. [Para 31] [910-B-C]

3.4. The plea of fog, even if its presence had been established, would only weaken the defence case and the trial court and the High Court had rightly rejected that plea. Even going by the evidence of PW15 (Director of Metrological Department) and also the report exhibited as PW 15/B, there is nothing to show the presence of fog on the spot of the accident. Report of PW-15 stated that the sky was mainly clear and there was no mention of the presence of mist or fog at the spot in the report. The visibility of 100 m of clear sky was reported by PW 15 in exhibit 15/B which would demolish the theory of fog at the spot of the accident and poor visibility. Assuming that there was presence of fog, it was the duty of the accused either to stop the vehicle if the visibility was poor or he should have been more cautious and driven the vehicle carefully in a lesser speed so that it would not have blurred his vision. This never happened since the accused was in an inebriated state and the fact that six persons died practically on the spot would indicate that the vehicle was driven in a rash and negligent manner at an excessive speed. [Para 33] [910-G-H; 911-A-C]

3.5. Admittedly, the first accused was not having an Indian driving licence at the time of accident, though he had produced a licence issued by the Licencing Authority from a State in the United States. An inference is drawn that the accused was not conversant in driving a vehicle on the Indian roads in the absence of an Indian licence at the time of the accident. In any view, since the accused was in an inebriated state, therefore, the question whether he knew driving is not of much consequence. [Para 35] [911-G-H; 912-A-C-E]

Suleman Rahiman Mulani and Anr. v. State of Maharashtra **AIR 1968 SC 829: 1968 SCR 515 – distinguished.**

4.1. Generally, the policy which the court adopts while awarding sentence is that the punishment must be appropriate and proportional to the gravity of the offence committed. Law demands that the offender should be adequately punished for the crime, so that it can deter the offender and other persons from committing similar offences. Nature and circumstances of the offence; the need for the sentence imposed to reflect the seriousness of the offence; to afford adequate deterrence to the conduct and to protect the public from such crimes are certain factors to be considered while imposing the sentence. [Para 57] [927-E-G]

4.2. The imposition of sentence without considering its effect on the social order in many cases is in reality a futile exercise. Had the accused extended a helping hand to the victims of the accident, caused by him by making arrangements to give immediate medical attention, perhaps lives of some of the victims could have been saved. Even after committing the accident, he only thought of his safety, did not care for the victims and escaped from the site showing least concern to the human beings lying on the road with serious injuries. Conduct of the accused is highly reprehensible and cannot be countenanced, by any court of law. [Para 58] [927-G-H; 928-A-B]

4.3. Convicts in various countries, now, voluntarily come forward to serve the community, especially in crimes relating to motor vehicles. Graver the crime greater the sentence. But, serving the society actually is not a punishment in the real sense where the convicts pay back to the community which he owes. Conduct of the convicts will not only be appreciated by the

community, it will also give a lot of solace to him, especially in a case where because of one's action and inaction, human lives have been lost. In the facts and circumstances of the case, where six human lives were lost, adoption of this method would be good for the society rather than incarcerating the convict further in jail. Further sentence of fine also would compensate at least some of the victims of such road accidents who have died, especially in hit and run cases where the owner or driver cannot be traced. Therefore, it is ordered that the accused has to pay an amount of Rs.50 lakh (Rupees Fifty lakh) to the Union of India within six months, which will be utilized for providing compensation to the victim of motor accidents, where the vehicle owner, driver etc. could not be traced, like victims of hit and run cases. On default, he will have to undergo simple imprisonment for one year. This amount be kept in a different head to be used for the aforesaid purpose only. It is also ordered that the accused would do community service for two years which will be arranged by the Ministry of Social Justice and Empowerment within two months. On default, he will have to undergo simple imprisonment for two years. [Paras 60 and 61] [928-D-H; 929-A-C]

5.1. Section 134 of Motor Vehicles Act, 1988 casts a duty on a driver to take reasonable steps to secure medical attention for the injured person. Section 187 of the Act provides for punishment relating to accident. The accused had never extended any helping hand to the victims lying on the road and fled from the scene. No proceedings were instituted against the accused in the case on hand invoking the above mentioned provisions. [Para 36] [912-F-G; 914-A-D]

Pt. Parmanand Katara v. Union of India (UOI) and Ors. **(1989) 4 SCC 286: 1989 (3) SCR 997 – relied on.**

5.2. No legal obligation as such is cast on a

bystander either under the Motor Vehicle Act or any other legislation in India. But greater responsibility is cast on them, because they are people at the scene of the occurrence, and immediate and prompt medical attention and care may help the victims and their dear ones from unexpected catastrophe. Private hospitals and government hospitals, especially situated near the Highway, where traffic is high, should be equipped with all facilities to meet such emergency situations. Ambulance with all medical facilities including doctors and supporting staff should be ready, so that, in case of emergency, prompt and immediate medical attention could be given. [Para 37] [915-A-C]

5.3. This Court in **Paschim Banga Khet Mazdoor Samiti* **gave various directions to the Union of India and other States to ensure immediate medical attention in such situations and to provide immediate treatment to save human lives. Law Commission in its 201st report dated 31.8.2006 had also made various recommendations, but effective and proper steps are yet to be taken by Union of India and also many State Governments. Immediate attention of the Union of India and other State Governments, is called upon if they have not already implemented those directions, which they may do at the earliest. [Para 37] [915-C-F]**

Paschim Banga Khet Mazdoor Samiti and Ors. v. State of West Bengal and Ors.* **(1996) 4 SCC 37: 1996 (2) Suppl. SCR 331 – relied on.

5.4. Proper attention by the passing vehicles will also be of a great help and can save human lives. Many a times, bystanders keep away from the scene, perhaps not to get themselves involved in any legal or court proceedings. Good Samaritans who come forward to help must be treated with respect and be assured that they will have to face no hassle and will be properly

rewarded. Therefore, the Union of India and State Governments are directed to frame proper rules and regulations and conduct awareness programmes so that the situation like this could, to a large extent, be properly attended to and, in that process, human lives could be saved. [Para 38] [915-G-H; 916-A-B]

Case Law Reference:

In the judgment of Deepak Verma, J.

(1981) 4 SCC 245	**Referred to**	**Para 25**
2000 (3) SCR 1000	**Referred to**	**Para 25**
(2004) 1 SCC 525	**Referred to**	**Para 25**
(2012) 2 SCC 648	**Referred to**	**Para 25**
AIR 1936 PC 253 (2)	**Referred to**	**Para 29**
1976 (3) SCR 303	**Referred to**	**Para 34**
2007 (11) SCR 987	**Referred to**	**Para 34**

In the Judgment of K.S. Radhakrishnan, J.:

1965 SCR 622	**Relied on**	**Para 29**
1968 SCR 515	**Distinguished**	**Para 35**
1989 (3) SCR 997	**Relied on**	**Para 36**
1996 (2) Suppl. SCR 331	**Relied on**	**Para 37**
1996 (4) Suppl. SCR 631	**Relied on**	**Para 40**
2003 (5) Suppl. SCR 610	**Relied on**	**Para 40**
2010 (4) SCR 103	**Relied on**	**Para 41**
2006 (2) SCR 1081	**Relied on**	**Para 41**
1976 (3) SCR 303	**Relied on**	**Para 45**
2007 (11) SCR 987	**Relied on**	**Para 47**
(2012) 2 SCC 648	**Relied on**	**Para 48**
2009 (10) SCR 167	**Relied on**	**Para 49**
1977 (1) SCR 601	**Referred to**	**Para 50**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1168 of 2012.

From the Judgment & Order dated 20.7.2009 of the High Court of Delhi at New Delhi in Criminal Appeal No. 807 of 2008.

Sidharth S. Dave, Anil Katiyar for the Appellant.

Ram Jethmalani, Lata Krishnamurti, R.N. Karanjawala, Manik Karanjawala, Sandeep Kapur, Ravi Sharma (for Karanjawala & Co.,) for the Respondent.

The Judgments & Order of the Court was delivered by

K.S. RADHAKRISHNAN, J.

Delay condoned.

Leave granted.

1. I had the benefit and privilege of carefully considering the judgment delivered by my esteemed brother. However, I find it difficult to agree with some of the findings and observations recorded therein, even though I agree with most of the major conclusions, however, with a caveat. I, therefore, deem it fit and proper to supplement it with few suggestions and directions.

2. Facts have been meticulously and concisely dealt with by my learned Brother and I do not want to burden my judgment with those voluminous facts which find a place in the judgment of the trial court as well as the High Court.

3. The controversy in this case had been considerably narrowed down since learned senior counsel appearing for the accused – Sanjeev Nanda admitted that it was he, who was driving the BMW car bearing registration No. M-312 LYP in the early hours of 10.01.1999, which resulted in the death of six persons, leaving another injured. Admission was made after a prolonged trial, spanning over a period of nine years, that too after the trial court, appreciating the oral and documentary evidence adduced by the prosecution and defence, came to the conclusion that he was guilty and convicted him for the offence under Section 304(II) of the IPC and sentenced him to undergo rigorous imprisonment for five years.

4. The accident had occurred in early hours of 10.01.1999 near the Car Care Centre, Lodhi Road. Charges were framed against the first accused and others on 08.04.1999. Charges under Sections 338, 304 of the IPC were framed against the first accused – Sanjeev Nanda and another for causing death of six persons and for attempting to commit culpable homicide not amounting to murder of Manoj Malik. Another charge was also framed under Section 201/34 against the first accused and two others for fleeing away from the spot with the intention to screen themselves from legal punishment.

5. We are in this case primarily concerned with the charge against Sanjeev Nanda – the first accused. Prosecution in order to establish the guilt examined 61 witnesses, of which Sunil Kulkarni was given up by the prosecution and was examined as a court witness. Upon completion of the prosecution evidence, accused persons were questioned and statements of the accused persons were recorded under Section 313 of the Cr.P.C. On the side of the accused, DW1 to DW9 were examined. Documentary evidences such as FSL report exhibited as P16/A etc. were also produced. The trial court vide judgment dated 02.09.2008, as already stated, found the first accused guilty under Section 304(II) of the IPC and awarded the sentence of five years rigorous imprisonment.

6. Aggrieved by the judgment of the trial court, the first accused filed Criminal Appeal No. 807 of 2008 before the High Court and the High Court after examining the contentions of the parties converted the conviction from Section 304(II) to Section 304A of the IPC and reduced the sentence to two years. The accused had already undergone the punishment awarded by the High Court and no appeal was preferred by him against the judgment of the High Court or the findings recorded by the High Court. The present appeal has been preferred by the State contending that the High Court has committed an error in converting the conviction from Section 304(II) to Section 304A of the IPC considering the seriousness of charges proved and the gravity of the offence.

7. Shri Harin P. Raval, Additional Solicitor General appearing for the State, submitted that in the facts and circumstances of the case, the High Court was not justified in converting the conviction from Section 304(II) to 304A of the IPC, raising various grounds. Learned ASG submitted that the High Court had misdirected itself in concluding that the facts of the case would not attract 304(II) of the IPC. Shri Raval submitted that it was the first accused who had driven the vehicle on a high speed after consuming liquor and that too without a licence, causing death of six persons and injuring one, leaving them unattended. Learned ASG further submitted that the gravity of the offence was of such a nature that it is touching the boundaries of Section 300(4) of the IPC. Further, it was also pointed out by Shri Raval that the knowledge of the second degree comprehended from Part-III of Section 299 of the IPC, where death is caused by the offender by an act which offender knows is likely to cause death, would be attracted. Reference was made to the judgments of this Court in *State of Gujarat v. Haidarali Kalubhai* (1976) 1 SCC 889, *Kulwant Rai v. State of Punjab* (1981) 4 SCC 245, *State of Maharashtra v. Salman Salim Khan & Another* (2004) 1 SCC 525 and *Alister Anthony Pareira v. State of Maharashtra* (2012) 2 SCC 648. Learned counsel referred to the oral and documentary evidence, the

scene of crime as narrated by Kailash Chand, S.I. in Rukka, as well as site plan and submitted that the scene of occurrence, which was horrifying, clearly indicates beyond doubt, that the accused had knowledge that the persons who were hit by the car might die but left the scene of occurrence without caring for human lives.

8. Shri Raval also extensively referred to the oral and documentary evidence adduced in this case and submitted that the trial court as well as the High Court had concurred in finding that it was the accused who had committed the offence over and above admission of the first accused. Prosecution case, it was pointed out, mainly rested on the oral evidence of PW1 – Hari Shankar, an employee of petrol pump, PW2- Manoj Malik, injured and an employee of a hotel and PW3 – Sunil Kulkarni, the court witness though, given up by the prosecution. Further, Shri Raval submitted that the evidence of all these witnesses, though turned hostile, have to be appreciated in the light of the peculiar facts and circumstances of this case and also taking note of the admission of the first accused that it was he who had driven the vehicle on the fateful day. Learned Counsel also submitted that the court should appreciate the circumstance under which most of the prosecution witnesses turned hostile and the incidents which led to the judgment of this Court in *R.K. Anand v. Registrar,* Delhi High Court [(2009) 8 SCC 106] cannot be lost sight of, which revealed the unholy alliance, then defence counsel had with the special public prosecutor for subverting the criminal trial of this case. PW2, who got injured in the accident, turned hostile so as to subvert trial. Evidently, all these were done at the behest of the accused though the prosecution was successful in bringing home the guilt of the accused, as found by the courts below.

9. Shri Raval submitted that since learned counsel for the accused had admitted that it was the first accused who was driving the vehicle on the fateful day resulting in the death of six persons, the only question that remains to be considered

is whether the accused deserves proper punishment for the offence committed under Section 304(II) of the IPC or whether the conviction or sentence awarded by the High Court under Section 304A of the IPC would be inadequate punishment, so far as the facts and circumstances of this case are concerned. Shri Raval submitted that the accused deserves harsher punishment, as rightly held by the trial court considering the fact that he was driving the vehicle in an inebriated state, without licence and that he had left the scene of occurrence without extending any helping hand to the victims either by taking them to the hospital or reporting the accident to the police at the earliest point of time. Shri Raval placed considerable reliance on the evidence of PW-16 and the FSL report proved on record as Exhibit 16/A and pointed out that the report indicated the presence of 0.115% alcohol in the blood sample of the accused. Shri Raval submitted that the High Court had correctly understood the scope and ambit of Section 185 of the Motor Vehicles Act r/w Section 203 of the Act and came to a correct conclusion that the presence of 0.115% alcohol was much above the limit of 30mg prescribed under the Motor Vehicles Act and it can definitely affect the ability to drive the vehicle in a normal manner.

10. Shri Raval also submitted that the fog and lack of visibility on the site projected by the counsel for the accused was rightly rejected by the High Court. Learned counsel pointed out that this argument was neither raised before the trial court nor in the grounds of appeal taken before the High Court. Further, PW 15 – Dr. S.C. Gupta's report had not stated the presence of fog on the site of the accident. On the other hand, PW15 stated that the sky was clear and the mention of mist in the report was of no consequence. Shri Raval submitted that the car was coming in a high speed and considering the fact that there was clear visibility, the only conclusion possible was that the accused was in a drunken state and nobody knew whether he had driven the car 16 kms prior to the accident. Shri Raval, therefore submitted that the High Court was not

justified in holding that the offence will attract Section 304A of the IPC and not 304 (II) of the IPC.

11. Shri Ram Jethmalani, learned senior counsel appearing for the respondent – accused, submitted that the accused had already undergone the sentence awarded by the High Court and since no sufficient grounds have been made by the prosecution to upset the conclusion reached by the High Court that in the facts and circumstances of the case, the offence will fall only under Section 304A of the IPC. Learned senior counsel submitted that the accused had admitted the factum of the accident that, he was driving the vehicle on the morning hours of 10.01.1999 so as to give a quietus to the entire controversy and to purchase peace for the accused, who had undergone agony of the criminal trial for over a decade.

12. Learned senior counsel submitted, the factum of admission made by the accused in this regard cannot be put against him or prejudice the court in appreciating various contentions raised in defending his case. Shri Jethmalani, learned senior counsel, submitted, though the accident had occurred in the morning hours of 10.01.1999, the trial was prolonged due to various reasons – mainly due to the lethargic attitude of the prosecution and also due to the delay in the court proceedings which cannot be put against the accused. Further, he had already undergone the sentence of two years awarded by the High Court and subsequently he got married and has also been blessed with a daughter and it will be too harsh to punish him with imprisonment for a further term.

13. Learned senior counsel also pointed out his behavior and conduct in jail was also well-acknowledged and he has also not been involved in any criminal offence subsequently. Further, the families of the victims were adequately compensated in monetary terms and he was only 21 years on the date of the incident. These factors according to the learned senior counsel should weigh with the court and the appeal be not entertained. Learned senior counsel also attacked the various findings

recorded by the High Court and pointed out that since the accused had already undergone the punishment, no appeal was preferred in challenging those findings and in case where the State is seeking enhancement of the punishment, the accused can always raise his defence against various grounds raised by the prosecution in the appeal, since the appeal is only the continuation of the trial.

14. Learned senior counsel pointed various instances of judicial unfairness meted out to the respondent. Reference was made to the evidence of Sunil Kulkarni - the court witness. Learned senior counsel pointed out free and fair trial is sine qua non of Article 21 of the Constitution of India, which was denied to the accused in the instant case. In support of his contention regarding unfair trial, reference was made to the judgment in Jamaica (Constitutional) Order as referred in *Herbert Bell v. Director of Public Prosecutions & Anr.* [(1985) A.C. 937], *Datar Singh v. State of Punjab* [(1975) 4 SCC 272], *Birdhichand Sarda v. State of Maharashtra* [(1984) 4 SCC 116] and *Chandran @ Surendran and Anr. v. State of Kerala* [1991 Supp(1) SCC 39]. Learned senior counsel also pointed out that the judgment in *R.K. Anand* (supra) had also influenced the judicial mind, especially that of the trial judge and that the High Court has rightly converted the conviction from Section 304(II) of the IPC to Section 304A of the IPC and that the accused had undergone the punishment.

15. Learned senior counsel also submitted that the prosecution had committed a grave error in suppressing the PCR messages which were of great significance for the accused to prove his defence. PW2, one of the victims of the accident who was in the Jeep, also disclosed various facts which were suppressed by the prosecution. Learned senior counsel also pointed out Kulkarni was a totally unreliable witness and the statements made by him were given importance by the trial court as well as the High Court in reaching various conclusions against the accused.

16. Shri Jethmalani submitted there is no evidence on record to prove that the accused was intoxicated in the sense in which intoxication was understood under Section 85 of the IPC nor in the sense of his ability to control the motor vehicle being substantially impaired as a result of consuming alcohol as laid down by Section 185(1) of the M.V. Act. Further, it was also pointed that the test statutorily recognized for drunken driving is the breath analyzer test for drunken driving and the accused was not subjected to that test. Learned counsel has submitted that when a statute prescribes a particular method the prosecution has to follow that method and not any other method. Reliance was placed on the judgments of the House of Lords in *Rowlands v. Hamilton* [(1971) 1 All E.R. 1089], *Gumbley v. Cunningham* [(1989) 1 All E.R. 5], and judgments of the Privy Council in *Nazir Ahmad v. Emperor* [AIR 1936 PC 253], *State of Uttar Pradesh v. Singhara Singh and Ors.* [AIR 1964 SC 358].

17. Learned senior counsel also submitted that no reliance could be placed on the evidence tendered by PW-16 – Dr. Madhulika Sharma, Senior Scientific Officer as well as the evidence of PW10 – Dr. T. Milo and submitted that there is nothing to show the vehicle was driven in a reckless or negligent manner so as to infer that the accused was drunk. On the other hand, learned senior counsel pointed out that the accused could not have avoided the accident since policemen and others were standing on the middle of the road on a foggy day when the visibility was poor. Further, it was pointed out that the accused had driven car about 16 kms before the accident without any untoward incident, which would indicate that, his condition was stable and he had not consumed liquor beyond the prescribed limit.

18. Learned senior counsel also submitted that the evidence of PW 15 - Dr. S.C. Gupta was also not properly appreciated by the courts below, so also the evidence tendered on the presence of fog. The presence of fog, according to the learned senior counsel, clearly restricted the visibility and the

entire fault cannot be put on the accused. Reference was also made to the evidence of PW2 on the presence of fog on the morning of 10.01.1999. On the plea of excessive speed, learned senior counsel submitted, assuming it was so, that itself would not establish that the accused was negligent or rash, at the most, there was gross negligence. Reference was made to the judgment of this Court in *State of Karnataka v. Satish* [(1998) 8 SCC 493].

19. Learned senior counsel submitted, in the facts and circumstances of the case, no knowledge could be attributed to the accused since there was nothing to show that the accused had the intention to commit the offence, nor any knowledge can be attributed to him and even if it is assumed that he was negligent or rash, only section 304A of the IPC would apply and not 304(II) of the IPC. The judgment of this Court in *Alister Anthony Pareira* (supra), according to learned senior counsel, requires reconsideration. Learned senior counsel also submitted that the judgment of this Court in *Haidarali Kalubhai* (supra) would not apply to the facts of this case.

20. We may at the outset point out that both the trial court and High Court, on appreciation of oral and documentary evidence, came to the clear finding that it was the accused who had driven the BMW car at the early hours of 10.01.1999 – the day on which six human lives were lost due to the rash and negligent act of the first accused, leaving another person injured. The facts and circumstances of the case according to the trial court, as already indicated, would attract conviction under Section 304(II) of the IPC but the High Court converted the same to Section 304A of the IPC, the correctness of which is the main issue that falls for consideration. We have to first examine whether any prejudice had been caused to the first accused due to the alleged unfair and delayed trial as contended and who was primarily instrumental for the delay in completion of the trial and also whether any injustice had been caused to the accused due to the alleged judicial unfairness.

21. The incident had occurred on 10.01.1999 and charge-sheet against the accused was filed on 08.04.1999. Sixty one witnesses were examined on the side of the prosecution and nine witnesses were examined on the side of the defence and a large number of documents were produced including expert evidence before the trial court and the court finally rendered its judgment on 02.09.2008. When the trial was on, the part played by Sunil Kulkarni, one of the eye witnesses, who later turned hostile and the unholy alliance he had with the defence counsel etc. were also adversely commented upon by this court in *R.K. Anand* case (supra). The operative portion of which reads as follows:

> "Before laying down the records of the case we must also advert to another issue of great importance that causes grave concern to this Court. At the root of this odious affair is the way the BMW trial was allowed to be constantly interfered with till it almost became directionless."

Further, the court held as follows:

> "Every trial that fails due to external interference is a tragedy for the victim(s) of the crime. More importantly, every frustrated trial defies and mocks the society based on the rule of law. Every subverted trial leaves a scar on the criminal justice system. Repeated scars make the system unrecognisable and it then loses the trust and confidence of the people."

22. We do not want to delve much into the background facts in *R.K. Anand* (supra) any further, but only to put a question, but for the accused for whose benefit the entire drama was played by Anand and Sunil Kulkarni. We have referred to the above judgment since an argument was raised by Shri Ram Jethmalani on the right of the accused for speedy trial and on judicial unfairness. Had the first accused been honest enough and wanted early disposal of the trial, he would have come out with the truth at the earliest opportunity. Only after a protracted

trial that too after examining sixty one witnesses and producing and proving a host of documents and after having been found guilty and convicted under Section 304(II) of the IPC and sentenced to five years rigorous imprisonment, wisdom dawned on the accused, that too, at the appellate stage. Learned senior counsel for the accused before the High Court then submitted that to narrow down the controversy, the accused is admitting the factum of the accident and that he was driving the BMW on the fateful morning of 10.01.1999. The High Court recorded the same as follows:

> "As already noticed, to narrow down the controversy, Mr. Ram Jethmalani very fairly conceded at the threshold of the arguments that he would proceed in the matter by admitting the factum of the accident and the appellant being on the driver seat on the fateful morning of 10th January, 1999, when the horrifying incident had taken place. This admission on the part of the counsel for the appellant would mean that the appellant gives up his right to challenge the findings of the Lower Court so far as the factum of accident by the appellant while driving BMW car bearing registration No. M312LYP resulted in death of six persons and injury to one person on the morning of 10th January, 1999 near Car Care Centre petrol pump at Lodhi Road is concerned, despite the fact that several contentions have been raised by the appellant denying his involvement in the accident in the grounds of appeal."

23. Shri Ram Jethmalani, as already pointed out, submitted that the first accused was seriously prejudiced due to the unfair and delayed trial, which was also commented upon by the High Court which reads as follows:

> "In any event of the matter, the appellant himself must share the burden of causing delay in the matter as with a view to hoodwink the prosecution and to escape from the clutches of law, he denied the factum of accident. It is only at the stage of final arguments before the trial court and in

appeal, the appellant turned hostile to accept occurrence of the said horrifying accident while driving BMW car bearing registration No. M-312-LYP. Certainly, a lot of time could have been saved had the accused been honest from day one and admitted his guilt."

24. Accused, though did not file any appeal against those findings, we heard his senior counsel at length on all points and we do not find any illegality in the reasoning of the trial court as well as the High Court which we fully concur with. Learned senior counsel, however, after admitting the factum of the accident and that it was the accused, who was driving the car on the fateful day, causing death of persons, pointed out various factors which according to the counsel had contributed to the accident and hence no further enhancement of sentence is warranted.

Drunken driving

25. Learned senior counsel, appearing for the accused, as already pointed, has stated that there was nothing on record to prove that the first accused was intoxicated in the sense in which it is understood under Section 85 of the IPC nor in the sense that his ability to control the motor vehicle had been substantially impaired as a result of consumption of alcohol as laid down by Section 185 of the M.V. Act. Further, it was also stated that the first accused had driven the vehicle about 16 kms prior to the accident. If he was in a drunken state, he could not have driven the car for that much of distance. Further, it was also pointed out that the procedure laid down under Section 185 of the M.V. Act was not followed. Consequently, learned senior counsel pointed out that the courts have committed an error in holding that he was under the influence of liquor when the accident had happened. In our view, both the courts below have rightly rejected those contentions raised by learned senior counsel. The scope of Section 185 is not what the senior counsel submits.

Section 185 of the M.V. Act is extracted herein below:

"Section 185 - Driving by a drunken person or by a person under the influence of drugs

Whoever, while Driving, or attempting to drive, a motor vehicle,-

(a) has, in his blood, alcohol exceeding 30 mg. per 100 ml. of blood detected in a test by a breath analyser, or

(b) is under this influence of a drug to such an extent as to be incapable of exercising proper control over the vehicle,

shall be punishable for the first offence with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both; and for a second or subsequent offence, if committed within three years of the commission of the previous similar offence, with imprisonment for a term which may extend to two years, or with fine which may extend to three thousand rupees, or with both.

Explanation. -For the purposes of this section, the drug or drugs specified by the Central Government in this behalf, by notification in the Official Gazette, shall be deemed to render a person incapable of exercising proper control over a motor vehicle."

26. Section 203 of the MV Act deals with Breath Tests. The relevant portion for our purpose is given below:

"203. Breath tests.- (1) A police officer in uniform or an officer of the Motor Vehicles Department, as may be authorized in this behalf by that Department, may require any person driving or attempting to drive a motor vehicle in a public place to provide one or more specimens of breath for breath test there or nearby, if such police officer

or officer has any reasonable cause to suspect him of having committed an offence under section 185:

xxx xxx xxx

xxx xxx xxx

(4) If a person, required by a police officer under sub-section (1) or sub-section (2) to provide a specimen of breath for a breath test, refuses or fails to do so and the police officer has reasonable cause to suspect him of having alcohol in his blood, the police officer may arrest him without warrant except while he is at a hospital as an indoor patient.

xxx xxx xxx

xxx xxx xxx"

Section 205 deals with presumption of unfitness to drive which reads as follows:

"205. Presumption of unfitness to drive.- In any proceeding for an offence punishable under section 185 if it is proved that the accused when requested by a police officer at any time so to do, had refused, omitted or failed to consent to the taking of or providing a specimen of his breath for a breath test or a specimen of his blood for a laboratory test, his refusal, omission or failure may, unless reasonable cause therefor is shown, be presumed to be a circumstance supporting any evidence given on behalf of the prosecution, or rebutting any evidence given on behalf of the defence, with respect to his condition at that time."

The accused, in this case, escaped from the scene of occurrence, therefore, he could not be subjected to Breath Analyzer Test instantaneously, or take or provide specimen of his breath for a breath test or a specimen of his blood for a

laboratory test. Cumulative effect of the provisions, referred to the above, would indicate that the Breath Analyzer Test has a different purpose and object. The language of the above sections would indicate that the said test is required to be carried out only when the person is driving or attempting to drive the vehicle. The expressions "while driving" and "attempting to drive" in the above sections have a meaning "in praesenti". In such situations, the presence of alcohol in the blood has to be determined instantly so that the offender may be prosecuted for drunken driving. A Breath Analyzer Test is applied in such situations so that the alcohol content in the blood can be detected. The breath analyzer test could not have been applied in the case on hand since the accused had escaped from the scene of the accident and there was no question of subjecting him to a breath analyzer test instantaneously. All the same, the first accused was taken to AIIMS hospital at 12.29 PM on 10.01.1999 when his blood sample was taken by Dr. Madulika Sharma, Senior Scientific Officer (PW16). While testing the alcohol content in the blood, she noticed the presence of 0.115% weight/volume ethyl alcohol. The report exhibited as PW16/A was duly proved by the Doctor. Over and above in her cross-examination, she had explained that 0.115% would be equivalent to 115 mg per 100 ml of blood and deposed that as per traffic rules, if the person is under the influence of liquor and alcohol content in blood exceeds 30 mg per 100 ml of blood, the person is said to have committed the offence of drunken driving.

27. Further, the accused was also examined on the morning of 10.01.1999 by Dr. T. Milo – PW10, Senior Resident, Department of Forensic Medicine, AIIMS, New Delhi and reported as follows:

> "On examination, he was conscious, oriented, alert and co-operative. Eyes were congested, pupils were bilaterally dilated. The speech was coherent and gait unsteady. Smell of alcohol was present."

28. Evidence of the experts clearly indicates the presence of alcohol in blood of the accused beyond the permissible limit, that was the finding recorded by the Courts below. Judgments referred to by the counsel that if a particular procedure has been prescribed under Sections 185 and 203, then that procedure has to be followed, has no application to the facts of this case. Judgments rendered by the House of Lords were related to the provision of Road Safety Act, 1967, Road Traffic Act, 1972 etc. in U.K. and are not applicable to the facts of this case.

29. We are in this case not merely dealing with a traffic violation or a minor accident, but an accident where six human beings were killed. we find no relevance in the argument that the accused was coming from a distance of 16 kms. before the accident, causing no untoward incident and hence it is to be presumed that he was in a normal state of mind. First of all, that statement is not supported by evidence apart from the assertion of the accused. Assuming so, it is a weak defence, once it is proved that the person had consumed liquor beyond the prescribed limit on scientific evidence. This court in *Kurban Hussain v. State* [AIR 1965 SC 1616] approved the plea that simply because of the fact that no untoward incident had taken place prior to the occurrence of the accident, one cannot infer that the accused was sober and not in a drunken state. In the instant case, the presence of alcohol content was much more (i.e. 0.115%) than the permissible limit and that the accused was in an inebriated state at the time of accident due to the influence of liquor and in the accident, six human lives were lost.

30. Drunken driving has become a menace to our society. Everyday drunken driving results in accidents and several human lives are lost, pedestrians in many of our cities are not safe. Late night parties among urban elite have now become a way of life followed by drunken driving. Alcohol consumption impairs consciousness and vision and it becomes impossible to judge accurately how far away the objects are. When depth perception deteriorates, eye muscles lose their precision causing inability to focus on the objects. Further, in more

unfavourable conditions like fog, mist, rain etc., whether it is night or day, it can reduce the visibility of an object to the point of being below the limit of discernibility. In short, alcohol leads to loss of coordination, poor judgment, slowing down of reflexes and distortion of vision.

31. Punishment meted out to a drunken driver, is at least a deterrent for other such persons getting away with minor punishment and fine. Such incidents are bound to increase with no safety for pedestrians on the roads. The contention raised by learned senior counsel that the accused was not under the influence of liquor or beyond the limit prescribed under the M.V. Act and he was in his senses and the victims were at fault being on the middle of the road, is without any substance and only to be rejected.

Fog, visibility and speed

32. Learned senior counsel, as already indicated, pointed out that the morning of 10.01.1999 was a foggy one and that disrupted the visibility. Reference was made to the report exhibited as PW15/B, that of Dr. S.C. Gupta Director of Meteorological Department. Learned senior counsel pointed out that the presence of fog is a fact supported by the said report. Further, it was also pointed out that PW2 – Manoj Malik had also suggested the presence of fog and the absence of street light and all those factors contributed to the accident. It was pointed out by the High Court that even, during the course of the arguments, there was no mention of the plea of fog nor was the ground taken in the appeal memorandum. Further, it was also pointed out that such an argument was never raised before the trial court as well. No case was built up by the defence on the plea of fog and in our view there is no foundation for such an argument.

33. Even going by the evidence of PW15 – Dr. S.C. Gupta and also the report exhibited as PW 15/B, there is nothing to show the presence of fog on the spot of the accident. PW15

Dr. Gupta's report stated the sky was mainly clear and there was no mention of the presence of mist or fog at the spot in the report. The visibility of 100 m of clear sky was reported by PW 15 in exhibit 15/B which would demolish the theory of fog at the spot of the accident and poor visibility. In our view, there is another fallacy in that argument. Assuming that there was presence of fog, it was a duty of the accused either to stop the vehicle if the visibility was poor or he should have been more cautious and driven the vehicle carefully in a lesser speed so that it would not have blurred his vision. This never happened since the accused was in an inebriated state and the fact that six persons died practically on the spot would indicate that the vehicle was driven in a rash and negligent manner at an excessive speed. The plea of fog, even if its presence had been established, would only weaken the defence case and the trial court and the High Court had rightly rejected that plea.

Driving without licence

34. Learned senior counsel, appearing for the accused, submitted that the first accused knows driving, though he does not have a licence duly issued by a licencing authority under the M.V. Act, 1988. Learned senior counsel submitted that the accused had driven the vehicle in America and European countries and possesses a valid driving licence issued by the licencing authority of a State in the United States at the relevant point of time. Learned senior counsel, therefore, pointed out that the mere fact that he was not holding a driving licence would not mean that he does not know driving.

35. Learned senior counsel also submitted that there is no presumption in law that a person who has no licence does not know driving. Further, it was also pointed out that driving without a licence is an offence under M.V. Act and not under the Penal Code, unless and until it is proved that a person was driving a vehicle in a rash and negligent manner so as to attract Section 304A of the IPC. Admittedly, the first accused was not having an Indian licence at the time of accident though he had

produced a licence issued by the Licencing Authority from a State in the United States. A person who is conversant in driving a motor vehicle in the United States and European countries may not be familiar with the road conditions in India. In India, the driver is always on the defensive due to various reasons. Pedestrians in India seldom use footpaths nor respect Zebra lines or traffic lights, two wheelers, auto-rickshaws, cyclists and street-vendors are common sights on Indian roads. A driver in Indian roads should expect the unexpected always, therefore, the plea that the accused has an American driving licence is not an answer for driving in Indian roads unless it is recognized in India or that person is having a driving licence issued by the Licensing Authority in India. We have to necessarily draw an inference that the accused was not conversant in driving a vehicle on the Indian roads in the absence of an Indian licence at the time of the accident. Therefore, the judgment of this Court in Suleman Rahiman Mulani and Anr. V. State of Maharashtra [AIR 1968 SC 829] that there is no presumption of law that a person who possesses only a learning licence or possesses no licence at all, does not know driving is inapplicable to the facts of this case. In any view, in the instant case, we have already found that the accused was in an inebriated state, therefore, the question whether he knew driving is not of much consequence.

Duty of Driver, Passengers and Bystanders

36. We have found on facts that the accused had never extended any helping hand to the victims lying on the road and fled from the scene. Section 134 of M.V. Act, 1988 casts a duty on a driver to take reasonable steps to secure medical attention for the injured person. Section 134 of M.V. Act, 1988 reads as follows:

> **"134. Duty of driver in case of accident and injury to a person. –** When any person is injured or any property of a third party is damaged, as a result of an accident in which a motor vehicle is involved,

the driver of the vehicle or other person in charge of the vehicle shall –

(a) unless it is not practicable to do so on account of mob fury or any other reason beyond his control, take all reasonable steps to secure medical attention for the injured person, by conveying him to the nearest medical practitioner or hospital, and it shall be the duty of every registered medical practitioner or the doctor on the duty in the hospital immediately to attend to the injured person and render medical aid or treatment without waiting for any procedural formalities, unless the injured person or his guardian, in case he is a minor, desired otherwise;

(b) give on demand by a police officer any information required by him or, if no police officer is present, report the circumstances of the occurrence, including the circumstances, if any, or not taking reasonable steps to secure medical attention as required under clause (a), at the nearest police station as soon as possible, and in any case within twenty-four hours of the occurrence;

(c) give the following information in writing to the insurer, who has issued the certificates of insurance, about the occurrence of the accident, namely :-

(i) insurance policy number and period of its validity;

(ii) date, time and place of accident;

(iii.) particulars of the persons injured or killed in the accident;

(iv.) name of the driver and the particulars of his driving licence.

Explanation. – For the purposes of this section, the

expression "driver" includes the owner of the vehicle."

Section 187 of the M.V. Act, 1988 provides for punishment relating to accident, which reads as follows:

> **"187. Punishment for offence relating to accident.** – Whoever fails to comply with the provisions of clause (c) of sub-section (1) of section 132 or of section 133 or section 134 shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both or, if having been previously convicted of an offence under this section, he is again convicted of an offence under this section, with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

Of course, no proceedings were instituted against the accused in the case on hand invoking the above mentioned provisions, however, the unfortunate accident in which six persons were killed at the hands of the accused, prompted us to express our deep concern and anguish on the belief that, at least, this incident would be an eye-opener and also food for thought as to what we should do in future when such situations arise. This Court in *Pt. Parmanand Katara v. Union of India (UOI) and Ors.* [(1989) 4 SCC 286] pointed out that it is the duty of every citizen to help a motor accident victim, more so when one is the cause of the accident, or is involved in that particular accident. Situations may be there, in a highly charged atmosphere or due to mob fury, the driver may flee from the place, if there is a real danger to his life, but he cannot shirk his responsibility of informing the police or other authorized persons or good samaritans forthwith, so that human lives could be saved. Failure to do so, may lead to serious consequences, as we see in the instant case. Passengers who are in the vehicle which met with an accident, have also a duty to arrange proper medical attention for the victims. Further they have

equal responsibility to inform the police about the factum of the accident, in case of failure to do so they are aiding the crime and screening the offender from legal punishment.

37. No legal obligation as such is cast on a bystander either under the Motor Vehicle Act or any other legislation in India. But greater responsibility is cast on them, because they are people at the scene of the occurrence, and immediate and prompt medical attention and care may help the victims and their dear ones from unexpected catastrophe. Private hospitals and government hospitals, especially situated near the Highway, where traffic is high, should be equipped with all facilities to meet with such emergency situations. Ambulance with all medical facilities including doctors and supporting staff should be ready, so that, in case of emergency, prompt and immediate medical attention could be given. In fact, this Court in *Paschim Banga Khet Mazdoor Samiti and Ors. V. State of West Bengal and Ors.* (1996) 4 SCC 37, after referring to the report of Justice Lilamoy Ghose, a retired Judge of the Calcutta High Court, gave various directions to the Union of India and other States to ensure immediate medical attention in such situations and to provide immediate treatment to save human lives. Law Commission in its 201st report dated 31.8.2006 had also made various recommendations, but effective and proper steps are yet to be taken by Union of India and also many State Governments. We call for the immediate attention of the Union of India and other State Governments, if they have not already implemented those directions, which they may do at the earliest.

38. Seldom, we find that the passing vehicles stop to give a helping hand to take the injured persons to the nearby hospital without waiting for the ambulance to come. Proper attention by the passing vehicles will also be of a great help and can save human lives. Many a times, bystanders keep away from the scene, perhaps not to get themselves involved in any legal or court proceedings. Good Samaritans who come

forward to help must be treated with respect and be assured that they will have to face no hassle and will be properly rewarded. We, therefore, direct the Union of India and State Governments to frame proper rules and regulations and conduct awareness programmes so that the situation like this could, to a large extent, be properly attended to and, in that process, human lives could be saved.

Hostile Witnesses

39. We notice, in the instant case, the key prosecution witnesses PW1 – Harishankar, PW2 – Manoj Malik, PW3 – Sunil Kulkarni turned hostile. Even though the above mentioned witnesses turned hostile and Sunil Kulkarni was later examined as court witness, when we read their evidence with the evidence of others as disclosed and expert evidence, the guilt of the accused had been clearly established. In *R.K. Anand* (supra), the unholy alliance of Sunil Kulkarni with the defence counsel had been adversely commented upon and this Court also noticed that the damage they had tried to cause was far more serious than any other prosecution witness.

40. Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law thereby, eroding people's faith in the system. This court in *State of U.P. v. Ramesh Mishra and Anr.* [AIR 1996 SC 2766] held that it is equally settled law that the evidence of hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. In *K. Anbazhagan v. Superintendent of Police and Anr.* [AIR 2004 SC 524], this

Court held that if a court finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole with due caution, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the High Court and they found the accused guilty.

41. We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This Court in *Sidhartha Vashisht @ Manu Sharma v. State (NCT o Delhi)* [(2010) 6 SCC 1] and in *Zahira Habibullah Shaikh v. State of Gujarat* [AIR 2006 SC 1367] had highlighted the glaring defects in the system like non-recording of the statements correctly by the police and the retraction of the statements by the prosecution witness due to intimidation, inducement and other methods of manipulation. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the Courts shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 of the IPC imposes punishment for giving false evidence but is seldom invoked.

Section 304(II) or Section 304A of the IPC

42. We may in the above background examine whether the offence falls under Section 304(II) of the IPC or Section 304A of the IPC from the facts unfolded in this case. Shri Raval, appearing for the State, as already indicated, argued that the facts of this case lead to the irresistible conclusion that it would fall under Section 304(II) of the IPC. Learned counsel pointed out that the accused after having noticed that the speeding car had hit several persons, left the spot without giving any medical

aid or help knowing fully well that his act was likely to cause death. Learned counsel pointed out that in any view, it would at least fall under Section 304(II) of the IPC.

43. Shri Ram Jethmalani, on the other hand, submitted that Section 304(II), will never apply in a case of this nature, especially in the absence of any premeditation. Learned senior counsel submitted that the accused entertained no knowledge that his action was likely to cause death assuming he was rash and negligent in driving the car. Learned senior counsel pointed out that the offence of culpable homicide presupposes an intention or knowledge and the intention must be directed either deliberately to put an end to human life or to some act which to the knowledge of the accused is likely to eventuate in putting an end to human life. Learned senior counsel submitted that the accused had no such knowledge either before or immediately after the accident.

44. First we will examine the scope of section 304A of the IPC which reads as follows:

> **"304A. Causing death by negligence.-**
>
> Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

On reading the above mentioned provision, the following requirements must be satisfied before applying this section:

(i) Death must have been caused by the accused;

(ii) Death caused by rash or negligent act;

(iii) Rash and negligent act must not amount to culpable homicide.

Section 304A carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide not amounting to murder under Section 299 or murder under Section 300. Section 304A excludes all the ingredients of Section 299 or Section 300.

45. The above mentioned section came up for consideration in *Haidarali Kalubhai* (supra) wherein this Court held as follows:

> "Section 304A carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide u/s 299 IPC or murder u/s 300 IPC. If a person willfully drives a motor vehicle in the midst of a crowd and thereby causes death to some persons, it will not be a cause of mere rash and negligent driving and the act will amount to culpable homicide. Each case will, therefore, depend upon the particular facts established against the accused."

Before elaborating and examining the above principle laid down by this court, we will refer to sections 299, 300, 304A of the IPC.

Section 299

A person commits culpable homicide if the act by which the death is caused is done

****

(c) with the knowledge that he is likely to cause death.

Section 300

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done

****

(4) with the knowledge that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

"304. Punishment for culpable homicide not amounting to murder.- Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death,

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

46. Section 299 of the IPC defines culpable homicide as an act of causing death (i) with the intention of causing death; (ii) with the intention of causing some bodily injury as is likely to cause death; and (iii) with the knowledge that such act is likely to cause death. The first and second clauses of the section refer to intention apart from knowledge and the third clause refers to knowledge apart from intention. "Intention" and "knowledge" postulate the existence of positive mental attitude. The expression 'knowledge' referred to in section 299 and section 300 is the personal knowledge of the person who does the act. To make out an offence punishable under Section 304(II) of the IPC, the prosecution has to prove the death of the person in question and such death was caused by the act of the accused and that he knew such act of his is likely to cause death.

47. Section 304A, as already indicated, carves out a

specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide not amounting to murder under Section 299 or murder under Section 300. The scope of the above mentioned provisions came up for consideration before this court in the judgment of *Naresh Giri v. State of M.P.* [(2008) 1 SCC 791]; wherein this court held as follows:

> "Section 304A IPC applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. The provision is directed at offences outside the range of Sections 299 and 300 IPC. Section 304A applies only to such acts which are rash and negligent and are directly the cause of death of another person. Negligence and rashness are essential elements under Section 304A."

48. In a recent judgment, in *Alister Anthony Pareira* (supra), this Court after surveying a large number of judgments on the scope of Sections 304A and 304(II) of the IPC, came to the conclusion that in a case of drunken driving resulting in the death of seven persons and causing injury to eight persons, the scope of Sections 299, 300 and 304(I) and (II) of the IPC stated to be as follows:

> "Each case obviously has to be decided on its own facts. In a case where negligence or rashness is the cause of death and nothing more, Section 304A may be attracted but where the rash or negligent act is preceded with the knowledge that such act is likely to cause death, Section 304 Part II Indian Penal Code may be attracted and if such a rash and negligent act is preceded by real intention on the part of the wrong doer to cause death, offence may be punishable under Section 302 Indian Penal Code."

On facts, the court concluded as follows:

> "The facts and circumstances of the case which have been proved by the prosecution in bringing home the guilt of the accused under Section 304 Part II Indian Penal Code undoubtedly show despicable aggravated offence warranting punishment proportionate to the crime. Seven precious human lives were lost by the act of the accused. For an offence like this which has been proved against the Appellant, sentence of three years awarded by the High Court is too meagre and not adequate but since no appeal has been preferred by the State, we refrain from considering the matter for enhancement. By letting the Appellant away on the sentence already undergone i.e. two months in a case like this, in our view, would be travesty of justice and highly unjust, unfair, improper and disproportionate to the gravity of crime. It is true that the Appellant has paid compensation of Rs. 8,50,000/- but no amount of compensation could relieve the family of victims from the constant agony. As a matter of fact, High Court had been quite considerate and lenient in awarding to the Appellant sentence of three years for an offence under Section 304 Part II Indian Penal Code where seven persons were killed."

49. In *Jagriti Devi v. State of Himachal Pradesh* [(2009) 14 SCC 771]; wherein the Bench of this Court held that it is trite law that Section 304 Part II comes into play when the death is caused by doing an act with knowledge that it is likely to cause death but there is no intention on the part of the accused either to cause death or to cause such bodily injury as is likely to cause death.

50. One of the earlier decisions of this Court in *State of Andhra Pradesh v. Rayavarapu Punnayya and Another* [(1976) 4 SCC 382], this Court succinctly examined the distinction between Section 299 and Section 300 of the IPC and in para 12 of the Judgment and held as follows:

> "In the scheme of the Penal Code, 'culpable homicide' is

genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder', is 'culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, culpable homicide of the first degree. This is the gravest form of culpable homicide which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the 1st part of Section 304. Then, there is 'culpable homicide of the third degree.' This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second Part of Section 304."

51. Referring to para 14 of that judgment, the Court opined that the difference between Clause (b) of Section 299 and Clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. The word "likely" in Clause (b) of Section 299 conveys the sense of 'probable' as distinguished from a mere possibility. The words "bodily injury...sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury having regard to the ordinary course of nature.

Ultimately, the Court concluded as follows:

"From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder,' on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection

between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300, Penal Code is reached. This is [the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four Clauses of the definition of murder' contained in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of Section 304, depending, respectively, on. whether the second or the third Clause of Section 299 is applicable. If this question is found in the positive, but the case comes, within any of the Exceptions enumerated in Section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the First Part of Section 304, Penal Code."

52. The principle mentioned by this court in *Alister Anthony Pareira* (supra) indicates that the person must be presumed to have had the knowledge that, his act of driving the vehicle without a licence in a high speed after consuming liquor beyond the permissible limit, is likely or sufficient in the ordinary course of nature to cause death of the pedestrians on the road. In our view, *Alister Anthony Pareira* (supra) judgment calls for no reconsideration. Assuming that Shri Ram Jethmalani is right in contending that while he was driving the vehicle in a drunken state, he had no intention or knowledge that his action was likely to cause death of six human beings, in our view, at least, immediately after having hit so many human beings and the bodies scattered around, he had the knowledge that his action was likely to cause death of so many human beings, lying on the road unattended. To say, still he had no knowledge about his action is too childish which no reasonable man can accept as worthy of consideration. So far

as this case is concerned, it has been brought out in evidence that the accused was in an inebriated state, after consuming excessive alcohol, he was driving the vehicle without licence, in a rash and negligent manner in a high speed which resulted in the death of six persons. The accused had sufficient knowledge that his action was likely to cause death and such an action would, in the facts and circumstances of this case fall under Section 304(II) of the IPC and the trial court has rightly held so and the High Court has committed an error in converting the offence to Section 304A of the IPC.

53. We may now examine the mitigating and aggravating circumstances and decide as to whether the punishment awarded by the High Court is commensurate with the gravity of the offence.

54. Mitigating circumstances suggested by the defence counsel are as follows:

(i) The accused was only 21 years on the date of the accident, later married and has a daughter;

(ii) Prolonged trial, judicial unfairness caused prejudice;

(iii) The accused has undergone sentence of two years awarded by the High Court and, during that period, his conduct and behavior in the jail was appreciated;

(iv) Accident occurred on a foggy day in the early hours of morning with poor visibility;

(v) The accused had no previous criminal record nor has he been involved in any criminal case subsequently;

(vi) The accused and the family members contributed

and paid a compensation of 65 lacs, in total, in the year 1999 to the families of the victims;

(vii) The accused had neither the intention nor knowledge of the ultimate consequences of his action and that he was holding a driving licence from the United States.

55. Following are, in our view, the aggravating circumstances unfolded in this case:

(i) Six persons died due to the rash and negligent driving of the accused and the car was driven with the knowledge that drunken driving without licence is likely to cause death.

(ii) Much of the delay in completing the trial could have been avoided if wisdom had dawned on the accused earlier. Only at the appellate stage the accused had admitted that it was he who was driving the vehicle on the fateful day which resulted in the death of six persons and delay in completion of the trial cannot be attributed to the prosecution as the prosecution was burdened with task of establishing the offence beyond reasonable doubt by examining sixty one witnesses and producing several documents including expert evidence.

(iii) The accused did not stop the vehicle in spite of the fact that the vehicle had hit six persons and one got injured and escaped from the spot without giving any helping hand to the victims who were dying and crying for help. Human lives could have been saved, if the accused had shown some mercy.

(iii) The accused had the knowledge that the car driven by him had hit the human beings and human bodies were scattered around and they might die, but he thought of only his safety and left the place, leaving

their fate to destiny which, in our view, is not a normal human psychology and no court can give a stamp of approval to that conduct.

(iv) Non-reporting the crime to the police even after reaching home and failure to take any steps to provide medical help even after escaping from the site.

56. Payment of compensation to the victims or their relatives is not a mitigating circumstance, on the other hand, it is a statutory obligation. Age of 21, as such is also not a mitigating factor, in the facts of this case, since the accused is not an illiterate, poor, rustic villager but an educated urban elite, undergoing studies abroad. We have to weigh all these mitigating and aggravating circumstances while awarding the sentence.

Sentencing

57. We have to decide, after having found on facts, that this case would fall under Section 304 Part II, what will be the appropriate sentence. Generally, the policy which the court adopts while awarding sentence is that the punishment must be appropriate and proportional to the gravity of the offence committed. Law demands that the offender should be adequately punished for the crime, so that it can deter the offender and other persons from committing similar offences. Nature and circumstances of the offence; the need for the sentence imposed to reflect the seriousness of the offence; to afford adequate deterrence to the conduct and to protect the public from such crimes are certain factors to be considered while imposing the sentence.

58. The imposition of sentence without considering its effect on the social order in many cases is in reality a futile exercise. In our view, had the accused extended a helping hand to the victims of the accident, caused by him by making

arrangements to give immediate medical attention, perhaps lives of some of the victims could have been saved. Even after committing the accident, he only thought of his safety, did not care for the victims and escaped from the site showing least concern to the human beings lying on the road with serious injuries. Conduct of the accused is highly reprehensible and cannot be countenanced, by any court of law.

59. The High Court, in our view, has committed an error in converting the conviction to Section 304A of the IPC from that of 304(II) IPC and the conviction awarded calls for a re-look on the basis of the facts already discussed, otherwise this Court will be setting a bad precedent and sending a wrong message to the public. After having found that the offence would fall under Section 304(II) IPC, not under Section 304A, the following sentence awarded would meet the ends of justice, in addition to the sentence already awarded by the High Court.

Community Service for Avoiding Jail Sentence

60. Convicts in various countries, now, voluntarily come forward to serve the community, especially in crimes relating to motor vehicles. Graver the crime greater the sentence. But, serving the society actually is not a punishment in the real sense where the convicts pay back to the community which he owes. Conduct of the convicts will not only be appreciated by the community, it will also give a lot of solace to him, especially in a case where because of one's action and inaction, human lives have been lost.

61. In the facts and circumstances of the case, where six human lives were lost, we feel, to adopt this method would be good for the society rather than incarcerating the convict further in jail. Further sentence of fine also would compensate at least some of the victims of such road accidents who have died, especially in hit and run cases where the owner or driver cannot be traced. We, therefore, order as follows:

(1) Accused has to pay an amount of Rs.50 lakh (Rupees Fifty lakh) to the Union of India within six months, which will be utilized for providing compensation to the victim of motor accidents, where the vehicle owner, driver etc. could not be traced, like victims of hit and run cases. On default, he will have to undergo simple imprisonment for one year. This amount be kept in a different head to be used for the aforesaid purpose only.

(2) The accused would do community service for two years which will be arranged by the Ministry of Social Justice and Empowerment within two months. On default, he will have to undergo simple imprisonment for two years.

The Appeal is allowed to the aforesaid extent and the accused is sentenced as above.

DEEPAK VERMA, J. 1. Delay condoned.

2. Leave granted.

3. The solitary question that arises for our consideration in this appeal is whether respondent accused deserves to be held guilty of commission of offence under Section 304 Part II of the Indian Penal Code (for short IPC) or the conviction and sentence awarded to him by the High Court of Delhi, under Section 304 A of the IPC should be held to be good and legally tenable.

4. On 12.04.2010, limited notice was issued to the respondent by this Court, which reads as under:

"Issue notice confining to the nature of offence".

Facts shorn of unnecessary details as unfolded by prosecution are mentioned hereinbelow:

5. On the intervening night of 9/10.01.1999, an unfortunate motor accident took place involving BMW Car No.M-312LYP. At the relevant point of time, it is no more in dispute that offending vehicle BMW was being driven by respondent. As per prosecution story, the said vehicle was coming from Nizamuddin side and was proceeding towards Lodhi Road. Just at the corner from where Lodhi Road starts, seven persons were standing on the road at about 4.00 a.m. In the said car, Manik Kapur and Sidharth Gupta (since discharged) were also sitting.

6. As per prosecution story, Manoj Malik (P.W.2) had started from his house to leave friends Nasir, Mehendi Hasan and his friend Gulab at Nizamudin Railway Station on foot. When they reached the petrol pump of Lodhi Road, three police officials of checking squad, Constables Rajan, Ram Raj and Peru Lal, stopped them and started checking. In the meantime, BMW car driven rashly and negligently came from Nizamuddin side at a high speed and dashed violently against them. The impact was so great and severe, that they flew in the air and fell on the bonnet and wind screen of the car. Some of them rolled down and came beneath the car. On account of this, accused lost control of the vehicle which swerved to right side of the road and ultimately hit the central verge. The persons who had come under the car were dragged up to that point. Manoj (P.W.2) who had fallen on the bonnet fell down at some distance but did not come under the wheels. After hitting the central verge, car finally stopped at some distance, respondent came out from the car and inspected the gruesome site. It is said that co-passenger Manik Kapur asked the accused to rush from the scene of occurrence. Injured persons were shouting and crying for help. But ignoring them, he drove away the car at high speed towards Dayal Singh College, even though there were still some persons beneath the car. In the said accident ultimately six of them were killed and Manoj (P.W.2) was injured. Accused then took the car to his friend Sidharth Gupta's house at 50, Golf Links, New Delhi.

7. Prosecution story further goes to show that there another accused Rajeev Gupta, father of Sidharth Gupta with the help of two servants, accused Shyam and Bhola washed the car and destroyed the material evidence.

8. Prosecution alleges that PW.1 Hari Shankar, attendant at the petrol pump saw the accident and immediately informed telephonically his employer Brijesh Virmani, (P.W.70) who in turn informed the PCR at No.100. On getting the necessary information, police acted with promptitude. The telephonic information was recorded as DD No. 27-A.

9. Pursuant to the information being received, SI Kailash Chand reached the spot. By that time few PCR vans had already reached as the news about the accident was flashed. First to reach the spot was A.S.I. Devendra Singh (P.W.36), who carried Manoj Malik to the hospital. The other PCR vans took the remaining injured /deceased persons to the hospital.

10. S.I. Kailash Chand (P.W.58) wrote a Rukka describing the scene of crime. As per his description, he had found three persons, two constables Ravi Raj and Rajan and one person dead on the spot. He also came to know that other four injured persons were taken in another PCR van to the hospital. He found one broken number plate and other broken parts of the car. When plate was reassembled, the number read as M312LYP BMW. One black colour piece of bumper and rear view mirror were found scattered between 100 to 150 feet. Head of one person was found crushed. There were skid marks of the tyres of the vehicle on the spot for a long distance. The body of another constable namely, Ram Raj was found crushed and his right leg was found at a distance of 10 to 15 feet away. Abdomen of Constable Rajan Kumar was completely ripped open and blood was oozing out on the road. All the three dead bodies were sent to All India Institute of Medical Sciences (AIIMS) by ambulance.

11. Thus, it was clear to SI Kailash Chand that offending

vehicle was a black colour BMW car having the aforesaid number plate. Looking to the nature of crime said to have been committed, he recommended registration of FIR under Section 338/304 IPC. The said Rukka was dispatched to the Police Station, where formal FIR was registered.

12. S.I. Jagdish Pandey (P.W.13) also reached the spot. He found a trail of oil on the road starting from the scene of offence. He, thus followed the trail and was able to reach 50 Golf Links. The gate of the house was closed. Jagdish P.W.13 peeped through the side hinges of the gate, and found accused Rajeev Gupta, Bhola Nath and Shyam Singh washing damaged black BMW car. He tried to get the gate opened, but failed. He then gave a message to SHO Lodhi Colony, Ms. Vimlesh Yadav who reached there with S.I. Kailash Chand and the gate was then got opened. This car was not having any number plate. The broken pieces collected from the spot matched with BMW car, other parts collected from the scene fitted well, at the respective places where the car was damaged. Some blood was also noticed in the rear left wheel of the car. On enquiries being made, accused Rajeev informed that car belonged to respondent Sanjeev Nanda, a friend of his son Sidharth Gupta.

13. Thereafter, S.I. Ulhas Giri went to the house of the accused Sanjeev Nanda at Defence Colony. He brought accused Sanjeev Nanda, Manik Kapur and Sidharth Gupta to 50 Golf Links. All the accused were sent for their medical examination. Respondent accused had sustained an injury on the lip as noticed by Dr. T.Milo (P.W. 10) who had prepared the MLC. He also recorded that he was informed by Head Constable with regard to history of consuming alcohol previous night. He also noted that a smell of alcohol was present even though, the speech of accused Sanjeev was coherent but gait unsteady. Sample of blood was taken on the same day at about 12.00 noon which was sent for medical examination and after testing, alcohol presence of 0.115% milligram per 100 millilitre was recorded. This has been proved by Dr. Madhulika Sharma (P.W. 16).

14. It is pertinent to mention that no Breath Analyzer or Alco meter was used. Prosecution has not assigned any cogent or valid reasons for this default.

15. After completion of the investigation, charge sheet was filed against the accused in the Court of Additional Sessions Judge, New Delhi. Respondent was charged under Sections 201, 304 (I), 308 read with 34 of the IPC. The case was registered as Sessions Case No. 25/1999.

16. It is important to mention here that in fact, all the material witnesses had turned hostile. P.W.1 Hari Shankar, the alleged eye witness, P.W.2 Manoj Malik, the injured witness turned hostile and did not support the prosecution story. The infamous Sunil Kulkarni was examined as court witness, who alone supported the prosecution story and has been believed by the Trial Court as trustworthy. Trial Court recorded that testimony of this witness alone as to how the accident took place is worthy of credence and the same is well corroborated by the scene of crime.

17. On conclusion of trial, after appreciating the evidence available on record, the trial court found respondent guilty of commission of offence under Section 304 Part II of the IPC and awarded him a jail sentence of five years. He was acquitted of other charges. However, accused Rajeev Gupta, Shyam Singh and Bhola Nath were convicted under Section 201 IPC. Rajeev Gupta was sentenced to undergo a sentence of one year and Bhola Nath and Shyam Singh to undergo a sentence of six months each.

18. Feeling aggrieved by the said judgment and order of conviction, respondent filed Criminal Appeal No. 807 of 2008 in the High Court of Delhi at New Delhi. Co-accused, Rajeev Gupta, Bhola Nath and Shyam filed Criminal Appeals No. 767 of 2008 and 871 of 2008 respectively against their conviction and sentences awarded to them under section 201 of the IPC.

19. The learned Single Judge considered the matter at great length and thereafter found the accused Sanjeev Nanda guilty of commission of offence under Section 304 A of the IPC and reduced the sentence to two years. While converting the conviction of said accused from Section 304 Part II to 304 A, the High Court has disbelieved the testimony of Sunil Kulkarni which was the basis for the trial court to come to a conclusion that the case fell under section 304 Part II. The High Court has also held that though the act of accused amounted to rashness and negligence endangering the lives of others, since there was no intention or knowledge of causing death, no case for conviction of accused under section 304 Part II was made out.

20. Other accused Rajeev Gupta, Shyam and Bhola were found guilty of commission of offence under Section 201 of the IPC and were awarded six months' and three months' RI respectively. As mentioned hereinabove, they have preferred separate appeals against the said judgment and order of conviction, which were heard separately. Their appeals have been allowed and they have been acquitted of the charge under Section 201 of the IPC.

21. Even though lengthy arguments have been advanced by learned Additional Solicitor General Mr. Harin P. Raval, to show the manner in which the investigation was conducted, suggesting many lacunae were left in the same, at the instance and behest of respondent accused, who not only happens to be a rich person but influential as well. Much was also argued assigning the reasons as to how relevant and material witnesses (P.W.1) Hari Shankar, and (P.W.2) Manoj, injured witness, had turned hostile. It was also then argued that the matter was carried to higher court against every order. Thus, Respondent tried his best to see to it that Sessions Trial is not concluded early. All these facts have been mentioned not only by the Trial Court but have been reiterated by learned Single Judge also.

22. In the light of this, we have heard Mr. Harin P.Raval

learned Additional Solicitor General ably assisted by Mr. Siddharth S. Dave, Advocate for Appellant and Mr. Ram Jethmalani learned Senior Counsel with Mr. S. Kapur, Advocate and other Advocates for the respondent and have microscopically examined the materials available on record.

23. The arguments of Mr. Raval are as follows:

a) Admittedly respondent was not holding any valid Indian licence to drive a vehicle in India.

b) As per the evidence of (P.W.10) Dr. T. Milo, and (P.W.16) Dr. Madhulika, he was in an intoxicated condition, at the time of accident.

c) He was driving a powerful machine like BMW in excessive speed in a rash and negligent manner and certainly beyond reasonable control over it.

d) His negligence coupled with intoxication would lead to culpable homicide with knowledge.

e) He knew that persons have been crushed and some of them were underneath his car, yet he continued to drive the vehicle till all the injured were disentangled from the vehicle.

f) He fled away from the scene of crime, did not render any help to the injured. Not only this, he did not report the matter to the police and tried to obliterate the evidence available.

g) Even if intention may not be attributed to him but at least he had knowledge of what he had done, thus ingredients mandated under Section 304 Part II IPC were fully met.

h) Thus, High Court committed grave error in interfering with a well reasoned order of the Trial

Court. Respondent should thus be held guilty of commission of offence under Section 304 Part II IPC and sentence be awarded accordingly.

24. We have been taken through almost the entire documentary and oral material evidence adduced by prosecution. Following authorities have been cited by the Appellant to show that such type of acts would fall precisely under Section 304 Part II of the IPC and not under Section 304 A, as has been held by the learned Single Judge in the impugned order.

25. These authorities are reported as under:

a) (1976) 1 SCC 889 *State of Gujarat Vs. Haidarali Kalubhai* where distinction has been drawn with regard to case falling under Sections 304 A and 304 Part II of the IPC. In the said judgment, proper and correct effect of Sections 299 and 300 of the IPC has also been discussed. This judgment has been followed by this Court in 2008 (1) SCC 791 Naresh Giri Vs. State of M.P.

b) (1981) 4 SCC 245 *Kulwant Rai Vs. State of Punjab,* highlights main and basic ingredients of Section 304 Part II.

c) (2000) 5 SCC 82 *Dalbir Singh Vs. State of Haryana,* has been cited to show that as far back as in the year 2000, drunken driving was heavily criticized and a warning was issued to all those who may be in the habit, to be more careful and cautious. It further went on to say that no benefit to the accused found guilty, can be granted under the Probation of Offenders Act, 1958.

d) (2004) 1 SCC 525 *State of Maharashtra Vs. Salman Salim Khan* was cited to show that in identical circumstances where the accused was not

holding a valid motor driving licence and was under influence of alcohol, he would be held to have committed offence under section 304 Part II of the IPC.

e) The last in the series is (2012) 2 SCC 648 *Alister Anthony Pareira Vs. State of Maharashtra* to show that this Court has already taken a stern view where person involved in commission of such offence was driving a vehicle in a drunken condition and has to be dealt with severely so as to send proper and correct message to the society.

26. On the other hand, Mr. Ram Jethmalani, learned Senior Counsel appearing for respondent/accused contended that looking to the facts and features of the case and taking into consideration the following mitigating circumstances, no case for interference is made out:

a) Offence was said to have been committed in the year 1999, almost 13 years back.

b) Respondent was aged 21 years at that time, and was prosecuting his course in foreign country. He had come to India on a short holiday.

c) He has already undergone the sentence of two years awarded by High Court and only thereafter, after the period of limitation of filing the appeal had expired, he got married to his long time love, now they are blessed with a daughter.

d) His behaviour and conduct in jail was extremely good, which is evident from the two affidavits filed in support of the respondent by two NGOs.

e) Fact cannot be given a go-by that it was a cold wintry night of 9/10th January, 1999, thus possibility

cannot be ruled out that visibility must have been poor due to fog.

f) He had neither any previous criminal record nor has been involved in any criminal activity ever since then. The case of *Alister Anthony* (supra) does not apply to the facts of this case.

g) It was contended that respondent has already learnt sufficient lesson at young age and no useful purpose would be served, if he is sent to jail again.

h) The victim and/or families of deceased have been paid handsome amount of compensation of Rs.65 lacs, in the year 1999 itself, i.e. Rs. 10 lacs each to the families of the deceased and Rs.5 lacs to the injured.

i) It would not only be humiliating but great embarrassment to the respondent, if he is again sent to jail for little more period, over and above the period of two years awarded and undergone.

j) He had neither intention nor knowledge of the ultimate consequences of the offence said to have been committed.

Learned Senior Counsel for the Respondent Mr. Ram Jethmalani further contended that it would not fall within the parameters of Section 304 Part II, IPC. The impugned judgment and order calls for no interference. Even otherwise, looking to facts and features of the case, no case for taking any other view is made out.

27. After having critically gone through the evidence available on record, we have no doubt in our mind that accident had occurred solely and wholly on account of rash and negligent driving of BMW car by the respondent, at a high speed, who was also intoxicated at that point of time. This fact has been

admitted by the Respondent-Accused at the Appellate stage in the High Court that at the relevant point of time, Respondent was driving the vehicle and had caused the accident but even then, it would be only his rash and negligent act, attracting Section 304A of IPC only. Even though it is difficult to come to the aforesaid conclusion, since he was in an inebriated condition. For the simple reason that he had already driven almost 16 kms from the place where he had started, to the point where he actually met with the accident without encountering any untoward incident would not go absolutely in favour of the Respondent. There is no evidence on record that they had consumed more liquor on their way also. No such material objects were recovered from the vehicle, to suggest that even while driving they were consuming liquor. One may fail to understand if one could drive safely for a distance of 16 kms, then whether the effect of intoxication would rise all of a sudden so as to find the respondent totally out of control. There is nothing of that sort but it cannot be denied that he must have been little tipsy because of the drinks he had consumed some time back. It is, indeed, extremely difficult to assess or judge when liquor would show its effect or would be at its peak. It varies from person to person.

28. As mentioned hereinabove, prosecution failed to use either the Breath Analyser or Alco Meter to record a definite finding in this regard. Evidence of (P.W.10) Dr. Milo and (P.W.16) Dr. Madhulika shows that certain amount of alcoholic contents was still found on examination of his blood at 12.00 noon, next day.

29. It is a settled principle of law that if something is required to be done in a particular manner, then that has to be done only in that way or not, at all. In AIR 1936 PC 253 (2) *Nazir Ahmad Vs. King Emperor,* it has been held as follows:

> ".....The rule which applies is a different and not less well recognized rule, namely, that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. ....."

30. It has also come on record that seven persons were standing close to the middle of the road. One would not expect such a group, at least, at that place of the road, that too in the wee hours of the morning, on such a wintry night. There is every possibility of the accused failing to see them on the road. Looking to all this, it can be safely assumed that he had no intention of causing bodily injuries to them but he had certainly knowledge that causing such injuries and fleeing away from the scene of accident, may ultimately result in their deaths.

31. It is also pertinent to mention that soon after hitting one of them, accused did not apply the brakes so as to save at least some of the lives. Since all the seven of them were standing in a group, he had not realized that impact would be so severe that they would be dragged for several feet. Possibility also cannot be ruled out that soon after hitting them, respondent, a young boy of 21 years then, might have gone into trauma and could not decide as to what to do until vehicle came to a halt. He must have then realized the blunder he committed.

32. Respondent, instead of rendering helping hand to the injured, ran away from the scene, thus adding further to the miseries of the victims. It is not a good trend to run away after causing motor road accidents. An attempt should be made to render all possible help, including medical assistance, if required. Human touch to the same has to be given.

33. An aspect which is generally lost sight of in such cases is that bodily injuries or death are as a consequence of accidents. 'Accident' has been defined by Black's Law Dictionary as under:

> "Accident: An unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated."

Thus, it means, if the injury/death is caused by an accident, that itself cannot be attributed to an intention. If intention is proved and death is caused, then it would amount to culpable homicide.

34. It is to be noted that in Alister Anthony Pareira's case, the earlier two judgments of this Court reported in (1976) 1 SCC 889 *State of Gujarat Vs. Haiderali Kalubhai,* and 2008 (1) SCC 791 *Naresh Giri Vs. State of M.P.,* both rendered by bench of two learned Judges of this Court, were neither cited nor have been referred to. Thus, the ratio decidendi of these cases has not at all been considered in Alister's case.

35. In the former case, it has been held in paras 4 and 5 as under:

> "4. Section 304-A carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide under Section 299 IPC or murder under Section 300 IPC. If a person wilfully drives a motor vehicle into the midst of a crowd and thereby causes death to some persons, it will not be a case of mere rash and negligent driving and the act will amount to culpable homicide. Each case will, therefore, depend upon the particular facts established against the accused.
>
> 5. The prosecution in this case wanted to establish a motive for committing the offence against the sarpanch. It was sought to be established that there was enmity between the sarpanch and the accused and his relations on account of panchayat elections. Some evidence was led in order to prove that the accused and his relations were gunning against the sarpanch for some time after the latter's election as sarpanch. Even an anonymous letter was received by the sarpanch threatening his life which was handed over to the police by the sarpanch. Both the Sessions Judge as well as the High Court did not accept

> the evidence appertaining to motive. Mr. Mukherjee, therefore, rightly and very fairly did not address us with regard to that part of the case. Even so, the learned Counsel submits that the act per se and the manner in which the vehicle was driven clearly brought the case under Section 304 Part II IPC."

It is further held in the same judgment at para 10 as under:

> "10. Section 304-A, by its own definition totally excludes the ingredients of Section 299 or Section 300, I.P.C. Doing an act with the intent to kill a person or knowledge that doing of an act was likely to cause a person's death are ingredients of the offence of culpable homicide. When intent or knowledge as described above is the direct motivating force of the act complained of, Section 304 A has to make room for the graver and more serious charge of culpable homicide."

It is interesting to note that this judgment had been a sheet anchor of arguments of both the learned senior counsel appearing for parties. They have read it differently and have tried to put different interpretations to the same.

In the latter case of Naresh Giri it has been held in the Head note as under:

> "Section 304 A IPC applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. The provision is directed at offences outside the range of Sections 299 and 300 IPC. Section 304 A applies only to such acts which are rash and negligent and are directly the cause of death of another person. Negligence and rashness are essential elements under Section 304-A.
>
> Section 304 A carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide under Section

299 or murder under Section 300. If a person willfully drives a motor vehicle into the midst of a crowd and thereby causes death to some person, it will not be a case of mere rash and negligent driving and the act will amount to culpable homicide. Doing an act with the intent to kill a person or knowledge that doing an act was likely to cause a person's death is culpable homicide. When intent or knowledge is the direct motivating force of the act, Section 304 A has to make room for the graver and more serious charge of culpable homicide."

We may profitably deal with definition of 'Reckless' as defined in Lexicon, which reads as under:-

"Characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash. Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do. (Black, 7th Edn. 1999)

Intention cannot exist without foresight, but foresight can exist without intention. For a man may foresee the possible or even probable consequences of his conduct and yet not desire them to occur; none the less if he persists on his course he knowingly runs the risk of bringing about the unwished result. To describe this state of mind the word "reckless" is the most appropriate."

36. For our own benefit it is appropriate to reproduce Section 304 of the IPC, which reads thus:

"304. Punishment for culpable homicide not amounting to murder –

Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may

extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death,

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

37. Critical and microscopic analysis thereof shows that once knowledge that it is likely to cause death is established but without any intention to cause death, then jail sentence may be for a term which may extend to 10 years or with fine or with both.

38. Now, we have to consider if it is a fit case where conviction should be altered to Section 304 Part II of IPC and sentence awarded should be enhanced.

39. We are of the considered view that looking to the nature and manner in which accident had taken place, it can safely be held that he had no intention to cause death but certainly had the knowledge that his act may result in death.

40. Thus, looking to the matter from all angles, we have no doubt in our mind that knowledge can still be attributed to accused Sanjeev that his act might cause such bodily injuries which may, in ordinary course of nature, be sufficient to cause death but certainly he did not have any intention to cause death. He was not driving the vehicle with that intention. There is nothing to prove that he knew that a group of persons was standing on the road he was going to pass through. If that be so, there cannot be an intention to cause death or such bodily injury as is likely to cause death. Thus, in our opinion, he had committed an offence under Section 304 Part II IPC. We accordingly hold so.

41. Now the greater question that arises for consideration is if sentence deserves to be suitably enhanced or the same can be maintained as awarded by the High Court, the period which the Respondent has already undergone.

42. To do complete justice between the parties we have to weigh aggravating and mitigating circumstances to find out on which side justice tilts more.

43. In fact, the aggravating and mitigating circumstances have been mentioned in detail in the preceding paras. We have given our serious thought to the whole matter and are of the considered opinion that mitigating circumstances as mentioned in para 26 hereinabove are heavier than the aggravating circumstances. The balance of justice tilts more in favour of the accused.

44. In the case in hand, no useful purpose is going to be served by sending the respondent accused Sanjeev Nanda to jail once again. Even though in the facts and circumstances of the case, jail sentence awarded to him may not be just and appropriate but as mentioned hereinabove, the mitigating circumstances tilt heavily in favour of the accused.

45. In the light of the aforesaid discussion, the appeal is partly allowed. The judgment and order of conviction passed by Delhi High Court is partly set aside and the order of conviction of Trial Court is restored and upheld. Accused is held guilty under Section 304 Part II of the IPC. Looking to the facts and circumstances of the same, we deem it appropriate to maintain the sentence awarded by the High Court, which he has already undergone. However, we make it clear that this has been held so, looking to very peculiar facts and features of this particular case and it may not be treated as a precedent of general proposition of law on the point, for other cases.

46. Appeal stands allowed to the aforesaid extent. Accused has already undergone the sentence awarded to him by the High Court. Thus, he need not undergo any further sentence.

O R D E R

1. Delay condoned.

2. Leave granted.

3. In the light of separate judgments pronounced by us today, the judgment and order of conviction passed by Delhi High Court under Section 304A of the Indian Penal Code (IPC) is set aside and the order of conviction of Trial Court under Section 304 Part II of the I.P.C. is restored and upheld. However, we deem it appropriate to maintain the sentence awarded by the High Court, which the accused has already undergone.

4. In addition, the accused is put to the following terms:

(1) Accused has to pay an amount of Rs.50 lakh (Rupees Fifty lakh) to the Union of India within six months, which will be utilized for providing compensation to the victim of motor accidents, where the vehicle owner, driver etc. could not be traced, like victims of hit and run cases. On default, he will have to undergo simple imprisonment for one year. This amount be kept in a different head to be used for the aforesaid purpose only.

(2) The accused would do community service for two years which will be arranged by the Ministry of Social Justice and Empowerment within two months. On default, he will have to undergo simple imprisonment for two years.

The Appeal is accordingly allowed in terms of the judgments and this common order.

K.K.T. Appeal Partly allowed.

BHOPAL GAS PEEDITH MAHILA UDYOG SANGATHAN & ORS.

v.

UNION OF INDIA & ORS.

(Writ Petition (C) No. 50 of 1998)

AUGUST 09, 2012

[S.H. KAPADIA, CJI., A.K . PATNAIK AND SWATANTER KUMAR, JJ.]

Constitution of India, 1950 – Articles 21 and 32 – Bhopal gas Leak Disaster – Public Interest Litigation – By victims of the disaster – Praying for free and proper medical assistance from the State and for direction to Indian Council of Medical Research (ICMR) to resume and conduct research studies which it had undertaken immediately after disaster and had subsequently abandoned – Court directed constitution of two expert Committees viz. 'Monitoring Committee' and the 'Advisory Committee' – Court also directed creation of Bhopal Memorial Hospital and Research Centre (BMHRC) and Bhopal Memorial Hospital Trust (BMHT) for the purposes of healthcare of gas victims – In order to ensure smooth running of BMHT, a corpus was created – As per direction of Union Government, ICMR established National Institute of Research in Environment Health, (NIREH) as a permanent research centre – Monitoring Committee making certain recommendations proposing that further power be vested in it for improving the quality of medical care to gas victims – Management and corpus of BMHT transferred to Union Government – Thereafter certain Interlocutory applications were filed seeking certain directions and making certain suggestions – Held: In terms of Article 21, all the gas victims are entitled to greater extent of multi-dimensional health care, as their sufferings are not attributable to them – In addition to the directions already issued by this Court, certain further

directions issued in relation to better co-ordination between the functioning of the authorities, issuance of 'Health Booklets' and 'Smart Cards' to the gas victims, computerization of medical records of hospitals, taking over of corpus of BMHT, management of the Trust and certain matters where State Government failed to effectively accept the recommendations of the Committees – There is no justification for expanding the scope of functioning of the Monitoring Committee or bringing the private hospitals/clinics within its jurisdiction – It is directed that all the matters covered under Schedule I to NGT Act after coming into force of the Act shall stand transferred and can be instituted only before National Green Tribunal – Since the present case does not involve any complex or other environmental issues and primarily requires administrative supervision for proper execution of the orders of the court, it is transferred to High Court instead of the Tribunal – Supervisory jurisdiction to be exercised by the High Court to better serve the ends of justice – National Green Tribunal Act, 2010 – ss.14, 29, 30, 38(5) and schedule I – Environmental Law.

CIVIL ORIGINAL JURISDICTION : Writ Petition No. 50 of 1998.

Under Article 32 of the Constitution of India.

WITH

I.A. Nos. 62-63 of 2011

IN

C.A. Nos. 3187-88 of 1988

Sanjay Parikh, Aagney Sail, Mamta Saxena, A.N. Singh, Bushra Parveen, Naveen R. Nath, Karuna Nundy, Anupam Lal Das for the Petitioners.

Mohan Parasaran, ASG, Vijay Hansaria, Raju Ramachandran, S.W.A. Qadri, Rekha Pandey, Sunita Sharma,

M. Khairati, D.S. Mahra, Anil Katiyar, B. Krishna Prasad, C.D. Singh, Sunny Choudhary, Abhimanyu, Ayusha Kumar, Madhu Sikri, Rishi S. Chandra Shekhar for the Respondents.

The Order of the Court was delivered by

SWATANTER KUMAR, J. 1. Unlike natural calamities that are beyond human control, avoidable disasters resulting from human error/negligence prove more tragic and completely imbalance the inter-generational equity and cause irretrievable damage to the health and environment for generations to come. Such tragedy may occur from pure negligence, contributory negligence or even failure to take necessary precautions in carrying on certain industrial activities. More often than not, the affected parties have to face avoidable damage and adversity that results from such disasters. The magnitude and extent of adverse impact on the financial soundness, social health and upbringing of younger generation, including progenies, may have been beyond human expectations. In such situations and where the laws are silent or are inadequate, the courts have unexceptionally stepped in to bridge the gaps, to provide for appropriate directions and guidelines to ensure that fundamentals of Article 21 of the Constitution of India (for short "the Constitution") are not violated.

2. The Bhopal Gas Tragedy is a glaring example of such imbalances and adverse impacts, where by court's intervention, poor and destitute have been provided relief and rehabilitation.

3. The Bhopal Gas Leak Disaster occurred on the intervening night of the 2nd/3rd of December, 1984. Data reflecting the exact number of affected persons was not available initially. Earlier, it was felt that only a small number of persons were adversely affected in terms of health or otherwise by the leakage of toxic gases from the Union Carbide Unit at Bhopal. However, the Scientific Commission for Continuing Studies on Effects of Bhopal Gas Leakage on Life Systems (for short the 'Scientific Commission') released a

Report titled 'The Bhopal Gas Disaster: Effects on Life Systems' in July, 1987 which suggested otherwise. This Report stated that for the estimated population of 2,00,000 exposed to the toxic gases in the severely and moderately affected areas of Bhopal and the variety of long-term problems anticipated in the crisis period, the number of exposees covered so far by the Indian Council of Medical Research (for short the 'ICMR') through the epidemiological surveys constitute less than 20 per cent of the population. With the passage of time, this figure of the affected population has swollen to nearly 5,00,000. By the same Scientific Commission, it was also found that in general, the output of the epidemiological project so far had not equalled the magnitude of the tasks assigned to them, presumably due to lack of resources, trained staff as well as physical inputs. An opportunity for mounting such a massive long-term longitudinal study on a population exposed to a one-time acute chemical stress may not present itself again and hence it would be a pity if that opportunity was missed. Various steps were recommended by the Scientific Commission, from time to time, to tackle the two main aspects of this disaster. Firstly, health care of the affected victims and secondly, research work with the object to deal with the acute problems arising from this disaster on the one hand and to suggest preventive steps on the other.

4. Writ Petition (Civil) No. 50 of 1998 was filed by the Bhopal Gas Peedith Mahila Udyog Sanghathan as a public interest litigation under Article 32 of the Constitution. This petition was founded on the rights available to the victims of the Bhopal Gas Disaster under Article 21 of the Constitution and it was prayed that they were entitled to receive free and proper medical assistance from the respondents, the Union of India and the State of Madhya Pradesh. It was also prayed that the respondents be directed to take effective steps in that regard which inter alia included providing of free medicines and preparing a detailed plan of medical rehabilitation that ensured the availability of basic medical facilities to the gas victims.

Lastly, it was also prayed that the ICMR be directed to resume and conduct research studies and to make public the reports published by it so as to provide the basic ground for issuance of appropriate directions by this Court.

5. This Court has been passing various directions right from the filing of this petition and has directed certain effective and positive steps to be taken by the Union of India as well as the State of Madhya Pradesh to ensure providing of appropriate medical treatment to the gas victims. It is no use referring to the different orders passed by this Court from time to time in detail. However, we will be referring to some of the important orders in brief which have a bearing on the issue now pending before this Court and for passing of the final directions.

6. To begin with, the ICMR had undertaken certain research works immediately after the Bhopal Disaster and appropriate steps had been taken, as claimed by the State and the Central Government, to deal with the medical problems of the gas victims. However, it appears from the record and has been averred before us that after 1994, the ICMR allegedly took an irrational decision to disband all Bhopal Gas Disaster related medical research. This abandoning of research work has been seriously criticised in the present petition. Certain appeals had been filed against the order of the High Court of Madhya Pradesh which came to be registered as Civil Appeal Nos. 3187-3188 of 1988, which were subsequently clubbed with Writ Petition (Civil) No. 50 of 1998. I.A. Nos. 32-35, 36-37 in Civil Appeal Nos. 3187-3188 of 1988 titled "Union Carbide Corporation Ltd. v. Union of India" were filed for seeking different directions, upon which and vide order dated 15th May, 1988, this Court directed creation of the Bhopal Memorial Hospital and Research Centre (for short 'BMHRC') and the Bhopal Memorial Hospital Trust (for short 'BMHT/the Trust') which was constituted for the purposes of healthcare of the affected gas victims. This hospital initially was to run for a period of eight years which term was extended from time to

time and then finally, vide order dated 2nd May, 2006, the term was extended till completion of its object. Further, vide order dated 17th July, 2007, this Court also sought report from the ICMR on various toxic effects of the leaked gas.

7. This Court also, by order dated 17th September, 2004 passed in Writ Petition (Civil) No. 50 of 1998, ordered the constitution of two expert committees being the 'Monitoring Committee' and the 'Advisory Committee'. The latter was formed by ICMR under the Chairmanship of Director General of ICMR and its terms of reference were as follows:

> "(i) To examine the treatment practices currently followed by medical personnel in the hospitals/ clinics run by the Government for the Bhopal Gas victims for the various ailments suffered by them.
>
> (ii) To recommend/advise on the appropriate line of treatment to be offered to the Bhopal gas victims.
>
> (iii) To recommend/advise on the structure and content of the research to be undertaken in order to improve the quality of the treatment being offered to the Bhopal Gas victims."

8. The Advisory Committee has been submitting its reports from time to time and it was assured by the State Government that the said Committee will be provided with all facilities and technical inputs. Then, the ICMR conducted its research investigation in the form of 24 major research projects ranging from epidemiology to molecular biology implemented by 15 National Institutes. Vide letter dated 17th February, 2004, from the Director General of ICMR to the Government of Madhya Pradesh it was indicated that with respect to future needs for research, ICMR would facilitate the Madhya Pradesh State Government by constituting a Committee of experts which would look into the work carried out between 1985 to 1994 as well as the subsequent research by the Centre for Rehabilitation

Studies under the Bhopal Gas Tragedy Relief and Rehabilitation Department (for short, the 'BGTRRD'), Bhopal from 1995 till date, so as to provide guidelines for future research. On 24th June, 2010, the Union Cabinet passed a resolution directing the ICMR to establish a new permanent research centre at Bhopal which was done on 11th October, 2010, namely, the National Institute of Research in Environment Health (for short the 'NIREH'). The research work is being continued by the ICMR, while it submits its report to this Court from time to time. The vision document was duly prepared by the NIREH.

9. In the background of this vision document, it is stated that after the Methyl Isocyanate (MIC) gas episode at Bhopal, various research programmes were conducted by the ICMR to monitor the research programme and also to undertake long term epidemiological studies to record the morbidity and mortality of the cohort of gas exposed and control population.

10. In order to ensure smooth running of the BMHT, a corpus had been created which was provided with funds and contributions that were invested from time to time and the total corpus, as of now, constitutes Rs. 436.47 crores. Out of this amount, Rs.226.61 crores has been invested in RBI Bonds in Banks, Rs. 196.54 crores in FDRs in Banks, Rs.11.65 crores in the short term deposits in Flexi/Quantum in Banks and Rs.1.67 crores is the bank balance.

11. During the pendency of this petition, various directions had been passed by this Court to ensure smooth working of the Trust in both the fields of health care and research work. We may refer to some significant orders passed by this Court.

12. The surveys conducted by the ICMR, including the epidemiological survey in 1994, showed multi-organ symptoms amongst the persons exposed and there was tremendous increase in symptoms exhibited by the affected persons. There was even shortage of medicines and various representations

were made requesting improvement thereof. Vide order dated 17th September, 2004, the Court had spelt out the terms and conditions for the Monitoring Committee and the Advisory Committee. It related to procedural matters, functioning and terms of reference of the respective Committees. The paramount functions of the Monitoring Committee were to monitor suitability, availability and maintenance of medical equipments, deployment of adequate and competent medical personnel, more specifically the treatment offered at the hospitals and the functioning of these hospitals run by the Government for the Bhopal Gas victims, purchase and availability of medicines to the affected persons etc. Similarly, the Advisory Committee, while determining its own rules of procedure, was to examine the treatment practices currently followed by the medical personnel in the hospitals run by the Government for these victims in relation to various ailments suffered by them. Further, this Committee was to recommend and advice on the appropriate line of treatment to be offered to the Bhopal gas victims. It was further to recommend and advise on the kind of medical equipments and medicines required to be procured to improve the quality of treatment being offered to the victims as well as to initiate and recommend community health initiatives in health education and community participation for prevention and care.

13. Then vide order dated 17th July, 2007, the Court directed the State of Madhya Pradesh to take necessary steps for computerising the records of the hospital so that the details of the patients and/or their ailments were made permanent record to ensure their proper treatment in future. One of the factors which invited the attention of the Court at that time was that the patients who were not the victims of the gas tragedy had also started coming to the hospital, which led to passing of an order wherein the Court required the Monitoring Committee to submit a report if the treatment facilities afforded to such patients were adversely affecting the treatment of the gas victims.

14. Various reports were submitted by the two Committees afore-mentioned which were considered from time to time by this Court. Vide order dated 15th November, 2007, the Court had called upon the State of Madhya Pradesh to provide answers to the questions which were raised by the Monitoring Committee which was overseeing the functions of the hospital and the research work. Report was also sought from the ICMR on various toxic effects of the gas.

15. Thereafter, because of certain events, the Chairman of BMHT resigned. The co-ordination and smooth functioning of these units was found to be lacking and many applications in this regard were filed before the Court. As already noticed, the Court had directed setting up of a hospital for treatment of Bhopal Gas victims vide its order dated 15th May, 1988 in furtherance to which the hospital was established and even the Trust was registered on 11th August, 1988. There existed uncertainty in the decision making process. The Attorney General for India made a statement that the Union of India had decided to take over the BMHRC and run it through Department of Biotechnology and Department of Automic Energy. In furtherance to this statement, the Court disposed of I.A. No. 58-59 of 2009 and vide its order dated 19th July, 2010, the Court directed the Central Government to take steps for winding up the Trust and taking over the management of the hospital.

16. Thereafter, certain IAs came to be filed before this Court. In these IAs, different parties had prayed for issuance of different directions in relation to the working, management and control of BMHRC. IA Nos.62-63 of 2011 in Civil Appeal Nos.3167-3188 of 1988 have been filed with the prayer that the Union of India be directed to take charge of the corpus funds of the erstwhile BMHT through its Department of Biotechnology and Department of Atomic Energy and transfer the accounts of BMHT to the new management. It was also prayed that the management of the erstwhile BMHT be relieved of all its responsibilities pertaining to management of the corpus and

new authorised signatories be appointed for its accounts. One of the petitioners in the main petition filed an application being IA No. 14 of 2012, primarily relying upon the letter written by Dr. Sathyamala, (Member, Advisory Committee) to Dr. P.M. Bhargava, (Member, Advisory Committee and Chairperson of the Task Force). It was prayed that the same be taken on record and the Advisory Committee be directed to submit minutes of its meetings dated 13th August, 2009, 22nd September, 2010 and 10th December, 2011. Petitioner Nos.1 and 3 have filed IA No.16 of 2012 wherein they have prayed for issuance of certain directions. In this application, it has been stated that the Monitoring Committee in its reports dated 10th June, 2005, 31st October, 2005, 12th July, 2006, 20th December 2006, 7th August, 2007 and 27th May, 2008 have consistently recommended computerization of the hospital records and issuance of 'health booklets' to the gas victims. It is averred that recommendations of the Advisory Committee have not been complied with by the State Government, the ICMR and even the Union of India. They have also made a suggestion for issuance of 'smart cards' to the gas affected victims besides issuance of proper health booklets. The NIREH, as established by the ICMR, though was a welcome step, according to these applicants much is desired of the functioning of NIREH. The allegation is that the decision makers at the ICMR are doing everything on their part to ensure that the crucial issues affecting the life and health of the gas victims remain unaddressed at a macro level. All the concentration presently is on building the infrastructure for the NIREH. On this premise, the applicants have prayed that the orders of the Court should be complied with by the State of Madhya Pradesh as well as the ICMR for issuance of 'health booklets' and 'smart cards' to the affected persons. They also prayed for adoption of a common referral system among various medical units under BMHRC and under the BGTRRD so that the gas victims are referred to the appropriate centres for proper diagnosis, investigation and treatment in terms of the nature and degree of injury suffered by each one of them and

also in terms of therapeutic requirements. They also prayed that NIREH be directed to set up completely computerized and centrally networked Central Registry, to maintain proper medical records of all gas victims, to streamline and intensify epidemiological studies among the gas-affected population and to prepare treatment protocol for treating each category of ailment that the gas victims are suffering, such as respiratory diseases, eye-related diseases, gastro-intestinal diseases, neurological diseases, renal failure, urological problems, gynaecological problems, mental disorders, etc.

17. In other IAs/ replies filed on behalf of different parties, it has been pointed out that the Monitoring Committee should have the jurisdiction over all hospitals, including non-governmental hospitals and clinics in Bhopal. They should also be vested with powers of recommending penal action against the persons who are found to be defaulting in carrying out the appropriate treatment or following the directions of the Monitoring Committee from time to time. It has also been prayed that the research work could be carried out by private laboratories or private research units besides the research work being carried on by the ICMR and/or its established unit. It was also brought out from the record before the Court that there is no co-ordination between the various functionaries dealing with this tragedy and, in fact, the views of the Advisory Committee are not given due weightage by the implementing agencies, thereby adding to the suffering and agony of the affected parties.

18. No doubt, the BMHT was established for providing medical treatment and care to the gas victims. Both the Monitoring Committee and the Advisory Committee, appointed by this Court, had different earmarked areas of their respective operation, though their aim was common. The Advisory Committee was required to advise as per its expertise on matters which the implementing agencies, i.e., the Trust as well as the State Government, were expected to perform. On the other hand, the Monitoring Committee was required to oversee

the functioning of the research work as well as the timely providing of medical care and treatment to the gas affected victims. Functions of each of these bodies were sufficiently and unambiguously spelt out in different orders of this Court. After submission of the reports by the respective Committees, this Court had also passed various directions for the better and improved performance of these units, so as to ensure better medical care and requisite treatment to the gas victims.

19. As we have already noticed, with the passage of time this disaster has attained wider dimensions and greater concerns, which require discharge of higher responsibilities by all the agencies. In terms of Article 21 of the Constitution, all the gas victims are entitled to greater extent of multi-dimensional health care, as their sufferings are in no way, directly or indirectly, attributable to them. It was, primarily and undoubtedly, the negligence on the part of the Union Carbide Ltd. that resulted in leakage of the MIC gas, causing irreversible damage to the health of not only the persons affected but even the children who were still to be born.

20. The first and foremost question that arises for consideration of this Court is as to whether this matter should be kept pending before this Court or should it be transferred to an appropriate forum, including the High Court, for a more effective and purposeful management of these institutions and to ensure that they satisfactorily serve the purpose of 'public service and benefit' for which they have been constituted. Various applications filed before this Court and reports submitted by the Committees, as afore-referred, are to provide requisite help to the gas victims, as it is not possible for the poor victims to approach this Court for issuance of appropriate directions from time to time. This Court has already ordered providing of basic requirements and constitution of Advisory Committee and the Monitoring Committee. While the management of BMHT was taken over by the Union of India, through Ministry of Health and Family Welfare, the hospital was

to run under the direct control of Department of Bio-Technology and Department of Atomic Energy and subsequently, the hospital was also placed under the control of the Ministry.

21. In our considered opinion, it will be appropriate that day-to-day directions are passed by a jurisdictional High Court. Such Court would be in a better position to appreciate the requirements of the gas affected victims as well as to exercise better control over the functioning of the said Committees and organizations. Such direct control would improve the functioning of these units and their inter and intra co-ordination resulting in better mutual performance. Therefore, we consider it not only desirable but also in the interest of all concerned that this matter should henceforth be dealt with by the High Court of Madhya Pradesh, Bench at Jabalpur.

22. In addition to the directions issued by this Court from time to time, it is also necessary for this Court to pass some further directions to provide clarity and precision and also to ensure effective implementation of the various orders which shall remain an integral part of this wide scheme sought to be enforced for the betterment of the gas victims. As far as the argument that there should be privatization of the research work and the Monitoring Committee should be empowered to have control over all hospitals where the gas victims may go for treatment, including private hospitals and clinics of Bhopal is concerned, the same is without any substance. We are of the considered opinion that it would neither serve the ends of justice nor the interest of the gas victims. On the contrary, there would be multi-differential research without any substantive result. Furthermore, the Monitoring Committee has been constituted by this Court vide its order dated 17th September, 2004, with a definite object and specifically assigned functions and terms of reference. There is no justification, much less any need, for expanding the scope of its functioning or bringing the private hospitals/clinics within the jurisdiction of this Empowered Monitoring Committee. Both these prayers, thus, need to be

declined, which we do hereby decline.

23. Certainly, there are certain other matters which require attention of this Court. Matters in relation to better co-ordination between the functioning of the authorities, issuance of 'Health Booklets' and 'Smart Cards' to the gas victims, computerization of medical records of the hospitals, taking over of corpus of the BMHT, management of the Trust and certain matters where the State of Madhya Pradesh has failed to effectively accept the recommendations of the Committees, are some of the matters where we would have to issue certain further directions. From the record before us, it appears that the meeting of the Monitoring Committee was held on 29th March, 2011. In this meeting, the Committee proposed that further powers be vested in it for improving the quality of medical care available to the Bhopal gas victims. The proposal of the Committee reads as under:

> "The Monitoring Committee for Medical Rehabilitation of Bhopal Gas Victims proposes to have the following powers to be vested upon it by the Hon'ble Supreme Court for improving the quality of medical care available to the Bhopal Gas Victims.
>
> 1. Powers to take up matters on the basis of complaints made by any individual gas victim or representatives of organization of gas victims. Such complaints may be against any individual official of the department of Bhopal Gas Tragedy Relief and Rehabilitation or any employee in the hospital and other health care centers meant for medical care of gas victims or employed by any agency that is working under the Department of Bhopal Gas Tragedy Relief and Rehabilitation.
>
> 2. Powers to direct the concerned department of the State government to ensure facilities such as sufficient office space with furniture and furnishings,

office staff including one secretary and one doctor to act as coordinating officer and one each of Hindi and English stenographer-cum-typist and one peon and for transportation of members one vehicle with seating capacity for at least five persons.

3. There should be provision of payment of honorarium to members of the committee and also to other persons who are assigned some specific job by the Committee. It is proposed that Rs. 1,000/- per meeting or hospital inspection may be granted.

4. Powers in respect of the following matters namely:-

(i) Requisitioning any official document or inspect any official records that the Monitoring Committee finds relevant.

(ii) To ask concern institutions and/or officers for their examination and record their view.

(iii) This Committee should have the facilities of collection of sample of medicine etc as may be required from time to time for detailed examination for this drug controller may be requested for these. Collection samples of medicines, food and other items that may be necessary for assessment of quality of medical care provided at the health care facility. Drug controller may be requested to depute drug inspector for collecting sample etc. to complete the process of inquiry wherever it may be necessary.

5. Powers to recommend penal action against any officer who without any reasonable cause has failed to implement the recommendations of the

Monitoring Committee within the time limit prescribed.

6. Powers to award studies to selected agencies (that could include non-government agencies) is may be required from time to time for proper assessment of the quality of care provided at different health care facilities within the jurisdiction of the Monitoring Committee.

7. Powers to engage the services of experts in different fields for assessment of quality of care for implementations of recommendations made by the Monitoring Committee.

8. Powers to call for public hearing for recording and redress of grievances and creating awareness about the activities of the Monitoring Committee among the Bhopal Victims.

The Monitoring Committee for Medical Rehabilitation of Bhopal Gas Victims shall have jurisdiction over all the hospitals, clinic, day care centres and other health care units and centers meant for the medical rehabilitation of the Bhopal Gas Victims including those run by the Department of Bhopal Gas Tragedy Relief and Rehabilitation.

The foregoing power and functions of the Authority shall be subject to the supervision and control of the Hon'ble Supreme Court.

The direction of the Hon'ble Supreme Court dated 10.01.2011 would be taken into consideration by the Monitoring Committee."

24. These recommendations of the Monitoring Committee have been answered by the State by filing an independent reply. In this reply, it has been stated that the recommendation with

regard to jurisdiction over all hospitals and clinics is contrary to the terms of the order of this Court dated 17th September, 2004. The power to receive complaints from the affected parties has already been permitted. The Monitoring Committee is also empowered to conduct hearing and collect evidence by requisitioning of the records and examination of the officers from various departments and the hospital. The State also has no objection to the Committee collecting the samples of medicines in accordance with the provisions of the Drug and Cosmetics Act, 1940 and the Drug and Cosmetics Rules, 1945. It is also the stand of the State Government that they have implemented most of the directions issued by the Monitoring Committee.

25. Another aspect that has been brought to the notice of this Court is that adequate space for office of the Monitoring Committee is not available. This makes it difficult for the public to gain accessibility to the small space that has been provided by the State to the said Committee. This is hampering its functioning in accordance with the orders of this Court.

26. It is commonly conceded before us that the corpus money stands completely transferred to the Ministry of Health and Family Welfare, Department of Health Research (for short 'DHR') and they have also taken over the management of BMHRC.

27. Thus, it is necessary for us to deal with the various prayers made in the above application and the background leading to the filing of such application in its correct perspective. We have to take a balanced approach which would further the cause of accurate research and better medical care in favour of the gas victims. The Union of India has already passed a resolution directing the ICMR to establish a permanent research centre at Bhopal which, as already noticed, has already been established in the name of NIREH. This itself is sufficiently indicative of the intent of the Government of India to provide and procure necessary machinery for research related

works as well as to further the process of getting much needed scientific manpower and research, which can contribute in research activities relating to gas affected persons.

28. The Advisory Committee is performing its advisory function continuously. Definite replies had been filed on behalf of the State of Madhya Pradesh and the Government of India ensuring their full cooperation and complete implementation of the recommendations of these Committees, so as to provide adequate medical facilities to the affected persons and the completion of the research work.

29. As already noticed, suggestions made by the Monitoring Committee in its Report dated 29th March, 2011 have been broadly accepted by the State of Madhya Pradesh, except for two of such proposals. The reservation of the State Government on the issue of assistance of non-governmental organisation and experts from outside in assessing the quality of care and research work, appears to be for valid and good reasons. We wish to make it clear that the recommendations of the Empowered Monitoring Committee, as afore-mentioned, shall not be deemed to have been accepted by this Court, except where directions in that behalf have been specifically passed by this Court in the operative part of this order.

30. Vide letter dated 12th April, 2012, the ICMR while making a reference to the order of this Court dated 19th July, 2010 had informed that the administrative control of BMHRC, after winding up of BMHT, had been transferred to the DHR, Ministry of Health and Family Welfare, Government of India and all other matters, including administrative, financial and legal, pertaining to BMHRC would be dealt with by the DHR. All documents were also admitted to have been transferred, except the corpus of the Trust. It was suggested that the Corpus of BMHT with accumulated interest along with original documents/ receipts be transferred to the Secretary, DHR-cum-DG, ICMR and it was also stated that BMHT had been wound up as per the directions of this Court with effect from 19th July, 2010.

31. The BMHT had been constituted under the Deed of Trust dated 11th August, 1998. Since then, it had carried on its activities under the guidance of the Monitoring Committee, the Advisory Committee and as per the orders of this Court. The BMHT was to remain irrevocable for all times and the Trust Deed was to be construed and have effect in accordance with the Indian laws as per the terms and conditions of the Trust.

32. In terms of the clauses of this Deed, initially the Trust was to stand possessed of the Trust property and income thereof. This possession was to remain both during and after termination of the said period of eight years for the purposes and objects stated therein, which primarily were related to providing for infrastructure of the hospital and grant of medical aid to the poor, without distinction of race, caste or creed to the gas affected victims.

33. The accounts of the Trust had been audited and the chartered accountants submitted their Report dated 15th July, 2011 pointing out no irregularity or objections to the accounts of BMHT. This Report was submitted to the Members of the Governing Body of the BMHT. In the opinion of the Chartered Accountants, the balance sheet of the state of affairs of BMHT upto 19th July, 2010 along with accounts giving the required information, gave the true and fair view and was in complete conformity with the accounting principles generally accepted in India. Similar remarks have been made in regard to the Income and Expenditure Account wherein an excess of income over expenditure can be seen for the said period.

34. It would still be in the interest of BMHT itself, particularly when the management and the corpus of the BMHT have been transferred to the Union of India that the Government agency, besides regularly inspecting the accounts of the BMHT, also gave their final report for the period ending July 2010. The Auditor General of the State of Madhya Pradesh would be the appropriate authority to inspect the accounts of the BMHT regularly even when the management and corpus thereof is transferred to the Union of India.

35. Having noticed in detail the factual aspect of this case, the suggestions made by various applicants, recommendations of the expert bodies and keeping in mind the very object for which the present Public Interest Litigation was instituted, we are of the considered view that issuance of certain specific directions are inevitably called for. These orders would be to ensure proper progress and implementation of the 'Relief and Rehabilitation programme' for the penurious gas victims as well as to ensure that the research work is result-oriented and continued with exactitude. We make it clear that these directions shall be in aid of the various orders passed by this Court from time to time in the present petition and not in derogation thereto. In other words, all orders passed by this Court with specific reference to the orders mentioned above, shall be read mutatis mutandis to these directions and shall remain in force. The orders-cum-directions are:

1) This Public Interest Litigation (Writ Petition (Civil) No.50 of 1998) shall stand transferred to the jurisdictional Bench of Madhya Pradesh High Court for better and effective control in this case. All applications filed henceforth shall be dealt with and disposed of by the concerned Bench of the High Court, in line with the various orders passed by this Court, so as to ensure proper functioning of the 'Relief and Rehabilitation Programme', working of the expert bodies and utmost medical care and treatment to the gas victims.

2) We request the Chief Justice of the Madhya Pradesh High Court to ensure that the case is dealt with by a Bench presided over by the Chief Justice himself or a Bench presided over by the senior most Judge of that Court or any other appropriate Bench in accordance with the High Court Rules of

that Court or any special legislation governing the subject in that behalf.

3) Since the space already provided appears to be insufficient, the State of Madhya Pradesh is hereby directed to ensure provision of proper and adequate office space for the Monitoring Committee and the Advisory Committee, to perform their functions effectively. The space so provided should be accessible to public so that the gas victims can conveniently approach the Monitoring Committee for redressal of their grievances and difficulties.

4) We also direct the State Government to provide proper infrastructure to the Committees in the independent office space provided to it. The members would also be entitled to receive Rs.1,000/- honorarium for each effective meeting. However, no honorarium shall be payable on a day when the meeting is adjourned or no effective business is performed in the meeting of the Committee.

5) The Monitoring Committee has already been authorised and it is hereby clarified that it would hear the complaints and, if necessary, can even call for the records from the concerned hospital or department, record the statements of Government servants or employees of the hospital and make its recommendations to the Government for taking appropriate steps. If no action is taken by the State Government even upon a reminder thereof, the Committee would be well within its jurisdiction to approach the High Court for appropriate directions. We make it clear that the Empowered Monitoring Committee shall have no penal jurisdiction. It shall discharge its functions strictly within the framework of the powers vested and functions awarded to it

under the orders of this Court. Such suggestions of the Monitoring Committee shall be primarily recommendatory and reformative in their nature and content.

6) The Empowered Monitoring Committee shall have complete jurisdiction to oversee the proper functioning of the hospital, i.e., BMHRC as well as other Government hospitals dealing with the gas victims. This jurisdiction shall be limited to the problems relateable to the gas victims and/or the problems arising directly from the incident or even the problems allied thereto. We make it clear that the Empowered Monitoring Committee shall have no jurisdiction over the private hospitals, nursing homes and clinics in Bhopal. However, it does not absolve the State of Madhya Pradesh and the Medical Council of India from discharging its responsibilities towards the gas victims who are being treated in private hospitals, nursing homes or clinics. We do expect these authorities to hear the grievances of the complainants as well as to ensure maintenance of due standards of treatment in these hospitals, nursing homes or clinics.

7) We direct the ICMR as well as NIREH to ensure that the research work is carried on with exactitude and expeditiousness and further to ensure disbursement of its complete benefit to the gas victims. We do not permit the research work to be carried out by any private/non-governmental institution, except the ICMR and NIREH.

8) The Government of India has already resolved to establish the NIREH and carry on the research work, for which it has been provided due infrastructure. Thus, we see no reason why the research work should not progress at the requisite

pace in all fields while providing benefits for proper care and treatment of patients in the various hospitals in Bhopal. We further issue a clear direction to the Union of India and the State of Madhya Pradesh to render all assistance, financial or otherwise, to ensure that there is no impediment in the carrying on of the research work by the specialized institutions.

9) The Monitoring Committee must operationalize medical surveillance, computerization of medical information, publication of 'health booklets' etc. The Monitoring Committee shall also ensure that the 'health booklets' and 'smart cards' are provided to each gas victim irrespective of where such victim is being treated. This direction shall apply to all the hospitals run by the Government or otherwise, in Bhopal. We direct the State Government to provide assistance in all respects to the Empowered Monitoring Committee and take appropriate action against the erring officer/officials in the event of default.

We also direct complete computerization of the medical information in the Government as well as non-government hospital/clinics, which should be completed within a period of three months from today.

10) We are informed that there are large number of vacancies of doctors and supporting staff in the hospitals and allied departments. In the BGTRRD, 80 per cent posts of specialists and 30 per cent of doctors are lying vacant. Some posts are also lying vacant in the Fourth Grade staff. Thus, we direct the concerned authorities to take appropriate steps in all respects not only to fill up these vacancies but also to provide such infrastructure and facilities that the doctors are not compelled to

or prefer to resign from BMHRC employment and its various departments, due to inadequate facilities.

11) The Union of India, the State Government and the ICMR should even consider the proposal for providing autonomy to BMHRC and even make it a teaching institution so as to provide attractive terms, studies and job satisfaction therein. This will not only help in providing better opportunities of employment but would better serve the purpose of providing care and treatment of high quality to the gas victims.

12) It is indisputable that huge toxic materials/waste is still lying in and around the factory of Union Carbide Corp. (I) Ltd. in Bhopal. Its very existence is hazardous to health. It needs to be disposed of at the earliest and in a scientific manner. Thus, we direct the Union of India and the State of Madhya Pradesh to take immediate steps for disposal of this toxic waste lying in and around the Union Carbide factory, Bhopal, on the recommendations of the Empowered Monitoring Committee, Advisory Committee and the NIREH within six months from today. The disposal should be strictly in a scientific manner which may cause no further damage to human health and environment in Bhopal. We direct a collective meeting of these organizations to be held along with the Secretary to the Government of India and the Chief Secretary of the State of Madhya Pradesh within one month from today to finalize the entire scheme of disposal of the toxic wastes. The above direction is without prejudice to the appropriate orders or directions being issued by the court of competent jurisdiction.

13) The Advisory Committee, the Monitoring and the

NIREH shall continue to file their respective quarterly reports before the High Court of Madhya Pradesh. These reports shall be dealt with and appropriate directions be passed by the High Court in accordance with law.

14) We have already noticed that the management of BMHT has already been vested in the Ministry of Health and Family Welfare, Government of India and the working of BMHT has come to an end. We, thus, direct that the Union of India and the State of Madhya Pradesh shall take appropriate steps to ensure the dissolution of the Trust in accordance with law. The BMHT was initially formed for a period of eight years and then was constituted for an indefinite period under the orders of this Court. In the facts and circumstances of the case and the subsequent events, we direct that BMHT shall stand dissolved. All concerned to take steps in accordance with law, under which it was created and/or registered.

15) The corpus of BMHT has already been ordered to be transferred to the Government of India and would remain under the control of the Ministry of Health and Family Welfare. If any other steps are required to be taken, they shall immediately be taken by the concerned Ministry. We further issue a clear direction that all the Fixed Deposit Receipts, RBI Bonds, Short Term Deposits and the bank balance of the BMHT, Bhopal, shall stand transferred and be under the control of the said Ministry. If any steps even in this regard are required to be taken, we direct all concerned to take appropriate steps.

16) Accounts of BMHRC and the allied departments, as far as they are subject matter of the present writ petition, shall be audited by the Principal Accountant General (Audit), Madhya Pradesh. It shall also examine the accounts and the audit report dated 15th July, 2011 submitted by M/s. V.K. Verma and Company within three months from today.

17) We also direct the State Government and the Monitoring Committee to evolve a methodology of common referral system amongst the various medical units under the erstwhile BMHRC and BGTRRD to ensure that the gas victims are referred to appropriate centres for proper diagnosis and treatment in terms of the nature and degree of injury suffered by each one of them.

18) We also direct that the Monitoring Committee, with the aid of the Advisory Committee, NIREH and the specialized doctors of BMHRC, issues a standardised protocol for treating each category of ailment that the gas victims may be suffering from. This shall be done expeditiously. It will be highly appreciated if the Committee also prescribes scientific categorization of patients and injuries.

19) Lastly, we direct all concerned in the Union of India, State of Madhya Pradesh, Empowered Monitoring Committee, Advisory Committee, ICMR, NIREH, BMHRC and all other Government or non-government departments/ agencies involved in the implementation of Relief and Rehabilitation Programme and research activity, to carry out the above directions expeditiously and without demur and default. We grant liberty to the applicants and/ or the petitioners or any other affected person to move the High Court of Madhya Pradesh, Bench at Jabalpur, in the event of violation, non-compliance or default of any of the above directions or any other orders passed by this Court.

36. Before we part with this matter, we consider it our duty to place on record our appreciation for the able assistance rendered by the learned counsel appearing for the respective parties and the functions performed by the various Chairpersons and Committees constituted under the orders of the Court, including the Bhopal Memorial Hospital Trust.

37. This writ petition is transferred to the High Court of Madhya Pradesh in the above terms. All applications are disposed of accordingly.

38. Keeping in view the provisions and scheme of the National Green Tribunal Act, 2010 (for short the 'NGT Act') particularly Sections 14, 29, 30 and 38(5), it can safely be concluded that the environmental issues and matters covered under the NGT Act, Schedule 1 should be instituted and litigated before the National Green Tribunal (for short 'NGT'). Such approach may be necessary to avoid likelihood of conflict of orders between the High Courts and the NGT. Thus, in unambiguous terms, we direct that all the matters instituted after coming into force of the NGT Act and which are covered under the provisions of the NGT Act and/or in Schedule I to the NGT Act shall stand transferred and can be instituted only before the NGT. This will help in rendering expeditious and specialized justice in the field of environment to all concerned.

39. We find it imperative to place on record a caution for consideration of the courts of competent jurisdiction that the cases filed and pending prior to coming into force of the NGT Act, involving questions of environmental laws and/or relating to any of the seven statutes specified in Schedule I of the NGT Act, should also be dealt with by the specialized tribunal, that is the NGT, created under the provisions of the NGT Act. The Courts may be well advised to direct transfer of such cases to the NGT in its discretion, as it will be in the fitness of administration of justice.

40. Normally, we would have even transferred this case to

NGT. However, as it does not involve any complex or other environmental issues and primarily requires administrative supervision for proper execution of the orders of the Courts, we have considered it appropriate to transfer this case to the High Court of Madhya Pradesh. We may notice that the supervisory work concerns itself with regard to the proper functioning of the various Committees, which were constituted under the orders of the Court, to ensure proper running of the hospital established by the government and health care facilities available to the Bhopal Gas victims. Thus, the matter should be heard and supervisory jurisdiction be exercised by the High Court to better serve the ends of justice.

41. The Registry is directed to transmit the records of the Writ Petition No. 50/1998 to the Madhya Pradesh High Court, Bench at Jabalpur, forthwith and also send copies of this order to all concerned quarters of the Union of India, the State of Madhya Pradesh, the Monitoring Committee, the Advisory Committee, ICMR, BMHRC and the NIREH for compliance of these directions without delay and default.

K.K.T. Writ Petition Transferred to High Court. IAs. disposed of.

COMMISSIONER OF CENTRAL EXCISE, MUMBAI

v.

M/S. FIAT INDIA (P) LTD. & ANR.

(Civil Appeal Nos. 1648-1649 of 2004)

AUGUST 29, 2012

[H.L. DATTU AND ANIL R. DAVE, JJ.]

Central Excise Act, 1944 – ss. 4(1)(a) and 4(1)(b) – Applicability – Assessee declaring wholesale price in terms of s. 4(1)(a) of the cars manufactured by them – Revenue determining the value of the goods as per s. 4(1)(b) r/w. Valuation Rules – Notice issued by Revenue to assessee alleging short levy and demanding differential duty – The adjudicating authority as well as the appellate authority confirming the show cause-cum-demand notice – Appellate Tribunal allowing the appeal of the assessee – On appeal, held: The fundamental criterion for computing the value of an excisable article is the normal price at which the excisable article is ordinarily sold by the manufacturer, where the buyer is not a related person and the price is the sole consideration – If there is anything to suggest to doubt the normal price, recourse to s. 4(1)(b) could be made – In the present case, the assessee sold its goods at a lower price than the manufacturing cost and profit to penetrate the market – This would constitute extra-commercial consideration – Thus price is not the sole consideration – Therefore assessing authority was justified in invoking clause (b) of s. 4(1) – Since s. 4(1)(b) is applicable, valuation is required to be done on the basis of 1975 Valuation Rules prior to 1.7.2000 and thereafter in accordance with 2000 Valuation Rules – The court cannot take exception of the assessable value of the excisable goods quantified by the assessing authority – Central Excise (Valuation) Rules 1975 – Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

Interpretation of Statutes – Legislative intent – Whenever legislature uses certain terms of well-known legal significance or connotations, courts to interpret them as used or understood in popular sense, if not defined under the Act or the Rules framed thereunder – The normal rule of interpretation is that words used by legislature are generally a safe guide to its intention – Where statute's meaning is clear and explicit, words cannot be interpolated.

Precedent – A case is only an authority for what it actually decides and not for what may seem to follow logically from it.

Words and Phrases:

'Value', 'Normal Price', 'Ordinarily Sold' and 'Sole Consideration' – Meaning of, in the context of s. 4(1)(a) of Central Excise Act.

'Transaction value' – Meaning of, in the context of Central Excise Act.

'Popular sense' – Meaning of, in the context of Interpretation of Statutes.

The respondents-assessee were the manufacturers of motor cars i.e. Fiat Uno-model. The assessees have filed several price declarations, declaring wholesale price of their cars for sale through wholesale depots during the period 27.5.1996 to 4.3.2001. The revenue issued 11 show-cause notices for the period from June 1996 to February 2000, alleging that the assessee had not paid the correct duty on the cars, and demanded differential duty on the assessable value determined as per s. 4(1)(b) of Central Excise Act, 1944 r/w. (Valuation) Rules. The assessee replied that they had declared the assessable value or normal price in terms of s. 4(1)(a) of Central Excise Act, 1944 and determination of the assessable value as per s. 4(1)(b) r/w. the Valuation rules, 1975 would not arise; that when normal price is available, the

recourse to any other method of valuation is incorrect and improper; that due to competition in the market, they kept the price of the cars low and were forced to sell their cars at a loss; and that the assessable value declared by them should be accepted even if it is below manufacturing cost and thus there is no short levy or short payment of duty.

The Adjudicating Authority confirmed the show cause-cum-demand notices holding that the cost of the production of the car was much higher than the price at which it was sold in the market; that the price was artificial to capture the market and therefore the price at which they were sold cannot be said to be 'normal price' as per Section 4 of the Act; and that when normal price cannot be ascertained as per s. 4(1)(a), the alternate procedure under the Valuation Rules, 1975 i.e. cost of production and profit has to be applied. The assesses were directed to pay the difference in duty. The order of the Adjudicating Authority was confirmed by the First Appellate Authority.

Customs, Excise and Service Tax Appellate Tribunal reversed the findings of the Adjudicating Authority and Appellate Authority and allowed the appeal of the appellants holding that there was no allegation that the wholesale price charged by the assessee was for extra-commercial consideration and that dealing of the assesses and their buyers was not at arms length or that there was a flow back of money from the buyers to the assesses and, therefore, the price declared by the assesse is the ascertainable normal price. Hence the present appeals by the Revenue.

Allowing the appeals, the Court

HELD: 1.1. Since excise is a duty on manufacture, duty is payable whether or not goods are sold. Duty is payable even when goods are used within the factory or

goods are captively consumed within factory for further manufacture. Excise duty is payable even in case of free supply or given as replacement. Therefore, sale is not a necessary condition for charging excise duty. [Para 23] [1003-H; 1004-A-B]

1.2. Section 4 of the Central Excise Act lays down the measure by reference to which the duty of excise is to be assessed. The duty of excise is linked and chargeable with reference to the value of the exercisable goods and the value is further defined in express terms by the said Section. In every case, the fundamental criterion for computing the value of an excisable article is the normal price at which the excisable article is sold by the manufacturer, where the buyer is not a related person and the price is the sole consideration. If these conditions are satisfied and proved to the satisfaction of the adjudicating authority, then, the burden which lies on the assessee under Section 4(1)(a) would have been discharged and the price would not be ignored and the transaction would fall under the protective umbrella contained in the Section itself. [Para 24] [1004-C-F]

1.3. To determine the value, the legislature has created a legal fiction to equate the value of the goods to the price which is actually obtained by the assessee, when such goods are sold in the market, or the nearest equivalent thereof. Though the price at which the assessee sells the excisable goods to a buyer or the nearest ascertainable price may not reflect the actual value of the goods, for the purpose of valuation of excise duty, by the deeming fiction created in Section 4(1), such selling price or nearest ascertainable price in the market, as the case may be, is considered to be the value of goods. [Para 26] [1006-F-G; 1007-A-B]

Bangaru Laxman v. State (through CBI) and Anr. **(2012) 1 SCC 500: 2011 (13) SCR 268;** *J.K. Cotton Spinning and*

Weaving Mills Ltd. v. U.O.I **(1987) Supp. (1) SCC 350 – relied on.**

1.4. Whenever the legislature uses certain terms or expressions of well-known legal significance or connotations, the courts must interpret them as used or understood in the popular sense if they are not defined under the Act or the Rules framed thereunder. Popular sense means "that sense which people conversant with the subject matter, with which the statute is dealing, would attribute to it." [Para 27] [1007-C-D]

1.5. The normal rule of interpretation is that the words used by the legislature are generally a safe guide to its intention. "No principle of interpretation of statutes is more firmly settled than the rule that the court must deduce the intention of Parliament from the words used in the Act." 'Where the statute's meaning is clear and explicit, words cannot be interpolated.' [Para 28] [1007-D-F]

S. Narayanaswami v. G. Pannerselvam and Ors. **(1973) 1 SCR 172 – relied on.**

Westminster Bank Ltd. v. Zang **(1966) A.C. 182 – referred to.**

1.6. The expression 'normal price' occurring in Section 4(1)(a) and (b) means the price at which goods are sold to the public. Where the sale to public is through dealers, the 'normal price' would be the 'sale price' to the dealer. Where excise duty is chargeable on any excisable goods with reference to value, such value shall be deemed to be the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal and where the assessee and the buyer have no interest directly or indirectly in the business of each other and the price is the sole consideration for the sale.

Normal price, therefore, is the amount paid by the buyer for the purchase of goods. [Paras 31 and 43] [1008-E-F; 1014-A-C]

Ashok Leyland Ltd. v. Collector of Central Excise,Madras **(2002) 10 SCC 344;** *Commissioner of Central Excise Ahemedabad v. Xerographic Ltd.* **(2006) 9 SCC 556;** *Burn Standard Co. Ltd. and Anr. v. Union of India* **(1991) 3 SCC 467: 1991 (2) SCR 960;** ***Tata Iron and Steel Co. Ltd. v. Collector of Central Excise Jamshedpur*** **(2002) 8 SCC 338: 2002 (3) Suppl. SCR 244 ;** ***Union of India and Ors. v. Bombay Tyre International Ltd and Ors.*** **(1984) 1 SCC 467: 1984 (1) SCR 347;** ***Metal Box India Ltd. v. CCE*** **(1995) 2 SCC 90:1995 (1) SCR 136;** ***Calcutta Chromotype Ltd. v.*** **CCE (1998) 3 SCC 681:1998 (2) SCR 570;** ***Commissioner of Central Excise v. Ballarpur Industries Ltd.*** **(2007) 8 SCC 89: 2007 (9) SCR 650;** ***Siddhartha Tubes Ltd. v. CCE*** **(2005) 13 SCC 564: 2005 (5) Suppl. SCR 859;** ***CCE v. Bisleri International (P) Ltd.*** **(2005) 6 SCC 58: 2005 (1) Suppl. SCR 841;** ***Procter and Gamble Hygiene and Health Care Ltd. v. Commissioner of Central Excise, Bhopal*** **(2006)1 SCC 267: 2005 (5) Suppl. SCR 496 – relied on.**

"*Advanced Law Lexicon"* by P. Ramanatha Aiyar – referred to.

1.7 In the show cause notices issued, the Revenue doubts the normal price of the wholesale trade of the assessees. They specifically allege, which is not disputed by the assessees, that the 'loss making price' continuously for a period of more than five years while selling more than 29000 cars, cannot be the normal price. It is true that in notices issued, the Revenue does not allege that the buyer is a related person, nor do they allege element of flow back directly from the buyer to the seller, but certainly, they allege that the price was not the sole consideration and the circumstance that no prudent businessman would continuously suffer huge loss only

to penetrate the market and compete with other manufacturer of more or less similar cars. A prudent businessman or woman and in the present case, a company is expected to act with discretion to seek reasonable income, preserve capital and, in general, avoid speculative investments. [Para 43] [1014-F-H; 1015-A-B]

Union of India v. Hindalco Industries **2003 (153) ELT 481 – relied on.**

1.8 If there is anything to suggest to doubt the normal price of the wholesale trade, then recourse to clause (b) of sub-section (1) of Section 4 of the Act could be made. The price is not the normal price, is established from the following three circumstances which the assessees themselves have admitted; that the price of the cars was not based on the manufacturing cost and manufacturing profit, but have fixed at a lower price to penetrate the market; though the normal price for their cars is higher, they are selling the cars at a lower price to compete with the other manufacturers of similar cars. This is certainly a factor in depressing the sale price to an artificial level; and, lastly, the full commercial cost of manufacturing and selling the cars was not reflected in the lower price. Therefore, merely because the assessee has not sold the cars to the related person and the element of flow back directly from the buyer to the seller is not the allegation in the show cause notices issued, the price at which the assessees had sold its goods to the whole sale trader cannot be accepted as 'normal price' for the sale of cars. [Para 43] [1015-B-E]

1.9 In the context of Section 4(1)(a) of the Act, the word 'ordinarily' does not mean majority of the sales; what it means is that price should not be exceptional. The word 'ordinarily', by no stretch of imagination, can include extra-ordinary or unusual. In the instant cases,

the assessees sell their cars in the market continuously for a period of five years at a loss price and claim that it had to do only to compete with the other manufacturers of cars and also to penetrate the market. If such sales are taken as sales made in the ordinary course, it would be anathema for the expression 'ordinarily sold'. In the instant cases, since the price charged for the sale of cars is exceptional, a meaning cannot be given which does not fit into the meaning of the expression 'ordinarily sold'. In other words, in the transaction under consideration, the goods are sold below the manufacturing cost and manufacturing profit. Therefore, such sales may be disregarded as not being done in the ordinary course of sale or trade. [Para 50] [1019-A-C, E-F]

Eicher Tractors Ltd. Haryana v. Commissioner of Customs, Mumbai **(2001) 1 SCC 315: 2000 (4) Suppl. SCR 597;** *Ispat Industries Ltd. v. Commissioner of Customs,Mumbai* **(2006) 12 SCC 583: 2006 (6) Suppl. SCR 733;** *Varsha Plastics Private Limited and Anr. v. Union of India and Ors.* **(2009) 3 SCC 365: 2009 (1) SCR 896;** *Rajkumar Knitting Mills (P) Ltd. v. Collector of Customs, Bombay* **(1998) 3 SCC 163;** *Ashok Leyland Ltd. v. Collector of Central Excise, Madras* **(2002) 10 SCC 344 – referred to.**

1.10 For the purpose of Section 4(1)(a) all that has to be seen is: does the sale price at the factory gate represent the wholesale cash price. If the price charged to the purchaser at the factory gate is fair and reasonable and has been arrived at only on purely commercial basis, then that should represent the wholesale cash price under Section 4(1)(a) of the Act. This is the price which has been charged by the manufacturer from the wholesale purchaser or sole distributor. What has to be seen is that the sale made at arms length and in the usual course of business, if it is not made at arms length or in the usual course of business, then that will not be real

value of the goods. The value to be adopted for the purpose of assessment to duty is not the price at which the manufacturer actually sells the goods at his sale depots or the price at which goods are sold by the dealers to the customers, but a fictional price contemplated by the Section. [Para 50] [1019-F-H; 1020-A-B]

Rajkumar Knitting Mills (P) Ltd. v. Collector of Customs, Bombay **(1998) 3 SCC 163 – relied on.**

1.11 When there is fair and reasonable price stipulated between the manufacturer and the wholesale dealer in respect of the goods purely on commercial basis that should necessarily reflect a dealing in the usual course of business, and it is not possible to characterise it as not arising out of agreement made at arms length. In contrast, if there is an extra-ordinary or unusual price, specially low price, charged because of extra-commercial considerations, the price charged could not be taken to be fair and reasonable, arrived at on purely commercial basis, as to be counted as the wholesale cash price for levying excise duty under Section 4(1)(a) of the Act. [Para 51] [1020-D-F]

1.12 Consideration means something which is of value in the eyes of law, moving from the plaintiff, either of benefit to the plaintiff or of detriment to the defendant. In other words, it may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other. [Para 53] [1021-D-E]

Currie v. Misa **(1875) LR 10 Ex. 153 – referred to.**

Webster's Third New International Dictionary (unabridged); CorpusJuris Secundum **(p.420-421 and425);** *Salmond on Jurisprudence* **– referred to.**

1.13 'Consideration' means a reasonable equivalent or other valuable benefit passed on by the promisor to the promisee or by the transferor to the transferee. Similarly, when the word 'consideration' is qualified by the word 'sole', it makes consideration stronger so as to make it sufficient and valuable having regard to the facts, circumstances and necessities of the case. [Para 58] [1022-G-H; 1023-A]

1.14 Since under new Section 4(1)(a), the price should be the sole consideration for the sale, it will be open for the Revenue to determine on the basis of evidence whether a particular transaction is one where extra-commercial consideration has entered and, if so, what should be the price to be taken as the value of the excisable article for the purpose of excise duty and that is what exactly has been done in the instant cases and after analysing the evidence on record it is found that extra-commercial consideration had entered into while fixing the price of the sale of the cars to the customers. When the price is not the sole consideration and there are some additional considerations either in the form of cash, kind, services or in any other way, then according to Rule 5 of the 1975 Valuation Rules, the equivalent value of that additional consideration should be added to the price shown by the assessee. If the sale is influenced by considerations other than the price, then, Section 4(1)(a) will not apply. In the instant case, the main reason for the assessees to sell their cars at a lower price than the manufacturing cost and profit is to penetrate the market and this will constitute extra-commercial consideration and not the sole consideration. The duty of excise is chargeable on the goods with reference to its value then the normal price on which the goods are sold shall be deemed to be the value, provided: (1) the buyer is not a related person and (2) the price is the sole consideration. These twin conditions have to be satisfied for the case to fall under Section 4(1)(a) of the Act. In the

instant cases, the price is not the sole consideration when the assessees sold their cars in the wholesale trade. Therefore, the assessing authority was justified in invoking clause(b) of Section 4(1) to arrive at the value of the exercisable goods for the purpose of levy of duty of excise, since the proper price could not be ascertained. Since, Section 4(1)(b) of the Act applies, the valuation requires to be done on the basis of the 1975 Valuation Rules. [Para 60] [1023-C-H; 1024-A-C]

1.15 Each removal is a different transaction and duty is charged on the value of each transaction. Section 4 after amendment, therefore, accepts different transaction values which may be charged by the assessee to different customers for assessment purposes where one of the three requirements, namely; (a) where the goods are sold for delivery at the time and place of delivery; (b) the assessee and buyers are not related; and (c) price is the sole consideration for sale, is not satisfied, then the transaction value shall not be the assessable value and value in such case has to be arrived at, under the Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000 which is also made effective from 1st July, 2000. Since the price is not the sole consideration for the period even after 1st July, 2000, the assessing authority was justified in invoking provisions of the Rules 2000. [Para 61] [1024-F-H; 1025-A]

1.16 Under Section 4(1)(b) of the Act, 1944, any goods which do not fall within the ambit of Section 4(1)(a) i.e. if the 'normal price' cannot be ascertained because the goods are not sold or for any other reason, the 'normal price' would have to be determined in the prescribed manner i.e. prior to 1st day of July, 2000, in accordance with Rules, 1975 and after 1st day of July 2000, in accordance with Rules, 2000. [Para 69] [1030-G-H; 1031-A]

1.17 A bare reading of Rules 3, 4, 5, 6 and 7 of 1975 Valuation Rules does not give any indication that the adjudging authority while computing the assessable value of the excisable goods, had to follow the rules sequentially. The rules only provides for arriving at the assessable value under different contingencies. Again, Rule 7 of the Valuation Rules which provides for the best judgment assessment gives an indication that the assessing authority while quantifying the assessable value under the said Rules, may take the assistance of the methods provided under Rules 4, 5 or 6 of the Valuation Rules. Therefore, it is not correct to say that the assessing authority before invoking Rule 7 of the 1975 Valuation Rules, ought to have invoked Rules 4, 5 and 6 of the said Rules. Since the assessing authority could not do the valuation with the help of the other rules, has resorted to best judgment method and while doing so, has taken the assistance of the report of the 'Cost Accountant' who was asked to conduct special audit to ascertain the correct price that requires to be adopted during the relevant period. Therefore, the Court cannot take exception of the assessable value of the excisable goods quantified by the assessing authority. [Para 70] [1031-F-H; 1032-A-B]

2. A case is only an authority for what it actually decides and not for what may seem to follow logically from it. "Each case depends on its own facts and a close similarity between one case and another is not enough because either a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive." [Para 66] [1029-C-E]

Sushil Suri vs. Central Bureau of Investigation and Anr. **(2011) 5 SCC 708: 2011 (8) SCR 1;** *Union of India v. Bombay Tyre International* **1983 (14) ELT 1896 (SC) – relied on.**

Commissioner of Central Excise, New Delhi v. *Guru NanakRefrigeration Corporation* **2003 (153) ELT 249 (SC);** CCE v. *Bisleri International Pvt. Ltd.* **2005 (186) ELT 257 (SC) – distinguished.**

A.K. Roy and Anr. v. Voltas Ltd. **1977 (1) ELT 177 (SC);** *Assistant Collector of Central Excise and Ors. v. M.R.F. Ltd.* **1987 (27) ELT 553 (SC) – referred to.**

Elgi Equipment Pvt. Ltd. v. CCE, Coimbatore **2007 (215) ELT 348 (SC);** *Philips India Ltd. v. Collector of Central Excise, Pune* **1997 (91) E.L.T. 540 (SC);** *VST Industries Ltd. v. Collector of Central Excise, Hyderabad* **1998 (97) E.L.T. 395 (SC);** *Devi Das Gopal v. State of Punjab* **(1967) 20 STC 430;** *Basant Industries v. Addl. Collector of Customs, Bombay* **1996 (81) E.L.T. 195 (SC);** *CCE v. Rajasthan Spinning and Weaving Mills* **(2007) 218 E.L.T. 641 (SC) – Cited.**

Case Law Reference:

2007 (215) ELT 348 (SC)	**Cited**	**Para 16**
1997 (91) E.L.T. 540 (SC)	**Cited**	**Para 17**
1998 (97) E.L.T. 395 (SC)	**Cited**	**Para 17**
(1967) 20 STC 430	**Cited**	**Para 18**
1996 (81) E.L.T. 195 (SC)	**Cited**	**Para 19**
(2007) 218 E.L.T. 641 (SC)	**Cited**	**Para 19**
2011 (13) SCR 268	**Relied on**	**Para 26**
(1987) Supp. (1) SCC 350	**Relied on**	**Para 26**
(1973) 1 SCR 172	**Relied on**	**Para 28**

(2002) 10 SCC 344	**Relied on**	**Para 31**
s(2006) 9 SCC 556	**Relied on**	**Para 32**
1991 (2) SCR 960	**Relied on**	**Para 33**
2002 (3) Suppl. SCR 244	**Relied on**	**Para 34**
1984 (1) SCR 347	**Relied on**	**Para 35**
1995 (1) SCR 136	**Relied on**	**Para 36**
1998 (2) SCR 570	**Relied on**	**Para 37**
2007 (9) SCR 650	**Relied on**	**Para 38**
2005 (5) Suppl. SCR 859	**Relied on**	**Para 39**
2005 (1) Suppl. SCR 841	**Relied on**	**Para 40**
(2002) 10 SCC 344	**Relied on**	**Para 41**
2005 (5) Suppl. SCR 496	**Relied on**	**Para 42**
2003 (153) ELT 481	**Relied on**	**Para 43**
2000 (4) Suppl. SCR 597	**Referred to**	**Para 45**
2006 (6) Suppl. SCR 733	**Referred to**	**Para 46**
2009 (1) SCR 896	**Referred to**	**Para 47**
(1998) 3 SCC 163	**Referred to**	**Para 48**
(2002) 10 SCC 344	**Referred to**	**Para 49**
1983 (14) ELT 1896 (SC)	**Relied on**	**Para 62**
1977 (1) ELT 177 (SC)	**Referred to**	**Para 62**
1987 (27) ELT 553 (SC)	**Referred to**	**Para 63**
2003 (153) ELT 249 (SC)	**Distinguished**	**Para 64**
2005 (186) ELT 257 (SC)	**Distinguished**	**Para 64**
2011 (8) SCR 1	**Relied on**	**Para 66**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1648-1649 of 2004.

From the Judgment & Order dated 21.11.2003 of the Customs, Excise and Service Tax Appellate Tribunal, West Regional Bench at Mumbai in Appeal Nos. E/3695 & E/302/02.

B. Bhattacharya, ASG, Ashok Bhan, Rahul Kaushik, K. Swami Krishna Kumar, Ajay Singh, Judy James (for B. Krishna Prasad) for the Appellant.

Joseph Vellapally, Tarun Gulati, Sparsh Bhargava, Rohan Batra (for S. Hariharan), V. Lakshmi Kumaran, Alok Yadav, Krishna Mohan, K. Menon (For Rajesh Kumar) for the Respondents.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. These appeals, by special leave, are directed against the judgment and order dated 21.11.2003 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Regional Bench at Mumbai (hereinafter referred to as "the Tribunal") in Appeal Nos. E/3695/02 & E/302/02. By the impugned judgment, the Tribunal has reversed the finding of the Commissioner (Appeals) and thereby, allowed the appeals filed by the respondents-assessees.

2. **Facts in nutshell are:** The respondents-assessees are the manufacturer of motor cars, i.e. Fiat Uno model cars. The said goods are excisable under chapter sub-heading No. 8703.90 of the Central Excise Tariff Act, 1985. The said business was initially managed by M/s Premier Automobiles Ltd. However, M/s Premier Automobile surrendered its central excise registration on 6.4.1998. Thereafter, M/s Ind Auto Ltd. (now M/s Fiat India Ltd.) carried on the said business after obtaining fresh central excise registration. The assessees have filed several price declarations in terms of Rule 173C of the Central Excise Rules, 1944 (hereinafter referred to as 'the 1944 Rules') declaring wholesale price of their cars for sale through

whole sale depots during the period commencing from 27.05.1996 to 04.03.2001.

3. The authorities under the Central Excise Act, 1944 (hereinafter referred to as 'the Act') had made enquiries on 20.12.1996 and 31.12.1996, under Sub-rule 3 of Rule 173C of the 1944 Rules read with Section 14 of the Act. They had prima facie found that the wholesale price declared by the assessees is much less than the cost of production and, therefore, the price so declared by them could not be treated as a normal price for the purpose of quantification of assessable value under Section 4(1)(a) of the Act and for levy of excise duty as it would amount to short payment of duty.

4. Since further enquiry was required to be conducted regarding the assessable value of the cars, the Assistant Commissioner, Central Excise, Kurla Division, vide his order dated 03.01.1997, had *inter alia* directed for the provisional assessment of the cars at a price which would include cost of production, selling expenses (including transportation and landing charges, wherever necessary from 28.09.1996) and profit margin, on the ground that the cars were not ordinarily sold in the course of wholesale trade as the cost of production is much more than their wholesale price, but were sold at loss for a consideration, that is, to penetrate the market which has been confirmed by the assessee vide its letter dated 30.10.1996 and during the course of enquiry under Section 14 of the Act read with sub Rule (3) of Rule 173C of the 1944 Rules. He had further directed the respondents to execute B-13 bond for payment of differential duty with surety or sufficient security, that is, 25% of the bond amount. Thereafter, respondents executed B-13 bond for Rs. 7.70 crores. However, the respondents showed their inability to submit 25% bond amount as a bank guarantee and requested the Revenue authorities to reduce the same. On such request, the Commissioner, vide letter dated 23.04.2007, directed the respondents to execute bank guarantee equivalent to 5% of the bond amount. Accordingly, the respondent furnished a bank

guarantee of Rs. 38 lakhs which was subsequently renewed and later fresh bank guarantees in lieu of original were submitted by the respondents.

5. The Preventive and Intelligence Branch of the Kurla Division sometime in the year 1997-98 had conducted investigation into the affairs of the respondents, whereby it was found that the respondents were importing all the kits in CKD/ SKD condition for manufacturing the cars and the cost of production of a single car was Rs. 3,98,585/- for manufacture from SKD condition and ‘ 3,80,883/- for manufacture from CKD condition against the assessable value of Rs. 1,85,400/-. In the investigation, it was also revealed that the respondents had entered into a spin-off agreement vide Deed of Assignment dated 30.03.1998, whereby M/s Fiat India Ltd. would be liable for any excise liability accruing from 29.09.1997 onwards, in respect of the Cars in issue.

6. After completion of the investigation, the Commissioner of Central Excise, Mumbai-II, had appointed Cost Accountant M/s Rajesh Shah and Associates on 25.01.1999 under Section 14A of the Act to conduct special audit to ascertain the correctness of the price declared by the respondents. The Cost Accountant had calculated the average price of the Fiat UNO Car by adding material cost (import, local, painting and others), rejection at 1% of total cost and notional profit at 5% of total cost for the period from April, 1998 to December, 1998 vide his report dated 31.03.1999, which came to Rs. 5,04,982/- per car.

7. In the meantime, the Superintendent of Central Excise, Kurla Division had issued 11 show cause notices to assessees for the period from June 1996 to February 2000, *inter alia,* making a demand of differential duty on the assessable value calculated on the basis of manufacturing cost plus manufacturing profit minus MODVAT availed per car, and the duty which the respondents were actually paying on the assessable value. It is alleged in the show cause notices that

the respondents have failed to determine and pay the correct duty on Fiat UNO cars while clearing them. It is further stated that the assessees have not taken into account the cost of raw material, direct wages, overheads and profits for calculating the assessable value of the cars which were declared in the invoices and declarations for the purpose of Section 4 of the Act. In this regard, the assessees were required to show cause as to why the correct duty due on the said goods along with interest should not be recovered from them under Rule 9 of the 1944 Rules read with Sections 11A and 11AB of the Act, the goods should not be confiscated and penalty imposed under Rule 9 read with Rule 52-A and Rule 173Q of the Rules, and further, penalty equal to the amount of duty should not be imposed under Section 11AC of the Act.

8. Assessees had replied in detail to the show cause-cum-demand notices. The assessees had submitted that they have declared assessable value or normal price in terms of Section 4(1)(a) of the Act. The assessees apart from others had also stated that the proper interpretation of Section 4(1)(a) of the Act would mean that the assessable value should be the normal price at which such goods are ordinarily sold in wholesale trade where price is the sole consideration; that they are not getting any additional consideration over and above the assessable value declared by them; that there is no flow back of money from the buyers and dealings between the assessees and their buyers are at arms length and since the price declared by them is proper as per Section 4(1) (a) of the Act, the question of determining the assessable value as per Section 4(1)(b) read with Central Excise (Valuation) Rules, 1975 (hereinafter referred to as ‘the 1975 Valuation Rules) would not arise. In other words, the assessees, relying on various decisions of this Court, had submitted that when normal price is available then recourse to any other method of valuation is incorrect and improper. They had also submitted that Section 4 of the Act nowhere mandates that price should always reflect the manufacturing cost and profits and, therefore, the price declared by them requires to

be accepted. The assessees had further submitted that since they have launched new models of the cars which require import of the cars in kit-form (CKD and SKD), thereafter they were assembled and sold. This cost of imports, assembly and overheads lead to increase in overall cost of production of their cars. Further, they were facing intense competition from Maruti car manufacturers which required them to keep the price of their cars at a lower price. Therefore, they were forced to sell their cars at a loss in order to compete and attract buyers in the market. The assessees had also stated that the amount quantified in the show cause-cum-demand notices is excessive since they were based on the initial costs in 1996 which has continuously come down due to the continuous process of indigenisation of imported components. They would further submit that this strategy of indigenisation of imported components is very common to automobile industry. The assessees had further submitted, the order of provisional assessment was erroneous as well not sustainable in the eyes of the law. They further submitted that the assessable value declared by them should be accepted even if it is below manufacturing cost. The assessees had also contended that there is no short levy or short payment of duty.

9. After receipt of the reply so filed, the adjudicating authority vide his order-in-original dated 31.01.2002 has proceeded to conclude that the assessees' main consideration was to penetrate the market, therefore, the price at which they were selling the Cars in the market could not be considered to be a normal price as per Section 4 of the Act. He has also observed that the cost of production of the Fiat UNO Cars is much higher than the price at which the assessees are selling them to the general public; that the price is artificial and arrived at without any basis just to capture the market and drive out the opponents from business; that the Fiat UNO Cars in issue are equipped with powerful Fire Engine and superior quality gadgets and that when normal price cannot be ascertained as per Section 4(1) (a) of the Act, the alternate procedure under

the Valuation Rules, i.e. cost of production and profit has to be applied. He also observed, by referring to the decisions of this Court in Bombay Tyre's and MRF Tyre's cases, that all costs incurred to make goods saleable/marketable should be taken into account for determining the assessable value and that the loss incurred by the assessees to penetrate the market should be borne by them and in the process Government should not lose revenue. He further found the basis of the price arrived at by the Cost Accountant in its report as authentic and acceptable, but adopted the average price of Rs.4,53,739/- reached by the Range Superintendent for different models of Cars in the show cause-cum-demand notices as more reasonable and appropriate. Accordingly, he had confirmed the show cause-cum-demand notices issued and, thereby, had directed the respondents to pay the difference in duty.

10. The assessees had carried the matter in appeal before the First Appellate Authority, being aggrieved by the order passed by adjudicating authority. The appellate authority by its orders dated 11.09.2002 and 30.09.2002 has sustained the order passed by the adjudicating authority and rejected the appeals.

11. The assessees, being aggrieved by the order so passed, had carried the matter in appeal before the Tribunal. The Tribunal vide its judgment and order dated 21.11.2003, has reversed the findings and conclusions reached by the First Appellate Authority and the Adjudicating Authority and, accordingly, allowed the appeals on the ground that there is no allegation that the wholesale price charged by the assessee was for extra commercial consideration and that dealing of the assessees and their buyers was not at arms length or that there is a flow back of money from the buyers to the assessees and, therefore, the price declared by the assessees is the ascertainable normal price in view of the decision of this Court in *Commissioner of Central Excise, New Delhi v. Guru Nanak Refrigeration Corporation*, 2003 (153) ELT 249 (SC). It is the

correctness or otherwise of the findings and conclusions reached by the Tribunal is the subject matter of these appeals.

Submissions

12. Before we proceed to examine the relevant provisions, it is necessary to notice the submissions made by learned counsel on both sides. Shri. Bhattacharya, the learned ASG, contends that the assessees are not fulfilling the conditions enumerated in Section 4(1)(a) of the Act and therefore, the valuation has to be done in accordance with Section 4(1)(b) of the Act read with the 1975 Valuation Rules. He would contend that the price fixed by the assessees do not reflect the true value of the goods as manufacturing cost and the profit is much higher than the sale price. He would further contend that since the price of the cars sold by the assessees do not reflect the true value of goods and that sole reason for lowering the price by the assessees below the manufacturing cost is just to penetrate the market and compete with other manufacturers and, therefore, such price cannot be treated as "normal price" in terms of Section 4(1)(a) of the Act. He would submit that since the price of the cars sold by the assessees was not ascertainable, the Revenue is justified in computing the assessable value of the goods for the levy of excise duty under Section 4(1)(b) of the Act and the relevant rules. The learned counsel further contends that under Section 4(1)(a) of the Act, value shall be deemed to be the normal price. A normal price, as per Section 4(1)(a), is the price at which the goods are ordinarily sold. A loss making price cannot be the price at which goods are ordinarily sold and the loss making price cannot be the normal price. Shri Bhattacharya would heavily rely on the decision of this Court in *Union of India v. Bombay Tyre* International, 1983 (14) ELT 1896 (SC), and contends that the judgement makes it abundantly clear that for arriving at the assessable value, the department is entitled to take into account the manufacturing cost plus manufacturing profit.

13. *Per contra*, Shri. Joseph Vellapally learned senior

counsel would submit that the charging Section and the computation Section are independent to each other and should not be mixed up. He would contend that the normal price as found in Section 4(1)(a) of the Act is nothing but the price at which the particular assessee sold his goods to his buyers in the ordinary course of business. He would state that the reason for the assessees for selling the Cars for lower price than the manufacturing cost was because the assessees had no foothold in the Indian market and, therefore, had to sell at a lower price than the manufacturing cost in order to compete in the market. He would submit that the issue raised by the Revenue in the instant case is squarely covered by the decision of this Court in the case of *Guru Nanak Refrigeration* (supra). He submits that the case of Bombay Tyre International (Supra) would only assist the assessees and not the Revenue. He would submit that this Court in Bombay Tyre's case has held that though the incident of excise is the manufacturing activity, the legislature was free to choose the time of collection and imposition of excise duty. He further points out that this Court in Bombay Tyre's case (supra) has separated the levy from the collection, that being the case, the learned senior counsel would submit that the cost of manufacture is irrelevant for the purpose of valuation under Section 4 of the Act. He would submit that 'normal price' is the selling price at which that particular assessee has sold the goods to all the buyers in the ordinary course of business. He would refute Shri Bhattacharya's argument that the price is not the sole consideration, by stating the word 'consideration' is used in the Section in the same sense as used in the Section 2 (d) of the Indian Contract Act, and it is only the monetary consideration from the buyer to the assessee that requires to be taken note of for the purpose of valuation under the Act. He would point out from the show cause notice that the sole ground for rejecting the invoice price of the assessee is that the price was not the sole consideration. He would submit that the intention and consideration cannot be treated as same; it is only the intention of the assessee to penetrate the market and the only consideration for the

assessee from the buyer was the sale price. He would further submit that the assessable value has to be gathered from the normal price and not from cost of manufacture which is irrelevant when normal price is ascertainable. Therefore, he would submit only when the normal price is not ascertainable in terms of Section 4(1)(a), then Section 4(1)(b) read with the 1975 Valuation Rules would come into play to determine nearest equivalent assessable value of the goods. He would contend that the Valuation Rules have to be applied sequentially, namely, Rules 4 and 5 should be invoked first in order to determine the assessable value and if Rules 4 and 5 of the 1975 Valuation Rules are not applicable or assessable value cannot be ascertained by applying the said Rules, then only Rule 6 can be invoked. He would further submit that it is only Rule 6(b)(ii) of the 1975 Valuation Rules which contemplates determination of assessable value on the basis of cost of manufacture only when the goods are captively consumed by the manufacturer and value of comparable goods manufactured by the assessee or any other assessee is not available. In this regard, he would submit, relying on few decisions of this Court, that fiscal provisions have to be construed strictly and also where a statute prescribes that a particular thing has to be done in a particular manner, then, that thing has to be done only in that manner and not otherwise.. Shri Vellapally submits that when the normal price is not ascertainable under Section 4(1)(a) of the Act when transaction is between related persons or price is not the sole consideration, then nearest equivalent at the time of removal of the goods is the criteria for the purpose of computation of assessable value. He would contend that it is when there is no like or identical article available at the time or place of removal, only then, Rule 6 of the 1975 Valuation Rules is invoked which deals with cost of manufacture. He would further submit by relying on the *Bombay Tyre's* case (Supra) that even old Section 4 (b) (prior to the 1973 amendment) suggests that in case wholesale price for the valuation is not ascertainable under old Section 4(a), then, the value of nearest equivalent article of

like kind and quality, which is sold or capable of being sold at the time and place of removal, is considered for the purpose of valuation. He would further submit that it is not practical to go into cost of manufacture in each and every case in order to determine whether goods are sold below the cost of production. He would submit that if wholesale price under Section 4(1)(a) is not ascertainable, then, assessing authority can go to the nearest equivalent to determine assessable value for the purpose of levy of excise duty under the Act.

14. Shri Vellapally would further submit by referring to Section 2(d) of the Indian Contract Act, that the consideration should flow from buyer to the seller. He would submit that the meaning of the expression 'consideration' in Section 4 should be determined by comprehensively reading Section 4 along with the Valuation Rules. In this regard, he would submit by referring to Rule 5 that in case the price is not the sole consideration then the value of the goods can be determined by taking into account the monetary value of the additional consideration flowing directly or indirectly from the buyer to the seller. He would submit that any additional consideration should flow from buyer to seller. He would submit that intention of the assessee to penetrate the market cannot be treated as a consideration as no money consideration flows from the buyer to the seller. Therefore, there is no additional consideration flowing from buyer to seller and whole transaction is bonafide. He would submit that this Court has already answered this issue of 'sole consideration' in the cases of *Guru Nanak Refrigeration* (supra) and *CCE v. Bisleri International Pvt.Ltd.*, 2005 (186) ELT 257 (SC).

15. *Shri. V. Lakshmi Kumaran,* learned counsel, who also appears for the assessees but for the period April 1998 to June 2001, would submit that the Cost Auditor's report has not been relied on or referred to in any of the show cause notices issued to the assessee, which are the basis of entire proceedings and, therefore, proceedings initiated by the assessing authority are

contrary to the settled principles enunciated by this Court. He would submit that all the show cause notices are identical or verbatim the same while alleging that assessee has not adopted any basis to determine the price and goods are sold at loss in order to penetrate the market. The allegations on the basis of Cost Auditors report amount to an issuance of new show cause notice. He would submit that the assessees' declared price is based on the competitive price in the market at arms length and where price is the sole consideration. He would submit that nothing as to sole consideration or transaction between related person has been alleged in the show cause notices, therefore, the show cause notices are without any basis. He would submit that the assessee has not been furnished with Cost Auditor's report till date. He would submit that the Revenue is not justified in rejecting the assessee's price as the price is a bench mark in order to sell the goods in market and it is even higher in comparison to other similar cars, although it is less than the cost of manufacture. He would further submit that the economic concept to penetrate the market is recognized by Article 6 of the WTO and Article VII of Customs Valuation Rules of WTO and further, Section 14 of the Indian Customs Act incorporates the above concept in harmony with other countries. He would submit that when the price of assessee is higher than that of its competitors, it would mean that the assessee is bench marking his prices. He would submit that the price at which goods are sold by the assessee to the buyer is purely a competitive price and there is no allegation as to transactions are with related person(s) and price is not the sole consideration and that there is flow back from buyer to the assessee in any form. He would further submit that whenever goods are sold in a competitive market at a price at arms length then it should be treated as assessable value. He would submit that value is a function of price and where price is not available, one of the methodology to determine it is cost. He would further submit, relying on Ship Breaker's case that this Court while explaining the meaning of expression 'Ordinary sale' occurring in Section 14 of the Customs Act which is in *pari materia* with Section 4

of the Act has observed that "Ordinary Sale' would mean the sale where goods are sold to unrelated parties and price is the sole consideration.

16. Shri. V. Lakshmi Kumaran would further submit that Section 4 of the Act was amended on 1st April 2000 to incorporate 'transaction value' as an assessable value instead of 'normal price' and the expression 'ordinarily' was dropped. Therefore, the new Section 4 (after 2000 amendment) is applicable to the transactions which took place during the period from July, 2000 to June, 2001. He would further submit that the word 'ascertain' and 'determination' have different meaning and connotation. He would submit that the word 'ascertain' would mean to find a thing which already exists whereas determination mean to arrive at something by adding or subtracting. He would then submit that when ascertainment of normal price is not possible under Section 4(1)(a) then that price has to be determined by the process of computation as provided under Section 4 (1) (b) of the Act read with the Rules framed thereunder. He would submit by relying on the decision of this Court in *Elgi Equipment Pvt. Ltd. v. CCE*, Coimbatore, 2007 (215) ELT 348 (SC) that the word 'Ordinary sale' would mean the normal practice or the practice followed by majority of persons in the wholesale trade in the concerned goods. He would submit that in the present case, the assessee is better placed as the entire sale is at the same price or rate, so the condition of the expression 'ordinarily sold' is being satisfied.

17. Shri. V. Lakshmi Kumaran would further submit that certain considerations for fixing the price like quantity or volume, long term relationship and status of buyer are all commercial consideration. He would further contend that consideration can be in any form but must flow from buyer to the seller. He would submit relying on the decision of this Court in *Philips India Ltd. v. Collector of Central Excise, Pune,* 1997 (91) E.L.T. 540 (SC), that where the buyer is taking responsibility on behalf of the seller, then it would be added in

the sale price of seller while assessing him and in case where seller and buyer share expenditure, then, it cannot be added in the sale price of the seller-assessee. He would further submit relying on the decision of this Court in *VST Industries Ltd. v. Collector of Central Excise, Hyderabad*, 1998 (97) E.L.T. 395 (SC) that this Court has distinguished Metal Box decision by observing that the notional interest on interest free deposit made by the buyer to the seller should not be included in the sale price of the seller-assessee as no extra commercial consideration is flowing from the buyer to the seller, there is no nexus between the security deposit and sale price, and if department is not able to quantify the money value of the additional consideration, then Rule 7 of the Valuation Rules is not applicable.

18. Shri. V. Lakshmi Kumaran would further submit that expression 'sale and purchase' is defined under Section 2(h) of the Act which would mean the transfer of possession of goods from one person to other in the ordinary course of trade for cash or deferred payment or other valuable consideration. He would submit by relying on the constitution bench decision of this Court in *Devi Das Gopal v. State of Punjab*, (1967) 20 STC 430, that the term 'purchase' would mean acquisition of goods for sale for cash or deferred payment or other valuable consideration. He would further submit that sale and purchase are different perspectives of same transaction and the price is defined in the Sale of Goods Act as "money consideration" and the expression 'cash', 'deferred payment' and 'other valuable consideration' are consistently used as monetary consideration. He further contended that Section 4(1)(a) of the Act has six ingredients and if any one of these ingredients is missing, then only the Revenue could invoke the Valuation Rules. He relies on Circular, issued by the Board, No.215/49/96-Cx., dated 27.05.1996, wherein the Board has clarified that if price was not the sole consideration then any additional consideration that flow from the buyer to assessee would have to be quantified in terms of money, if the Department was not in a position to

determine the same, then Rule 7 would not be applicable. Learned counsel would state that Rule 7 was the only Rule which could be applied in case the price was not sole consideration and if that Rule was not applicable then no Rule of the Valuation Rules would apply.

19. Shri. V. Lakshmi Kumaran would further submit by relying on the decision of this Court in *Basant Industries v. Addl. Collector of Customs, Bombay*, 1996 (81) E.L.T. 195 (SC), that ordinarily Courts would not interfere in the price fixation by merely stating that there is undervaluation and proceed on such presumption. He further relied on the decision of this Court in *CCE v. Rajasthan Spinning and Weaving* Mills, (2007) 218 E.L.T. 641 (SC), to contend that different methods prescribed under the Valuation Rules have to converge to a common valuation and it is not possible to accept wide variation in the results in order to ascertain the basis of assessable value. In conclusion, the learned counsel would submit that the Tribunal was justified in allowing the assessees' appeals by relying on the decision of this Court in *Guru Nanak Refrigeration's* case (supra). In nutshell, the arguments of both the learned senior counsel is that in terms of Section 4 of the Act, duty liability is on the normal price at which the goods are sold in wholesale trade to the buyers when the sale price is the sole consideration. The basis for valuation of excisable goods is the normal price at which the goods are sold. Only if, such a sale price is not available, valuation based on cost production can be resorted to. In summarization, it is contended that once the normal price at which the goods are sold is available, the Revenue cannot reject the normal price merely because it is less than the cost of production, specially when the genuineness of the sale price is not in doubt. Since the adjudicating authority does not question the genuineness of the sale price in the show cause notices issued, he cannot resort to Section 4(1)(b) of the Act read with relevant Rules for the purpose of quantification of assessable value.

Issues:

20. 1. Whether the Price declared by assessees for their cars which is admittedly below the Cost of manufacture can be regarded as "normal price" for the purpose of excise duty in terms of Section 4(1) (a) of the Act.

2. Whether the sale of Cars by assessees at a price, lower than the cost of manufacture in order to compete and penetrate the market, can be regarded as the "extra commercial consideration" for the sale to their buyers which could be considered as one of the vitiating factors to doubt the normal price of the wholesale trade of the assessees.

21. The decision in the present case turns upon the interpretation of Section 4(1)(a) and Section 4(1)(b) of the Act read with relevant Rules in order to determine the correctness or otherwise of impugned judgment and order.

22. To begin with, we might like to state here that the facts of the case undoubtedly reveal that if the provisions of the Section 4(1)(b) were to apply, it may work serious hardship to the respondents-asseessees as contended by learned senior counsel for the assessees, but as we are concerned with interpretation of a statutory provision, the mere fact that a correct interpretation may lead to hardship would not be a valid consideration for distorting the language of the statutory provisions.

23. Section 3 of the Act is the charging provision. The taxable event for attracting excise duty is the manufacture of excisable goods. The charge of incidence of duty stands attracted as soon as taxable event takes place and the facility of postponement of collection of duty under the Act or Rules framed thereunder can in no way effect the incidence of duty. Further, the sale or ownership of the end products is also not relevant for the purposes of taxable event under the central excise. Since excise is a duty on manufacture, duty is payable

whether or not goods are sold. Duty is payable even when goods are used within the factory or goods are captively consumed within factory for further manufacture. Excise duty is payable even in case of free supply or given as replacement. Therefore, sale is not a necessary condition for charging excise duty.

24. Section 3 of the Act provides for levy of duty of excise and Section 3(i) thereof states that there shall be levied and collected in the prescribed manner, a duty of excise on excisable goods manufactured in India at the rates set forth in the first Schedule. Neither Section 3 nor the first Schedule lays down the manner in which *ad valorem* price of the goods has to be calculated. This is found in Section 4 of the Act. Section 4 of the Act lays down the measure by reference to which the duty of excise is to be assessed. The duty of excise is linked and chargeable with reference to the value of the exercisable goods and the value is further defined in express terms by the said Section. In every case, the fundamental criterion for computing the value of an excisable article is the normal price at which the excisable article is sold by the manufacturer, where the buyer is not a related person and the price is the sole consideration. If these conditions are satisfied and proved to the satisfaction of the adjudicating authority, then, the burden which lies on the assessee under Section 4(1)(a) would have been discharged and the price would not be ignored and the transaction would fall under the protective umbrella contained in the Section itself.

25. Section 4 of the Act is the core provision containing statutory formula for assessment and collection at *ad valorem* basis of duty under Central Excise laws. Therefore, the Section requires to be noticed and some of the expressions contained therein, which are necessary for the purpose of the case, require to be analysed to appreciate the stand of the parties. Since the large part of the demand in question primarily pertains to the period after the year 1975, we will notice Section

4 of the Act, which has come into force with effect from 01.10.1975.

"4. Valuation of excisable goods for purposes of charging of duty of excise - (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section be deemed to be -

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale:

Provided that -

(i) where in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;

(ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force, or at a price, being the maximum fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso the price or the maximum price, as the case may be, so fixed,+ shall, in relation to the goods so sold, be deemed to be the normal price thereof;

(iii) where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are

ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail;

(b) where the normal price of such goods is not ascertainable for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

(2) Where, in relation to any excisable goods, the price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price.

(3) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of Section 3."

26. Section 4 of the Act lays down the valuation of excisable goods chargeable to duty of excise. The duty of excise is with reference to value and such value shall be subject to other provisions of Section 4, that is the normal price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal where the buyer is not a related person and the price is the sole consideration for the sale. To determine the value, the legislature has created a legal fiction to equate the value of the goods to the price which is actually obtained by the assessee, when such goods are sold in the market, or the nearest equivalent thereof. In other words, the legal fiction so created by Section 4 makes excise duty leviable on the actual market value of the goods or the nearest equivalent thereof. In *Bangaru Laxman* v. *State* (through CBI) and Anr.- (2012) 1

SCC 500, this Court relying on *J.K. Cotton Spinning and Weaving Mills Ltd. v. U.O.I*, (1987) Supp. (1) SCC 350, observed that a deeming provision creates a legal fiction and something that is in fact not true or in existence, shall be considered to be true or in existence. Therefore, though the price at which the assessee sells the excisable goods to a buyer or the nearest ascertainable price may not reflect the actual value of the goods, for the purpose of valuation of excise duty, by the deeming fiction created in Section 4(1), such selling price or nearest ascertainable price in the market, as the case may be, is considered to be the value of goods.

27. It is well settled that whenever the legislature uses certain terms or expressions of well-known legal significance or connotations, the courts must interpret them as used or understood in the popular sense if they are not defined under the Act or the Rules framed thereunder. Popular sense means "that sense which people conversant with the subject matter, with which the statute is dealing, would attribute to it."

28. The normal rule of interpretation is that the words used by the legislature are generally a safe guide to its intention. Lord Reid in *Westminster Bank Ltd. v. Zang* [(1966) A.C. 182] observed that 'no principle of interpretation of statutes is more firmly settled than the rule that the court must deduce the intention of Parliament from the words used in the Act." Applying such a rule, this Court observed in *S. Narayanaswami v. G. Pannerselvam & Ors*. (1973) 1 SCR 172 that 'Where the statute's meaning is clear and explicit, words cannot be interpolated.'

29. Section 4 of the Act, as we have already noticed, speaks of valuation of excisable goods, with reference to their value. The 'value' subject to other stipulation in Section 4 is deemed to be the 'normal price' at which the goods are 'ordinarily' sold to the buyer in the course of 'wholesale trade' where the buyer is not 'related person' and the 'price' is the 'sole consideration' for the sale. Against this background, for

the purpose of this case, we have now to consider the meaning of the words 'value', 'normal price', 'ordinarily sold' and 'sole consideration', as used in Section 4(1) (a) of the Act.

30. The 'value' in relation to excisable commodity means normal price or the price at which the goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade at the time and place of removal where the buyer is not a related person and price is the sole consideration for sale. Stated another way, the Central Excise duty is payable on the basis of the value. The assessable value is arrived on the basis of Section 4 of the Act and the Central Excise Valuation Rules.

31. Section 4(1) (a) deems the 'normal price' of the assessee for selling the excisable goods to buyers to be the value of the goods for purpose of levy of excise duty. The expression 'normal price' is not defined under the Act. In "Advanced Law Lexicon" by P. Ramanatha Aiyar, it is defined as the price which would have been payable by an ordinary customer of the goods. This Court while construing the meaning of the aforesaid expression in *Ashok Leyland Ltd. v. Collector of Central Excise, Madras* (2002) 10 SCC 344 has stated "Generally speaking the expression 'normal price' occurring in Section 4(1)(a) and (b) means the price at which goods are sold to the public. Where the sale to public is through dealers, the 'normal price' would be the 'sale price' to the dealer.

32. In *Commissioner of Central Excise, Ahemedabad v. Xerographic Ltd*. (2006) 9 SCC 556, this Court has explained the concept of normal price. That was in the context of transaction between the related persons. It was observed "that the existence of any extra commercial consideration while fixing a price would not amount to normal price."

33. In *Burn Standard Co. Ltd*. & Anr. *v. Union of India* (1991) 3 SCC 467, it is stated, "*Section 3 of the Act provides for levy of the duty of excise. It is a levy on goods produced or manufactured in India. Section 4 of the Act lays down the*

measure by reference to which the duty of excise is to be assessed. The duty of excise is linked and chargeable with reference to the value of the excisable goods and the value is further defined in express terms by the said section. In every case the fundamental criterion for computing the value of an excisable article is the normal price at which the excisable article or an article of the like kind and quality is sold or is capable of being sold by the manufacturer."

34. In *Tata Iron and Steel Co. Ltd. v. Collector of Central Excise, Jamshedpur* (2002) 8 SCC 338, it is held that "*it is true to be seen that under the said Act excise duty is chargeable on the value of the goods. The value is the normal price i.e. the price at which such goods are ordinarily sold by the assessee to a buyer, where the buyer is not a related person and the price is the sole consideration for sale.*"

35. In *Union of India and Others v. Bombay Tyre International Ltd & Ors.*. (1984) 1 SCC 467, it is held that "*it is true, we think, that the new Section 4(1) contains inherently within it the power to determine the true value of the excisable article, after taking into account any concession shown to a special or favoured buyer because of extra-commercial considerations, in order that the price be ascertained only on the basis that it is a transaction at arm's length. That requirement is emphasised by the provision in the new Section 4(l)(a) that the price should be the sole consideration for the sale. In every such case, it will be for the Revenue to determine on the evidence before it whether the transaction is one where extra-commercial considerations have entered and, if so, what should be the price to be taken as the value of the excisable article for the purpose of excise duty.*"

36. In *Metal Box India Ltd. v. CCE* (1995) 2 SCC 90, this Court held:

"10. *... It has been laid down by Section 4(1)(a) that normal price would be price which must be the sole consideration for the sale of goods and there could not be other consideration except the price for the sale of the goods and only under such a situation sub-section (l)(a) would come into play.*"

37. In *Calcutta Chromotype Ltd. v. CCE,* (1998) 3 SCC 681, it is held:

14. *... Law is specific that when duty of excise is chargeable on the goods with reference to its value then the normal price on which the goods are sold shall be deemed to be the value provided (1) the buyer is not a related person and (2) the price is the sole consideration. It is a deeming provision and the two conditions have to be satisfied for the case to fall under clause (a) of Section 4(1) keeping in view as to who is the related person within the meaning of clause (c) of Section 4(4) of the Act. Again if the price is not the sole consideration, then again clause (a) of Section 4(1) will not be applicable to arrive at the value of the excisable goods for the purpose of levy of duty of excise.*"

38. In *Commissioner of Central Excise v. Ballarpur Industries Ltd.,* (2007) 8 SCC 89, it is observed:

"*19. Under Section 4(1)(a) normal price was the basis of the assessable value. It was the price at which goods were ordinarily sold by the assessee to the buyer in the course of wholesale trade. Under Section 4(1)(b) it was provided that if the price was not ascertainable for the reason that such goods were not sold or for any other reason, the nearest equivalent thereof had to be determined in terms of the Valuation Rules, 1975. Therefore, Rule 57-CC has to be read in the context of Section 4(1) of the 1944 Act, as it stood at the relevant time. Section 4(1)(a) equated "value" to the "normal price" which in turn referred to goods being ordinarily sold in the course of wholesale trade. In other words, normal price, which in turn referred*

to goods being ordinarily sold in the course of wholesale trade at the time of removal, constituted the basis of the assessable value."

39. *In Siddhartha Tubes Ltd. v. CCE, (2005) 13 SCC 564, at page 567, it is held:*

"5*.……The essential basis of valuation under Section 4 of the Act is the wholesale cash price charged by the appellant. Normal price under Section 4(1)(a) constituted a measure for levy of excise duty. In the present case, we are concerned with assessment and not with classification. Duty under Section 4 was not leviable on the "conceptual value" but on the normal price charged or chargeable by the assessee. (See Union of India v. Bombay Tyre International Ltd.)*"

40. In *CCE v. Bisleri International (P) Ltd*., (2005) 6 SCC 58, at page 61, it is held:

"10*. At the outset, it may be mentioned that under Section 4(1)(a), "value" in relation to any excisable goods is a function of the price. In other words, "value" is derived from the normal price at the factory gate charged to an unrelated person on wholesale basis and at the time and place of removal.*

11. It is for the Department to examine the entire evidence on record in order to determine whether the transaction is one prompted by extra-commercial considerations. It is well settled that under Section 4 of the said Act, as it stood at the material time, price is adopted as a measure or a yardstick for assessing the tax. The said measure or yardstick is not conclusive of the nature of the tax. Under Section 4, price and sale are related concepts. The "value" of the excisable article has to be computed with reference to the price charged by the manufacturer, the computation being made in accordance with Section 4. In every case,

it will be for the Revenue to determine on evidence whether the transaction is one where extra-commercial considerations have entered and, if so, what should be the price to be taken into account as the value of the excisable article for the purpose of excise duty. These principles have been laid down in the judgment of this Court in the case of Union of India v. Bombay Tyre International Ltd."

41. In *Ashok Leyland Ltd. v. Collector of Central Excise, Madras,* (2002) 10 SCC 344, at page 348, it is held:

"10*. In our view, the provisions of the Act are very clear. Excise duty is payable on removal of goods. As there may be no sale at the time of removal, Section 4 of the Act lays down how the value has to be determined for the purposes of charging of excise duty. The main provision is Section 4(l)(a) which provides that the value would be the normal price thereof, that is, the price at which the goods are ordinarily sold by the assessee to a buyer in the course of a wholesale trade. Section 4(4)(e) clarifies that a sale to a dealer would be deemed to be wholesale trade. Therefore, the normal price would be the price at which the goods are sold in the market in the wholesale trade. Generally speaking, the normal price is the one at which goods are sold to the public. Here the sale to the public is through the dealers. So the normal price is the sale price to the dealer. The proviso, which has been relied upon by learned counsel, does not make any exception to this normal rule. All that the proviso provides is that if an assessee sells goods at different prices to different classes of buyers, then in respect of each such class of buyers, the normal price would be the price at which the goods are sold to that class. The proviso does not mean or provide that merely because the assessee sells at different prices to different classes of buyers, the price of that commodity becomes an unascertainable price. The price of that commodity will remain the normal*

price at which those goods are ordinarily sold by the assessee to the public, in other words, the price at which they are sold in the market."

42. In *Procter & Gamble Hygiene & Health Care Ltd. v. Commissioner of Central Excise, Bhopal*, (2006) 1 SCC 267, it is held:

"9. *This case relates to valuation. At the outset, we would like to clarify certain concepts under the excise law. The levy of excise duty is on the "manufacture" of goods. The excisable event is the manufacture. The levy is on the manufacture. The measure or the yardstick for computing the levy is the "normal price" under Section 4(l)(a) of the Act. The concept of "excisability" is different from the concept of "valuation". In the present case, as stated above, we are concerned with valuation and not with excisability. In the present case, there is no dispute that AMS came under Sub-Heading 3402.90 of the Tariff. There is no dispute in the present case that AMS was dutiable under Section 3 of the Act. In Union of India v. Bombay Tyre International Ltd., this Court observed that the measure of levy did not conclusively determine the nature of the levy. It was held that the fundamental criterion for computing the value of an excisable article was the price at which the excisable article was sold or was capable of being sold by the manufacturer. It was further held that the price of an article was related to its value and in that value, we have several components, including those components which enhance the commercial value of the article and which give to the article its marketability in the trade. Therefore, the expenses incurred on such factors inter alia have to be included in the assessable value of the article up to the date of the sale, which was the date of delivery."*

43. What can be construed from the plain reading of Section 4 of the Act and the interpretation that is given by this

Court on the expression 'normal value' is, where excise duty is chargeable on any excisable goods with reference to value, such value shall be deemed to be the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal and where the assessee and the buyer have no interest directly or indirectly in the business of each other and the price is the sole consideration for the sale. Normal price, therefore, is the amount paid by the buyer for the purchase of goods. In the present case, it is the stand of the revenue that 'loss making price' cannot be the 'normal price' and that too when it is spread over for nearly five years and the consideration being only to penetrate the market and compete with other manufacturers who are manufacturing more or less similar cars and selling at a lower price. The existence of extra commercial consideration while fixing the price would not be the 'normal price' as observed by this Court in *Xerographic Ltd*.'s case (supra). If price is the sole consideration for the sale of goods and if there is no other consideration except the price for the sale of goods, then only provisions of Section 4 (1)(a) of the Act can be applied. In fact, in *Metal Box's* case (supra) this Court has stated that under sub-Section (1) (a) of Section 4 of the Act, the 'normal price' would be the price which must be the sole consideration for the sale of goods and there cannot be any other consideration except the price for the sale of goods and it is only under such situation Sub-Section (1) (a) of Section 4 would come into play. In the show cause notices issued, the Revenue doubts the normal price of the wholesale trade of the assessees. They specifically allege, which is not disputed by the assessees, that the 'loss making price' continuously for a period of more than five years while selling more than 29000 cars, cannot be the normal price. It is true that in notices issued, the Revenue does not allege that the buyer is a related person, nor do they allege element of flow back directly from the buyer to the seller, but certainly, they allege that the price was not the sole consideration and the circumstance that no prudent businessman would continuously

suffer huge loss only to penetrate the market and compete with other manufacturer of more or less similar cars. A prudent businessman or woman and in the present case, a company is expected to act with discretion to seek reasonable income, preserve capital and, in general, avoid speculative investments. This court in the case of *Union of India v. Hindalco Industries* 2003 (153) ELT 481, has observed that, 'if there is anything to suggest to doubt the normal price of the wholesale trade, then recourse to clause (b) of sub-section(1) of Section 4 of the Act could be made'. That the price is not the normal price, is established from the following three circumstances which the assessees themselves have admitted; that the price of the cars was not based on the manufacturing cost and manufacturing profit, but have fixed at a lower price to penetrate the market; though the normal price for their cars is higher, they are selling the cars at a lower price to compete with the other manufacturers of similar cars. This is certainly a factor in depressing the sale price to an artificial level; and, lastly, the full commercial cost of manufacturing and selling the cars was not reflected in the lower price. Therefore, merely because the assessee has not sold the cars to the related person and the element of flow back directly from the buyer to the seller is not the allegation in the show cause notices issued, the price at which the assessees had sold its goods to the whole sale trader cannot be accepted as 'normal price' for the sale of cars.

44. We now deal with the second limb of the argument of Shri Bhattacharya, learned ASG that the loss price at which the goods are sold by the assessee clearly indicates or reflects that these goods are not "ordinarily sold" in terms of Section 4 (1) (a) of the Act. He submits that admittedly assessees are selling their goods at 100% loss continuously for five years i.e. from the year 1996 to 2001 and therefore, the transactions of the assessees cannot fit into description of expression 'ordinarily sold'. While countering this argument, Shri Joseph Vellapally would submit that the selling price at which the goods are sold in the ordinary course of business by the assessee to all the buyers is the same or uniform without any exception. He would, therefore, contend that the goods are ordinarily sold in terms of Section 4 (1) (a) of the Act. While adopting the submission of Shri Vellapally, Shri Lakshmi Kumaran would further contend, relying on *Ship Breaker's* case (supra) that this Court while explaining the meaning of the expression 'ordinarily sold', occurring in Section 14 of the Customs Act, 1962 which is in *pari materia* with Section 4 of the Act, would mean the sale where the goods are sold to un-related persons and price is the sole consideration. He would also contend that Section 4 of the Act was amended with effect from 1stApril, 2000, to incorporate 'transaction value' as an 'assessable value' instead of 'normal price' and the expression 'ordinarily' was omitted. Therefore, the new Section is applicable to the transactions which took place for the period from July 2000 to June 2001. He would submit by relying on the decision of this Court in *Elgi Equipment Pvt. Ltd.'s* case (supra), that the word 'ordinarily sold' would mean the normal practice or the practice followed by majority of persons in the wholesale trade in the concerned goods. He would submit that in the present cases, the assessees are better placed as the entire sale is at the same price or rate, so the condition of the expression 'ordinarily sold' is being satisfied.

45. The expression 'ordinarily sold' is again not defined under the Act, but came up for consideration before this Court while construing the said expression under the Customs Act. This Court in *Eicher Tractors Ltd*., *Haryana v. Commissioner of Customs, Mumbai* (2001) 1 SCC 315 has held:

> "6. *Under the Act customs duty is chargeable on goods. According to Section 14(1) of the Act, the assessment of duty is to be made on the value of the goods. The value may be fixed by the Central Government under Section 14(2). Where the value is not so fixed, the value has to be determined under Section 14(1). The value, according to Section 14(1), shall be deemed to be the price at which*

such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation - in the course of international trade. The word "ordinarily" necessarily implies the exclusion of "extraordinary" or "special" circumstances. This is clarified by the last phrase in Section 14 which describes an "ordinary" sale as one "where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale ....". Subject to these three conditions laid down in Section 14(1) of time, place and absence of special circumstances, the price of imported goods is to be determined under Section 14(1-A) in accordance with the Rules framed in this behalf."

46. In *Ispat Industries Ltd. v. Commissioner of Customs, Mumbai,* (2006) 12 SCC 583, it is held:

"14. *From a perusal of the above provisions (quoted above), it is evident that the most important provision for the purpose of valuation of the goods for the purpose of assessment is Section 14 of the Customs Act, 1962. Section 14(1), has already been quoted above, and a perusal of the same shows that the value to be determined is a deemed value and not necessarily the actual value of the goods. Thus, Section 14(1) creates a legal fiction. Section 14(1) states that the value of the imported goods shall be the deemed price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation in the course of international trade. The word "ordinarily" in Section 14(1) is of great importance. In Section 14(1) we are not to see the actual value of the goods, but the value at which such goods or like goods are ordinarily sold or offered for sale for delivery at the time of import. Similarly, the words "in the course of international trade" are also of great importance. We have to see the value of the goods not for each specific transaction, but the*

ordinary value which it would have in the course of international trade at the time of its import."

47. *In Varsha Plastics Private Limited & Anr. v. Union of India & Ors., (2009) 3 SCC 365, at page37l*, it is observed:

"19. *Section 14(1) of the Act prescribes a method for determination of the value of the goods. It is a deeming provision. By legal fiction incorporated in this section, the value of the imported goods is the deemed price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation in the course of international trade.*

20. The word "ordinarily" in Section 14(1) is a word of significance. The ordinary meaning of the word "ordinarily" in Section 14(1) is "non-exceptional" or "usual". It does not mean "universally". In the context of Section 14(1) for the purpose of "valuation" of goods, however, by use of the word "ordinarily" the indication is that the ordinary value of the goods is what it would have been in the course of international trade at the time of import. Section 14(1), thus, provides that the value has to be assessed on the basis of price attached to such or like goods ordinarily sold or offered for sale in the ordinary course of events in international trade at the time and place of transportation."

48. *In Rajkumar Knitting Mills (P) Ltd. v. Collector of Customs, Bombay (1998) 3 SCC 163***,** at page 165, it is held:

"7. ... *The words "ordinarily sold or offered for sale" do not refer to the contract between the supplier and the importer, but to the prevailing price in the market on the date of importation or exportation.*"

49. *In Ashok Leyland Ltd. v. Collector of Central Excise, Madras,* (2002) 10 SCC 344, at page 348, it is held:

"The price of that commodity will remain the normal price at which those goods are ordinarily sold by the assessee to the public, in other words, the price at which they are sold in the market."

50. In the context of Section 4(1)(a) of the Act, the word 'ordinarily' does not mean majority of the sales; what it means is that price should not be exceptional. In our considered opinion, the word 'ordinarily', by no stretch of imagination, can include extra-ordinary or unusual. In the instant cases, as we have already noticed, the assessees sell their cars in the market continuously for a period of five years at a loss price and claims that it had to do only to compete with the other manufacturers of cars and also to penetrate the market. If such sales are taken as sales made in the ordinary course, it would be anathema for the expression 'ordinarily sold'. There could be instances where a manufacturer may sell his goods at a price less than the cost of manufacturing and manufacturing profit, when the company wants to switch over its business for any other manufacturing activity, it could also be where the manufacturer has goods which could not be sold within a reasonable time. These instances are not exhaustive but only illustrative. In the instant cases, since the price charged for the sale of cars is exceptional, we cannot accept the submission of the learned counsel to give a meaning which does not fit into the meaning of the expression 'ordinarily sold'. In other words, in the transaction under consideration, the goods are sold below the manufacturing cost and manufacturing profit. Therefore, in our view, such sales may be disregarded as not being done in the ordinary course of sale or trade. In our view, for the purpose of Section 4(1) (a) all that has to be seen is: does the sale price at the factory gate represent the wholesale cash price. If the price charged to the purchaser at the factory gate is fair and reasonable and has been arrived at only on purely commercial basis, then that should represent the wholesale cash price under Section 4(1)(a) of the Act. This is the price which has been charged by the manufacturer from the wholesale

purchaser or sole distributor. What has to be seen is that the sale made at arms length and in the usual course of business, if it is not made at arms length or in the usual course of business, then that will not be real value of the goods. The value to be adopted for the purpose of assessment to duty is not the price at which the manufacturer actually sells the goods at his sale depots or the price at which goods are sold by the dealers to the customers, but a fictional price contemplated by the section. This Court in *Ram Kumar Knitting Mills* case (supra), while construing the said expression, has held that the word `ordinarily sold' do not refer to contract between the supplier and the importer, but, the prevailing price in the market on the date of importation and exportation. Excise duty is leviable on the value of goods as manufactured. That takes into account manufacturing cost and manufacturing profit.

51. Excise is a tax on the production and manufacture of goods and Section 4 of the Act provides for arriving at the real value of such goods. When there is fair and reasonable price stipulated between the manufacturer and the wholesale dealer in respect of the goods purely on commercial basis that should necessarily reflect a dealing in the usual course of business, and it is not possible to characterise it as not arising out of agreement made at arms length. In contrast, if there is an extra-ordinary or unusual price, specially low price, charged because of extra-commercial considerations, the price charged could not be taken to be fair and reasonable, arrived at on purely commercial basis, as to be counted as the wholesale cash price for levying excise duty under Section 4(1)(a) of the Act.

52. The next submission of Shri Bhattacharya, learned ASG, is that the price at which the cars sold by the assessees is not the sole consideration as envisaged under Section 4(1)(a) of the Act. He would contend that admittedly there exists a consideration other than the price, that is, to penetrate the market. He would also submit that the lower price would enable the assessee to generate higher turnover and this higher

turnover is monetary consideration for the assessee received directly from various buyers. In other words, he would submit, the intention to penetrate the market is intertwined with receiving a higher monetary turnover. Therefore, the price is not the sole consideration. However, it is contended by learned senior counsel Shri Vellapally that the reason for the assessees for selling their cars at a lower price than the manufacturing cost was because the assessees had no foothold in the Indian market and, therefore, had to sell at a lower price than the manufacturing cost and profit in order to compete in the market. He would submit that the intention of the assessees to penetrate the market cannot be treated as extra commercial consideration as it does not flow from the buyer to the seller. Therefore, there is no additional consideration flowing from buyer to seller and whole transaction is bona fide.

53. Now what requires to be considered is what is the meaning of the expression 'sole consideration'. Consideration means something which is of value in the eyes of law, moving from the plaintiff, either of benefit to the plaintiff or of detriment to the defendant. In other words, it may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other, as observed in the case of Currie *v. M*isa (1875) LR 10 Ex. 153.

54. Webster's Third New International Dictionary (unabridged) defines, consideration thus:

> "Something that is legally regarded as the equivalent or return given or suffered by one for the act or promise of another."

55. In volume 17 of Corpus Juris Secundum (p.420-421 and 425) the import of 'consideration' has been described thus:

> "Various definitions of the meaning of consideration are to be found in the text-books and judicial opinions. A sufficient one, as stated in Corpus Juris and which has been quoted and cited with approval is "a benefit to the party promising or a loss or detriment to the party to whom the promise is made…..

At common law every contract not under seal requires a consideration to support it, that is, as shown in the definition above, some benefit to the promisor, or some detriment to the promisee."

56. In Salmond on Jurisprudence, the word 'consideration' has been explained in the following words.

> "A consideration in its widest sense is the reason, motive or inducement, by which a man is moved to bind himself by an agreement. It is for nothing that he consents to impose an obligation upon himself, or to abandon or transfer a right. It is in consideration of such and such a fact that he agrees to bear new burdens or to forego the benefits which the law already allows him."

57. The gist of the term 'consideration' and its legal significance has been clearly summed up in Section 2(d) of theIndian Contract Act which defines 'consideration' thus:

> "When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration to the promise."

58. From a conspectus of decisions and dictionary meaning, the inescapable conclusion that follows is that 'consideration' means a reasonable equivalent or other valuable benefit passed on by the promisor to the promisee or by the transferor to the transferee. Similarly, when the word 'consideration' is qualified by the word 'sole', it makes consideration stronger so as to make it sufficient and valuable

having regard to the facts, circumstances and necessities of the case.

59. To attract Section 4(1)(a) of the Act what is required is to determine the 'normal price' of an excisable article which price will be the price at which it is ordinarily sold to a buyer in the course of wholesale trade. It is for the Excise authorities to show that the price charged to such selling agent or distributor is a concessional or specially low price or a price charged to show favour or gain in return extra-commercial advantage. If it is shown that the price charged to such a sole selling agent or distributor is lower than the real value of the goods which will mean the manufacturing cost plus manufacturing profit, the Excise authorities can refuse to accept that price.

60. Since under new Section 4(1)(a) the price should be the sole consideration for the sale, it will be open for the Revenue to determine on the basis of evidence whether a particular transaction is one where extra-commercial consideration has entered and, if so, what should be the price to be taken as the value of the excisable article for the purpose of excise duty and that is what exactly has been done in the instant cases and after analysing the evidence on record it is found that extra-commercial consideration had entered into while fixing the price of the sale of the cars to the customers. When the price is not the sole consideration and there are some additional considerations either in the form of cash, kind, services or in any other way, then according to Rule 5 of the 1975 Valuation Rules, the equivalent value of that additional consideration should be added to the price shown by the assessee. The important requirement under Section 4(1)(a) is that the price must be the sole and only consideration for the sale. If the sale is influenced by considerations other than the price, then, Section 4(1)(a) will not apply. In the instant case, the main reason for the assessees to sell their cars at a lower price than the manufacturing cost and profit is to penetrate the market and this will constitute extra commercial consideration and not the sole consideration. As we have already noticed,

the duty of excise is chargeable on the goods with reference to its value then the normal price on which the goods are sold shall be deemed to be the value, provided: (1) the buyer is not a related person and (2) the price is the sole consideration. These twin conditions have to be satisfied for the case to fall under Section 4(1)(a) of the Act. We have demonstrated in the instant cases, the price is not the sole consideration when the assessees sold their cars in the wholesale trade. Therefore, the assessing authority was justified in invoking clause(b) of Section 4(1) to arrive at the value of the exercisable goods for the purpose of levy of duty of excise, since the proper price could not be ascertained. Since, Section 4(1)(b) of the Act applies, the valuation requires to be done on the basis of the 1975 Valuation Rules.

61. **After amendment of Section 4 :-** Section 4 lays down that the valuation of excisable goods chargeable to duty of excises on *ad-valorem* would be based upon the concept of transaction value for levy of duty. 'Transaction value' means the price actually paid or payable for the goods, when sold, and includes any amount that the buyer is liable to pay to the assessee in connection with the sale, whether payable at the time of sale or at any other time, including any amount charged for, or to make provisions for advertising or publicity, marketing and selling, and storage etc., but does not include duty of excise, sales tax, or any other taxes, if any, actually paid or payable on such goods. Therefore, each removal is a different transaction and duty is charged on the value of each transaction. The new Section 4, therefore, accepts different transaction values which may be charged by the assessee to different customers for assessment purposes where one of the three requirements, namely; (a) where the goods are sold for delivery at the time and place of delivery; (b) the assessee and buyers are not related; and (c) price is the sole consideration for sale, is not satisfied, then the transaction value shall not be the assessable value and value in such case has to be arrived at, under the Central Excise Valuation (Determination of Price

of Excisable Goods) Rules 2000 ('the Rules 2000' for short) which is also made effective from 1st July, 2000. Since the price is not the sole consideration for the period even after 1st July, 2000, in our view, the assessing authority was justified in invoking provisions of the Rules 2000.

62. **Reference to the Citations:**

Shri Bhattacharya, learned ASG, submits that in view of the decision of this Court in *Bombay Tyre International* case (supra), the nominal price of the goods, even if it is sold for a loss price, for the purpose of assessable value under Section 4 of the Act, at least the manufacturing cost and manufacturing profit should be taken into consideration. In view of this decision, the learned counsel goes to the extent of saying the judgements relied upon by the opposite side on the decision of this Court in *Guru Nanak Refrigeration* (supra) and *Bisleri International* (supra) should be treated as *per-incurium*. We cannot agree. In *Bombay Tyre's* case, the issue before the Court was whether the value of an article for the purpose of excise duty had to be determined by reference exclusively to the manufacturing cost and manufacturing profit of the manufacturer or should be represented by the wholesale price charged by the manufacturer which would include post-manufacturing expenses and post-manufacturing profits arising between the completion of manufacturing process and the point of sale by the manufacturer. It is relevant to notice at this stage, in the Bombay Tyre's case, this Court considered the scope of Section 4 before its amendment and after the new section 4 was substituted with effect from 01.10.1975. This Court in the said case, after detailed consideration of rival contentions and after referring to several precedents of this Court has concluded that the levy of excise duty was on the manufacture or production of goods, the stage of collection need not in point of time synchronise with the completion of the manufacturing process while the levy had the status of a constitutional concept, the point of collection was located where the statute

declared it would be. The Court further went on to observe when enacting the measure to serve as a standard for assessing the levy, legislature need not contour it along lines which spell out the character of the levy itself. From this stand point, it is not possible to accept the contention that because the levy of excise is a levy on goods manufactured or produced, the value of the excisable article must be limited to the manufacturing cost plus the manufacturing profit. The Court further was of the opinion, that a broad-based standard of reference may be adopted for the purpose of determining the measure of levy. Any standard which maintains a manner with the essential character of levy could be regarded as a valid basis for assessing the measure of levy. This Court in this decision also distinguished the view expressed in *A.K. Roy & Anr. v. Voltas Ltd*., 1977 (1) ELT 177 (SC), wherein this Court had held that the value for the purpose of Section 4 would include only the manufacturing cost plus manufacturing profit and exclude post-manufacturing cost plus manufacturing profit but exclude post-manufacturing cost and profit arising from post-manufacturing operation by observing that this Court in the aforesaid decision intended to say was that entire cost of the article plus profit minus trade discount would represent the assessable value and in that decision there was no issue on the question of including the post manufacturing cost and post-manufacturing profits. In conclusion, insofar as amended Section 4 of the Act, the Court has observed that the assessable value will be the price at which the goods are ordinarily sold by the assessee to the buyer in the course of wholesale trade at the factory gate. However, firstly, the buyer should not be a related person and the price should be sole consideration for the same. This proposition is subject to Section 4(1)(a). Secondly, if the price of the excisable goods cannot be ascertained either because the goods are not sold or for any other reason, the value will have to be determined as per the Central Excise Valuation Rules.

63. Our attention was also drawn by learned counsel Shri

Bhattacharya to the decision of this Court in *Assistant Collector of Central Excise & Ors.. v. M.R.F. Ltd.* 1987 (27) ELT 553 (SC), wherein the Court dealt with concept of post-removal expenses.

64. Shri Vellapally and Shri Lakshmi Kumaran learned Counsel by placing reliance on *Guru Nanak's* case (supra) and *Bisleri's* case (supra) contends that the issue raised in these appeals is no more *res integra.* We cannot agree. In *Guru Nanak's* case, the facts are: the assessee therein was engaged in the manufacture of refrigeration and air-conditioning machinery. They had cleared the goods after approval of the price list by the department. The adjudicating authority being of the view that the assessable value declared by the assessee was low as compared to the cost of material used in the manufacture of the said machinery, had issued a show cause, to show cause why the assessable value should not be re-fixed and the duty fixed on the re-fixed assessable value after taking into consideration the cost of raw material plus manufacturing cost plus reasonable profit margin. The adjudicating authority after considering the reply filed had confirmed the show cause notice and had directed the assessee to pay the difference in excise duty. In the appeal filed before the Tribunal, the assessee had succeeded. In the appeal filed by the department, this Court was of the view that since in the show cause notice issued by the adjudicating authority there was no allegation that the wholesale price to the buyers was for consideration other than the one at which it was purported to be sold or that it was not at arms length and further, there was no allegation that there was any flow back from the buyer to the assessee and therefore, the department cannot take a stand that the normal price was not ascertainable for the purpose of valuation under Section 4(1)(a) of the Act and therefore, the Tribunal was justified in accepting the whole sale price as the correct price.

65. In *Bisleri's* case, the issue as noted by the Court was,

whether the assessee had undervalued the aerated water (Beverages) by excluding two items, namely, the amounts received under credit notes as price support incentive and rent on containers as assessable value. The Court after referring to provisions of Section 4(1)(a) of the Act and the decision of this Court in *Bombay Tyre's* case (supra) has held that the amounts received under credit notes as price support incentives from supplier of raw materials cannot be included in the assessable value, since the department failed to prove that there was flow back of additional consideration from buyers of aerated waters to the assessee and further, the price was not uniformly maintained and favour of exra-commercial consideration was shown to the buyers of aerated waters (beverages). The Court has also observed that under Section 4, the price and sale are related concepts. The value of the excisable article has to be computed with reference to the price charged by the manufacturer, the computation being made in accordance with Section 4. In every case, it will be for the revenue to determine on evidence whether the transaction is one where extra-commercial consideration have entered and if so, what should be the price to be taken into account as the value of the excisable article for the purpose of excise duty.

66. In our considered view, either the decision of *Guru Nanak's* case (supra) or the decision in *Bisleri's* case (supra) would not assist the assessee in any manner whatsoever. We say so for the reason, that, in *Guru Nanak's* case, the department had accepted the price declared by the assessee and the narration of the facts both by the Tribunal and this Court would reveal that it was one time transaction and lastly, this Court itself has specifically observed that the view that they have taken, is primarily based on the facts and circumstances of the case. In the instant cases, the department never accepted the declared value. It is for this reason, provisional assessments were completed instead of accepting declared price by the assessee under Rule 9B of the Rules *inter alia* holding that during the enquiry, the assessees had admitted

that they did not have any basis to arrive at the assessable value but they are selling their goods at 'loss price' only to penetrate the market. Secondly, as we have already noticed that for nearly five years the assessee was selling its cars in the wholesale trade for a 'loss price' and therefore, the conditions envisaged under Section 4(1)(a) of the Act, namely; the normal price, ordinarily sold and sole consideration are not satisfied. We further hold that the decision in *Bisleri's* case (supra) will also not assist the assessees for the reason that the issue that came up for consideration is entirely different from the legal issue raised in these civil appeals. Before we conclude on this issue, we intend to refer to the often quoted truism of Lord Halsbury that a case is only an authority for what it actually decides and not for what may seem to follow logically from it. We may also note the view expressed by this Court in the case of *Sushil Suri vs. Central Bureau of Investigation & Anr.* (2011) 5 SCC 708, wherein this Court has observed, "Each case depends on its own facts and a close similarity between one case and another is not enough because either a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive." We do not intend to overload this judgment by referring to other decisions on this well settled legal principle.

67. Reference to Valuation Rules:

Shri. Bhattacharya, the learned ASG, contends that the assessees are not fulfilling the conditions enumerated in Section 4(1)(a) of the Act and therefore, the valuation has to be done in accordance with Section 4(1)(b) read with the 1975 Valuation Rules. He would submit that since the price of the cars sold by the assessee was not ascertainable, the Revenue is justified in computing the assessable value of the goods for

the levy of excise duty under Section 4(1)(b) of the Act and the relevant rules. He would further submit that the Valuation Rules need not be applied sequentially. He would contend that all the Rules 3, 4, 5, 6 and 7 of the 1975 Valuation Rules specifically use the expression "shall…be determined", "shall be based" or "shall determine the value" and nowhere word "sequentially" occurs in these Rules, unlike Rule 3(ii) of the Customs Valuation Rules, 1988. He would submit that merely the presence of word "shall" does not imply that all the Rules has to be applied sequentially. He would further submit that in the facts and circumstances of the present cases, Rule 7 is the only applicable Rule in view of the decision in Bombay Tyre's case and assessing authority as well as the first appellate authority correctly adopted the application of this Rule.

68. Per Contra, Shri Joseph Vellapally, would submit that only when the normal price is not ascertainable in terms of Section 4(1)(a), then Section 4(1)(b) read with the 1975 Valuation Rules would come into play to determine the nearest equivalent assessable value of the goods. He would contend that the Valuation Rules have to be applied sequentially, *i.e.* first, Rules 4 and 5 should be invoked in order to determine the assessable value and if Rules 4 and 5 are not applicable or assessable, value cannot be ascertained by applying the said Rules, and then only Rule 6 can be invoked. He would further submit that it is only Rule 6(b)(ii) of the 1975 Valuation Rules which contemplates determining of assessable value on the basis of cost of manufacture, only when the goods are captively consumed by the manufacturer and value of comparable goods manufactured by the assessee or any other assessee are not available.

69. Under Section 4(1)(b) of the Act, 1944, any goods which do not fall within the ambit of Section 4(1)(a) i.e. if the 'normal price' cannot be ascertained because the goods are not sold or for any other reason, the 'normal price' would have to be determined in the prescribed manner i.e. prior to 1st day

of July, 2000, in accordance with Rules, 1975 and after 1st day of July 2000, in accordance with Rules, 2000.

70. Rule 2 of the 1975 Valuation Rules provides for definition of certain terms, such as "proper officer", "value" etc., Rule 3 of the above Rules, provides that the value of any excisable goods, for the purposes of Clause (b) of Sub-Section (1) of Section 4 of the Act be determined in accordance with these Rules. Rule 4 provides that the value of the excisable goods shall be based on the value of such goods by the assessee for delivery at any other time nearest to the time of removal of goods under assessment. Rule 5 provides that when the goods are sold in the circumstances specified in Clause (a) of Sub-Section (1) of Section (4) of the Act except that the price is not the sole consideration, the value of such goods shall be based on the aggregate price and the amount of the money value of any additional consideration flowing directly or indirectly from the buyer to the assessee. Rule 6 provides, that, if the value of the excisable goods under assessment cannot be made, then to invoke provisions of Rule 6 of the Rules, wherein certain adjustments requires to be made as provided therein. Rule 7 is in the nature of residuary clause. It provides that if the value of excisable goods cannot be determined under Rule 4, 5 and 6 of the Rules, the adjudging authority shall determine the value of such goods according to the best of his judgment and while doing so, he may have regard to any one or more methods provided under the aforesaid Rules. A bare reading of these rules does not give any indication that the adjudging authority while computing the assessable value of the excisable goods, he had to follow the rules sequentially. The rules only provides for arriving at the assessable value under different contingencies. Again, Rule 7 of the Valuation Rules which provides for the best judgment assessment gives an indication that the assessing authority while quantifying the assessable value under the said Rules, may take the assistance of the methods provided under Rules 4, 5 or 6 of the Valuation Rules. Therefore, contention of the

learned counsel that the assessing authority before invoking Rule 7 of the 1975 Valuation Rules, ought to have invoked Rules 4, 5 and 6 of the said Rules cannot be accepted. In our view, since the assessing authority could not do the valuation with the help of the other rules, has resorted to best judgment method and while doing so, has taken the assistance of the report of the 'Cost Accountant' who was asked to conduct special audit to ascertain the correct price that requires to be adopted during the relevant period. Therefore, we cannot take exception of the assessable value of the excisable goods quantified by the assessing authority.

71. In the result, the appeals require to be allowed and, accordingly, they are allowed and the impugned order is set aside and the order passed by the adjudicating authority is restored. No order as to costs.

K.K.T. Appeals allowed.

ASHRAFKHAN @ BABU MUNNEKHAN PATHAN
v.
STATE OF GUJARAT
(Criminal Appeal No. 482 of 2002 etc.)

SEPTEMBER 26, 2012

[H.L. DATTU AND CHANDRAMAULI KR. PRASAD, JJ.]

Terrorist and Disruptive Activities (Prevention) Act, 1987:

s.20-A(1) – Approval under – Absence – Effect of – Prosecution under provisions of IPC, TADA, Arms Act and Explosive Substances Act – Of 60 accused – Conviction of 11 accused by Designated Court under provisions of TADA, Arms Act and Explosive Substances Act and acquittal of 41 accused – Appeals by the convicted accused as well as the State – Plea of the accused that conviction was vitiated in absence of approval u/s. 20A(1) before registration of FIR – Plea of State interalia that there was approval by the Deputy Commissioner of Police (PW65) on 9.6.1994 as well as on 11.8.1994 and approval given by Additional Chief Secretary, Home Department of the State on 15.6.1994 – Held: From the evidence on record is it not proved that the Deputy Commissioner of Police (PW65) granted approval u/s. 20-A(1) either on 9.6.1994 or on 11.8.1994 – The approval by the Addl. Chief Secretary, Home Department of State, though is proved, but the same is inconsequential as s. 20-A(1) does not contemplate approval by the Addl. Chief Secretary, Home Department of the State – Thus the conviction stands vitiated in absence of approval u/s. 20-A(1) – However, the absence of approval u/s. 20-A(1) would not vitiate the conviction under the other penal provisions viz. Arms Act and Explosive Substances Act – But since the conviction under TADA is vitiated for non-compliance of s. 20-A(1), the confessions (on the basis of which conviction under Arms Act and Explosive

Substances Act was based) cannot be relied upon to establish the guilt thereunder – Hence the conviction under the provisions of Arms Act and Explosive Substances Act is set aside – Benefit of the judgment is also given to the convicted accused who did not approach Supreme Court or whose appeals were not entertained by this court on the ground that they had served out the sentence – Arms Act, 1959 – ss. 7 and 25 (1A) – Explosive Substances Act,1908 – ss. 4, 5 and 6.

s. 20-A(1) and 20-A(2) – Approval under s. 20-A(1) – Absence of – Whether inconsequential if sanction u/s. 20-A(2) granted – Held: The approval and sanction operate in different and distinct stages and for successful prosecution, both the requirements have to be complied with – The sanction u/s. 20-A(2) does not render approval u/s. 20-A(1) inconsequential.

ss. 20-A(1) and 20-A(2) – Non-compliance of s. 20-A(1) – Whether curable defect in parity with s. 20-A(2) – Held: It is not curable – An Act which is harsh, containing stringent provisions prescribing different procedure cannot be construed liberally – For ensuring rule of law, its strict adherence has to be ensured.

ss. 20-A(1) – Non compliance of – Whether curable defect u/s. 465 Cr.P.C – Held: s. 465 is attracted to trial under TADA – But since the defect goes to the root of the matter, it is not covered by s. 465 – Code of Criminal Procedure, 1973 – s. 465.

ss. 20-A(1) and 18 – Approval under s. 20-A(1) – Absence of – Whether rendered irrelevant on Designated Court taking cognizance of the case in exercise of power u/s. 18 and whether the issue permissible to be raised at later stage – Held: Exercise of power u/s. 18 by Designated Court does not prevent the accused to challenge the trial or conviction later.

ss. 20-A(1) and 14 – Non-compliance of s. 20-A(1) – Whether rendered irrelevant by the fact that Designated Court is empowered to take cognizance u/s. 14 irrespective of absence of compliance of s. 20-A(1) – Held: Power u/s. 14 to the Designated Court does not make all other provisions of the Act inconsequential.

s. 20-A(1) – Interpretation of – Requirement of approval u/s. 20-A(1) cannot be said to be directory – Negative words used in the provision makes it clear that it is not directory – Provisions of TADA has to be strictly construed – Interpretation of Statutes.

Interpretation of Statutes – Rule of interpretation – Legislative intent – Plain ordinary grammatical meaning affords the best guide to ascertain the intention of the legislature – Other methods to understand the meaning is resorted to, when the language of the provision is ambiguous or leads to absurd result.

Charge-sheets were filed against 62 accused including the appellants-accused in five stages, by the police. The accused were charged u/ss. 120B IPC, ss. 3 and 5 of Terrorist and Disruptive Activities (Prevention) Act, 1987, ss. 4, 5 and 6 of Explosive Substances Act, 1908 and s. 25 (1A) of the Arms Act. Designated Court charged 60 accused of the above-mentioned charges. Accused No. 57 was discharged and accused No. 9 absconded. Designated Court convicted 11 accused u/ss. 3 and 5 of TADA, ss. 7 and 25(1A) of Arms Act and ss. 4, 5 and 6 of Explosive Substances Act. 41 accused were acquitted.

Convicted accused filed appeals to this Court challenging their conviction. State also filed appeals aggrieved by inadequacy of the sentence to the convicted accused and also challenged acquittal order.

The appellants-accused contended that since the FIR under the provisions of TADA was registered without approval of District Superintendent of Police as contemplated u/s. 20-A(1) of TADA and therefore the conviction was vitiated.

The State contended that the Deputy Commissioner PW 65 had given prior approval on 9.6.1994 and also on 11.8.1994 for recording FIR and that approval was also given by the Addl. Chief Secretary, Home Department on 15.6.1994. Alternatively, the State contended that non-compliance of s. 20-A(1) is not fatal as the same is curable defect u/s. 465 Cr.P.C.; that since absence of sanction u/s. 20-A(2) is a curable defect, by parity absence of approval u/s. 20-A(1) would also be curable; that the police having granted sanction u/s. 20-A(2), conviction cannot be held bad only on the ground of non-compliance of approval; that the Designated Court having taken cognizance and decided to try the case in exercise of power u/s. 18 TADA, prior defects are rendered irrelevant and cannot be raised; that Designated Court having been empowered to take cognizance u/s. 14 TADA, irrespective of absence of compliance u/s. 20-A(1), its non-compliance would not be fatal to the prosecution; and that absence of approval u/s. 20-A(1) would not vitiate the conviction under other penal provisions i.e. Arms Act and Explosive Substances Act.

Allowing the appeals filed by the accused and dismissing the appeals filed by the State, the Court

HELD: 1.1 The case of the prosecution that the Deputy Commissioner granted approval under Section 20-A(1) of TADA before registration of the case is fit to be rejected. the Deputy Commissioner PW 65 has categorically stated in his evidence that he had gone to the Supreme Court with original records, which included the First Information Report, on which he had granted

approval and handed over the same to the counsel. Thereafter, according to him, the original First Information Report got lost or misplaced. It has been brought to the notice of the Court that accused 'YL' had not come to this Court for grant of bail and, therefore, the Deputy Commissioner had no occasion to come with the original records in connection with that case. True it is that some of the accused persons in the case had approached this Court for various reliefs, but in the face of the evidence of PW 65 that he came along with the record in connection with the case of the accused 'YL' is fit to be rejected. [Para 20] [1052-G-H; 1053-A-C]

1.2 Charge-sheet in the case has been filed in five stages. Further, report under Section 157 Cr.P.C. has been filed and all these acts had taken place before the alleged loss of the document in the Supreme Court and, therefore, should have formed part of the charge-sheet and the report given under Section 157 Cr.P.C. It has also come on record that later on, the Assistant Commissioner of Police, Crime Branch had sought for approval of the Deputy Commissioner which he granted on 11th of August, 1994. The communication of the Assistant Commissioner of Police (Exh.1173) does not refer to any approval granted by the Deputy Commissioner earlier and, not only that, the Deputy Commissioner while giving approval on 11th of August, 1994 has nowhere whispered that earlier he had already granted the approval. No explanation is forthcoming from the side of the prosecution that when Deputy Commissioner PW65 had already granted approval on 9th of June, 1994, what was the occasion to write to him for grant of another approval and the Deputy Commissioner granting the same. To prove prior approval, the prosecution has produced the xerox copy. According to the evidence of Deputy Commissioner PW65, he had got it prepared from the copy kept in his office. When a copy of the approval

was kept in the office of the Deputy Commissioner itself, why the xerox copy was produced. PW65 in his cross-examination, has admitted that he did not remember whether there was any such paper in his office or not for grant of approval for which he had deposed. From the analysis of the evidence on record, there is no manner of doubt that the Deputy Commissioner PW65 did not grant prior approval before registration of the case. [Paras 21 and 23] [1053-C-H; 1054-A-G]

1.3 The prosecution has relied on another approval dated 11th of August, 1994 granted by the Deputy Commissioner. In order to prove this, reference is made to the letter of the Assistant Commissioner addressed to the Deputy Commissioner of Police (Exh. 1173). In the said letter, the Assistant Commissioner of Police has observed that the Home Department of the Government has given approval to apply Sections of TADA and the approval of the Deputy Commissioner is necessary in this regard. The Deputy Commissioner of Police on the same day granted approval. However, Deputy Commissioner PW65, in his evidence, has nowhere stated about the approval granted on 11th of August, 1994 though he had deposed about the approval granted on 9th of June, 1994. In the face of it, the case of the prosecution that Deputy Commissioner PW65 gave another approval on 11th of August, 1994 is also fit to be rejected. [Para 24] [1055-A-C]

1.4 From a plain reading of s. 20-A(1) of TADA, it is evident that no information about the commission of an offence shall be recorded by the police without the prior approval of the District Superintendent of Police. The legislature, by using the negative word in Section 20-A(1) of TADA, had made its intention clear. The scheme of TADA is different than that of ordinary criminal statutes and, therefore, its provisions have to be strictly construed. Negative words can rarely be held directory.

The plain ordinary grammatical meaning affords the best guide to ascertain the intention of the legislature. Other methods to understand the meaning of the statute is resorted to, if the language is ambiguous or leads to absurd result. No such situation exists here. In the face of it, the requirement of prior approval by the District Superintendent of Police, on principle, cannot be said to be directory in nature. [Para 27] [1056-C-E]

Anirudhsinhji Karansinhji Jadeja v. State of Gujarat **(1995) 5 SCC 302: 1995 (2) Suppl. SCR 637;** *Mukhtiar Ahmed Ansari v. State (NCT of Delhi)* **(2005) 5 SCC 258: 2005 (3) SCR 797;** *Mohd. Yunus v. State of Gujarat* **(1997) 8 SCC 459: 1997 (4) Suppl. SCR 494 – relied on.**

Kalpnath Rai v. State **(1997) 8 SCC 732;** *State of A.P. v. A.Sathyanarayana* **(2001) 10 SCC 597 – referred to.**

2.1 In view of the evidence on record, the case of the prosecution that the Additional Chief Secretary, Home Department, on 15th of June, 1994 had given approval is accepted. Section 20-A of TADA authorises the District Superintendent of Police to grant approval for recording the offence and Additional Chief Secretary of the Home Department or for that matter, State Government does not figure in that. The legislature has put trust on the District Superintendent of Police and therefore it is for him to uphold that trust and nobody else. Hence approval by the Additional Chief Secretary is inconsequential and it will not save the prosecution on this count, if found vulnerable otherwise. [Paras 25 and 31] [1055-E; 1059-C-E]

2.2 In order to prevent the abuse of TADA, the State Government may put other conditions and prescribe approval by the Government or higher officer in the hierarchy but the same cannot substitute the requirement of approval by the District Superintendent of Police. Not only this, the District Superintendent of Police is obliged

to grant approval on its own wisdom and outside dictate would vitiate his decision. [Para 31] [1059-E-F]

Anirudhsinhji Karansinhji Jadeja v. State of Gujarat **(1995) 5 SCC302: 1995 (2) Suppl. SCR 637– relied on.**

3. Section 465 Cr.P.C. shall be attracted in the trial of an offence by the Designated Court under TADA. But Section 465 Cr.P.C. shall not be a panacea for all error, omission or irregularity. Omission to grant prior approval for registration of the case under TADA by the Superintendent of Police is not the kind of omission which is covered under Section 465 Cr.P.C. It is a defect which goes to the root of the matter and it is not one of the curable defects. [Paras 32 and 33] [1059-H; 1060-A-E-F]

4.1 It is also not correct to say that absence of sanction under Section 20-A(2) by the Commissioner of Police has been held to be a curable defect and for parity of reasons, the absence of approval under Section 20-A(1) would also be curable. An Act which is harsh, containing stringent provision and prescribing procedure substantially departing from the prevalent ordinary procedural law cannot be construed liberally. For ensuring rule of law, its strict adherence has to be ensured. [Para 34] [1060-F-H; 1061-A]

4.2 The very existence of the approval under Section 20-A(1) of TADA has been questioned by the accused during the course of trial, which is evident from the trend of cross-examination. Not only this, it was raised before the Designated Court during argument and has been rejected. Thus, it cannot be said that it was not raised at the earliest. [Para 35] [1061-F-G]

5. It is not correct to say that the accused cannot assail their conviction on the ground of absence of approval under Section 20-A(1) of TADA by the Deputy

Commissioner, when the Commissioner of Police had granted sanction under Section 20-A(2) of TADA. The provisions of TADA are stringent and consequences are serious and in order to prevent persecution, the legislature in its wisdom had given various safeguards at different stages. It has mandated that no information about the commission of an offence under TADA shall be recorded by the police without the prior approval of the District Superintendent of Police. Further safeguard has been provided and restriction has been put on the court not to take cognizance of any offence without the previous sanction of the Inspector-General of Police or as the case may be, the Commissioner of Police. Both operate in different and distinct stages and, therefore, for successful prosecution both the requirements have to be complied with. In a case in which different safeguards have been provided at different stages, it cannot be held that adherence to the last safeguard would only be relevant and breach of other safeguards shall have no bearing on the trial. [Paras 36] [1062-A-D]

Ahmad Umar Saeed Sheikh v. State of U.P. **(1996) 11 SCC 61 – relied on.**

Lal Singh v. State of Gujarat **(1998) 5 SCC 529 – held inapplicable.**

6. It is not correct to say that the Designated Court having taken cognizance and decided to try the case by itself in exercise of the power under Section 18 of TADA, the prior defects, if any, are rendered irrelevant and cannot be raised. The power of the Designated Court u/s. 18, to transfer the case to be tried by a court of competent jurisdiction would not mean that in case the Designated Court has decided to proceed with the trial, any defect in trial, cannot be agitated at later stage. Many ingredients which are required to be established to confer jurisdiction on a Designated Court are required to be

proved during trial. At the stage of Section 18, the Designated Court has to decide as to whether to try the case itself or transfer the case for trial to another court of competent jurisdiction. For that, the materials collected during the course of investigation have only to be seen. The investigating agency, in the present case, has come out with a case that prior approval was given for registration of the case and the allegations made do constitute an offence under TADA. In the face of it, the Designated Court had no option than to proceed with the trial. However, the decision by the Designated Court to proceed with the trial shall not prevent the accused to contend in future that they cannot be validly prosecuted under TADA. Even in a case which is not fit to be tried by the Designated Court but it decides to do the same, instead of referring the case to be tried by a court of competent jurisdiction, it will not prevent the accused to challenge the trial or conviction later on. [Para 37] [1062-F-H; 1063-A-E]

7. Section 14 of TADA confers jurisdiction on a Designated Court to take cognizance of any offence when the accused being committed to it for trial upon receiving a complaint of facts which constitute such offence or upon a police report of such facts. The offence under TADA is to be tried by a Designated Court. The Designated Court has all the powers of Court of Session and it has to try the offence as if it is a Court of Session. Cr.P.C. provides for commitment of the case for trial by the Court of Session. Section 14(1) of TADA provides that the Designated Court may take cognizance on receiving a complaint of facts or upon a police report. Had this provision not been there, the cases under TADA would have been tried by the Designated Court only after commitment. In any view of the matter, the accused during the trial under TADA can very well contend that their trial is vitiated on one or the other ground

notwithstanding the fact that the Designated Court had taken cognizance. Taking cognizance by the Designated Court shall not make all other provisions inconsequential. [Para 38] [1063-F-H; 1064-A-B]

8.1 The Designated Court, besides trying the case under TADA, can also try any other offence with which the accused may be charged at the same trial, if the offence is connected with the offence under TADA. When the Designated Court had the power to try offences under TADA as well as other offences, it is implicit that it has the power to convict also and that conviction is permissible to be ordered under TADA or other penal laws or both. It is not necessary for the Designated Court to first order conviction under TADA and only thereafter under other penal law. "The Designated Court is empowered to convict the accused for the offence under any other law notwithstanding the fact that no offence under TADA is made out." [Para 39] [1064-D-G]

Prakash Kumar v. State of Gujarat **(2005) 2 SCC 409: 2005 (1) SCR 408 – followed.**

8.2 Though the conviction of the accused is held to have been vitiated on account of non-compliance of Section 20-A(1) of TADA, it may be permissible in law to maintain the conviction under the Arms Act and the Explosive Substances Act but that shall only be possible when there are legally admissible evidence to establish those charges. The Designated Court has only relied on the confessions recorded under TADA to convict the accused for offences under the Arms Act and the Explosive Substances Act. In view of the finding that their conviction is vitiated on account of non-compliance of the mandatory requirement of prior approval under Section 20-A(1) of TADA, the confessions recorded cannot be looked into to establish the guilt under the aforesaid Acts.

Hence, the conviction of the accused under Section 7 and 25(1A) of the Arms Act and Section 4, 5 and 6 of the Explosive Substances Act cannot also be allowed to stand. [Para 40] [1065-D-G]

9. Many of the accused, because of poverty or for the reason that they had already undergone the sentence, have not preferred appeals before this Court. Further, this Court had not gone into the merits of the appeals preferred by few convicts on the ground that they have already served out the sentence and released thereafter. The view taken by this Court goes to the root of the matter and vitiates the conviction and, hence, benefit of this judgment is granted to all those accused who have been held guilty and not preferred appeal and also those convicts whose appeals have been dismissed by this Court as infructuous on the ground that they had already undergone the sentence awarded. [Para 44] [1066-G-H; 1067-A-B]

Case Law Reference:

1997 (4) Suppl. SCR 494	**Relied on**	**Para 21**
1995 (2) Suppl. SCR 637	**Relied on**	**Paras 27 and 31**
2005 (3) SCR 797	**Relied on**	**Para 28**
(1997) 8 SCC 732	**Referred to**	**Para 29**
(2001) 10 SCC 597	**Referred to**	**Para 30**
(1998) 5 SCC 529	**held inapplicable**	**Para 34**
(1996) 11 SCC 61	**Relied on**	**Para 35**
2005 (1) SCR 408	**followed**	**Para 39**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 482 of 2002.

From the Judgment & Order dated 31.01.2002 of the Additional Designated Judge, Court No. 3, Ahmedabad City in Tada Case No. 15/95 and 6/96 consolidated with Tada Case No. 32/94 and 43/96.

WITH

Crl. A. Nos. 486-487, 762-765 and 766-768 of 2002.

Sushil Kumar, Ranjit Kumar, Sanjay Jain, Afshan P., Vinay Arora, Vimal Chandra S. Dave for the Appellant.

Yashank Adhyaru, Pinky Behra, Nandini Gupta (for Hemantika Wahi), Kamini Jaiswal, Garvesh Kabra (A.C.), Pooja Kabra, Abhishek Jaju, Nikita Kabra Jaju, E.C. Agrawala, V. Anantharaman (For Meenakshi Arora), Balraj Dewan for the Respondent.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. These appeals have been filed against the judgment and order dated 31st of January, 2002 passed by Additional Designated Judge, Court No.3, Ahmedabad City in TADA Case Nos. 15/1995 and 6/1996 consolidated with TADA Case Nos. 32/1994 and 43/1996.

2. According to the prosecution, Abdul Wahab Abdul Majid Khan was arrested in a case of murder. On being interrogated in that case, he made startling and shocking revelations. He disclosed that accused Yusuf Laplap, who is involved in illegal business of liquor and running a gambling den is in possession of four foreign made hand grenades, revolvers and AK-47 rifles. The fountainhead of the weapons, according to the information is notorious criminal Abdul Latif Shaikh and came at the hand of accused Yusuf Laplap through his close associate accused Abdul Sattar @ Sattar Chacha. Sattar gave the arms and explosives to accused Siraj @ Siraj Dadhi, a constable attached to Vejalpur Police Station. He in turn

delivered those arms and explosives to accused Imtiyaz Nuruddin, the servant of Yusuf Laplap at latter's instance. The aforesaid information was passed on to A.K. Suroliya, the Deputy Commissioner of Police, Crime Branch. The police party searched the house of the accused Yusuf Laplap in the night and found him leaving the house with two bags. From one of the bags one revolver with ISI mark and five foreign made hand grenades were recovered and from another bag five detonators having clips affixed to it were found.

3. According to the allegation, the arms and explosives seized were similar to those used in the Ahmedabad City earlier by gang of criminals and intended to be used in the forthcoming "Jagannath Rath Yatra". The information given by the Police Inspector, U.T. Brahmbhatt led to registration of Crime No. 1-CR No. 11 of 1994 dated 9th of June, 1994, at the Crime Branch Police Station under Section 120B of the Indian Penal Code, Section 3 & 5 of Terrorist and Disruptive Activities (Prevention) Act (hereinafter referred to as 'TADA'), Section 7 & 25 (1) of the Arms Act and Section 4, 5 and 6 of the Explosive Substances Act against seven accused persons[1].

4. It is the case of the prosecution that the Police Inspector U.T. Brahmbhatt, before recording the first information report, sought prior approval of the Deputy Commissioner of Police, Crime Branch, for registration of the case which was granted. It is only thereafter, the first information report was registered and the investigation proceeded. It is also their case that another approval was granted on 15th of June, 1994 by the Additional Chief Secretary, Home Department. Not only that, the Deputy Commissioner of Police, Crime Branch, PW-65 A.R. Suroliya gave another approval on 11th of August, 1994.

5. During the course of investigation, the complicity of large number of persons surfaced. In all 46 AK-56 rifles, 40 boxes

1. List of persons named in Crime No. 1-CR No. 11 of 1994 dated 9th of June, 1994 is appended at Schedule No.-I.

of cartridges, 99 bombs, 110 fuse pins and 110 magazines were brought to Ahmedabad and seized by the investigating agency from various accused persons. These were distributed to the accused persons for killing and terrorising the Hindu community during "Jagannath Rath Yatra". All those persons who were either found in possession or involved in transporting or facilitating transportation of those weapons were charge-sheeted. All these were intended to be used to disturb peace and communal harmony during "Jagannath Rath Yatra".

6. Ultimately, the investigating agency, on 16th of December, 1994 submitted first[2] charge-sheet against 14 accused persons under Section 120B, 121A, 122, 123 and 188 of Indian Penal Code, Section 3 and 5 of TADA, Section 4, 5 and 6 of Explosive Substances Act, Section 25(1A) of Arms Act, Section 135 of Customs Act and Section 135 (1) of Bombay Police Act. Second[3] charge-sheet came to be filed on 23rd of May, 1995 against 2 accused persons. Investigation did not end there and third[4], fourth[5] and fifth[6] charge-sheets were submitted on 17th of April, 1996, 20th of December, 1996 and 24th of May, 2000 against 33, 11 and 2 accused persons respectively. Thus, altogether 62 persons were charge-sheeted.

7. The Designated Court framed charges against 60 accused persons under Section 120B of the Indian Penal Code, Section 3 and 5 of TADA, Section 4, 5 and 6 of the Explosive Substances Act and Section 25 (1A) of the Arms Act. However, Accused No. 57 namely, Mohmad Harun @ Munna

2. List of persons charge-sheeted in the first charge-sheet dated 16th of December, 1994 ios appended at Schedule No.-II.

3. List of persons charge-sheeted in the second charge-sheet dated 23rd May, 1995 is appended at Schedule No.-III.

4. List of persons charge-sheeted in the third charge-sheet dated 17th of April, 1996 is appended at Schedule No.-IV.

5. List of persons charge-sheeted in the fourth charge-sheet dated 20th of December, 1996 is appended at Schedule No.-V.

6. List of persons charge-sheeted in the fifth charge-sheet dated 24th of May, 2000 is appended at Schedule No.VI.

@ Riyaz @ Chhote Rahim, has been discharged by the Designated Court by its order dated 24th of August, 2001. During the course of trial six accused namely, Adambhai Yusufbhai Mandli (Shaikh), Accused No. 11, Fanes Aehmohmad Ansari, Accused No. 18, Abdullatif Abdulvahab Shaikh, Accused No. 35, Ikbal Jabbarkhan Pathan, Accused No. 38, Firoz @ Firoz Kankani, Accused No. 56 and Jay Prakash Singh @ Bachchi Singh, Accused No. 60 died. One accused namely, Accused No. 9, Mohmad Ismail Abdul Shaikh absconded.

8. In order to bring home the charge, the prosecution altogether examined 70 witnesses and a large number of documents were also exhibited. The accused were given opportunity to explain the circumstances appearing in the evidence against them and their defence was denial simpliciter. The Designated Court, on analysis of the evidence, both oral and documentary, vide its order dated 31st of January, 2002 convicted 11 accused persons[7] under Section 3 and 5 of TADA, Section 7 and 25(1A) of the Arms Act and Section 4, 5 and 6 of the Explosive Substances Act. They have been sentenced to undergo rigorous imprisonment for five years for the offence punishable under Section 3 and 5 of TADA and fine with default clause. The Designated Court further sentenced those convicted under Section 4, 5 and 6 of the Explosive Substances Act to suffer rigorous imprisonment for five years and fine with default clause. They were further sentenced to undergo rigorous imprisonment for five years and fine with default clause under Section 7 and 25(1A) of the Arms Act. All the sentences were directed to run concurrently. The Designated Court, however, acquitted 41 accused[8] of all the charges leveled against them.

7. List of persons convicted by Designated Court vide its order dated 31st of January, 2002 is appended at Schedule No.-VII.

8. List of persons acquitted by Designated Court vide its order dated 31st of January, 2002 is appended at Schedule No.VIII.

. All Schedules appended shall from part of the judgment.

9. Those found guilty have preferred Criminal Appeal No. 482 of 2002 (Ashrafkhan @ Babu Munnekhan Pathan & Anr. Vs. State of Gujarat) and Criminal Appeal Nos. 486-487 of 2002 (*Yusufkhan @ Laplap Khuddadkhan Pathan & Ors. Vs. State of Gujarat*). State of Gujarat, aggrieved by the inadequacy of sentence, preferred Criminal Appeal Nos. 762-765 of 2002 (*State of Gujarat Vs. Yusufkhan @ Laplap Khudadattkhan Pathan & Ors.*) and also preferred Criminal Appeal Nos. 766-768 of 2002 (*State of Gujarat Vs. Abdul Khurdush Abdul Gani Shaikh & Ors.*) against acquittal.

10. As all these appeals arise out of the same judgment, they were heard together and are being disposed of by this common judgment.

11. We have heard Mr. Sushil Kumar and Mr. Ranjit Kumar learned Senior Counsel, Mr. Garvesh Kabra, learned amicus curiae, Mr. Sanjay Jain and Ms. Meenakshi Arora, learned counsel on behalf of the accused. Mr. Yashank Adhyaru, learned Senior Counsel was heard on behalf of the State of Gujarat.

12. In order to assail the conviction several submissions were made by the learned counsel representing the accused. However, as the conviction has to be set aside on a very short ground, we do not consider it either expedient to incorporate or answer those submissions.

13. We may record here that we have incorporated only those parts of the prosecution case which have bearing on the said point and shall discuss hereinafter only those materials which are relevant for adjudication of the said issue.

14. It is the contention of the accused that the first information report under the provisions of TADA was registered without approval of the District Superintendent of Police as contemplated under Section 20-A(1) of TADA and this itself vitiates the conviction.

15. Plea of the State, however, is that such an approval was granted by A.R. Suroliya, the Deputy Commissioner of Police, Crime Branch, who is an officer of the rank of District Superintendent of Police. Alternatively, the State contends that Section 20-A of TADA is a two tiered provision which provides for approval by the Deputy Commissioner under Section 20-A(1) and sanction by the Commissioner under Section 20-A(2) of TADA. In the absence of challenge to the sanction, challenge only to the approval, to use the counsel's word "would be curable defect under Section 465 of the Code of Criminal Procedure". It has also been pointed out that the accused having not challenged the sanction granted by the Commissioner of Police under Section 20-A(2) of TADA, they cannot assail their conviction on the ground of absence of approval under Section 20-A(1) by the Deputy Commissioner. In order to defend the conviction, the State of Gujarat further pleads that the Designated Court having taken cognizance and decided to try the case by itself under Section 18 of TADA, the prior defects, if any, are rendered irrelevant and cannot be raised. It has also been pointed out that the Designated Court having been empowered to take cognizance under Section 14 of TADA irrespective of absence of compliance of Section 20-A(1) of TADA, its non-compliance would not be fatal to the prosecution. It has also been highlighted that several safeguards have been provided under the scheme of TADA including the power of the court to take cognizance and proceed with the trial and once cognizance has been taken, defects prior to that cannot be allowed to be raised. In any view of the matter, according to the State, absence of approval under Section 20-A(1) of TADA would not vitiate the conviction of the accused persons under other penal provisions.

16. In view of the rival submissions the question for determination is as to whether the Deputy Commissioner, A.R. Suroliya gave prior approval on 9th of June, 1994 or 11th of August, 1994 for recording the first information report as contemplated under Section 20-A(1) of TADA and in case it

is found on facts that no such approval was granted, the effect thereof on the conviction of the accused. Further, the effect of approval by the Additional Chief Secretary, Home Department on 15th of June,1994 is also required to be gone into.

17. To prove prior approval by the Deputy Commissioner before the lodging of the first information report, the prosecution has mainly relied on the evidence of the Inspector of Police U.T. Brahmbhatt, PW-10 and Deputy Commissioner A.R. Suroliya, PW-65. Xerox copy of the approval (Exh. 775)has also been brought on record to establish that. It is not in dispute that officer of the rank of Deputy Commissioner is equivalent to District Superintendent of Police. U.T. Brahmbhatt has stated in his evidence that "Mr. Suroliya passed an order, sanctioned the same and an endorsement is also made regarding that". This witness has been subjected to cross-examination and in the cross-examination he has admitted that the letter asking for approval to investigate and the report under Section 157 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') has been lost while producing the same in the Supreme Court. A.R. Suroliya, PW-65, in his evidence has supported the case of the prosecution regarding prior approval. While explaining the absence of the original approval, this witness has stated in his evidence that he had gone to the Supreme Court for hearing of the application filed by the accused Yusuf Laplap and handed over the original papers to the senior counsel. According to him, the senior counsel told him that after producing the necessary papers before the Supreme Court, the original papers would be sent back but it has not come and despite efforts and inquiry, it could not be traced out. According to his evidence "as the original letter of approval thereof is not found" the xerox copy thereof was produced. It was marked as Exh.775. In the cross-examination, he reiterated that he had gone to the Supreme Court along with original approval letter and in the bail application of accused Yusuf Laplap, the said approval was produced. He feigned ignorance as to whether entry was made into outward register regarding approval and

denied suggestion that he did not receive any proposal for approval nor granted the same and with a view to see that the case does not fall, he had deposed falsely regarding approval. In his cross-examination he has stated as follows:

> "I do not know whether there is any such paper in my office or not for grant of approval for which I have deposed."

18. The Designated Court accepted the case of the prosecution and held that prior approval was granted by the Deputy Commissioner under Section 20-A(1) of TADA. While doing so, the Designated Court observed as follows:

> "…The original documents were sent to the honorable Supreme Court for the purpose of producing the same in court in connection with the same petition and thereafter the same have been misplaced or lost…."

19. It further observed as follows:

> "….On receiving certain information from Abdul Wahab and Yusuf Laplap Mr. Brahmbhatt lodged the FIR against seven accused persons and it was sent for the approval of DCP and on getting the approval under section 20-A(1), the offence was registered under the TADA Act. Thereafter on perusal of the deposition, it becomes clear that there was total compliance of Section 20-A(1) of the TADA Act before lodging the FIR and on getting the approval from DCP the offence was registered.

20. Having given our anxious consideration to the facts of the present case and the evidence on record, we are of the opinion that the case of the prosecution that the Deputy Commissioner granted approval under Section 20-A(1) of TADA before registration of the case is fit to be rejected. It is interesting to note that the Deputy Commissioner A.R. Suroliya has categorically stated in his evidence that he had gone to the Supreme Court with original records, which included the first

information report, on which he had granted approval and handed over the same to the counsel. Thereafter, according to him, the said original first information report got lost or misplaced. It has been brought to our notice that accused Yusuf Laplap had not come to this Court for grant of bail and, therefore, the Deputy Commissioner had no occasion to come with the original record in connection with that case. True it is that some of the accused persons in the case had approached this Court for various reliefs, but in the face of the evidence of the Deputy Commissioner A.R. Suroliya that he came along with the record in connection with the case of the accused Yusuf Laplap is fit to be rejected. There are various other reasons also to reject this part of the prosecution story.

21. As stated earlier, charge-sheet in the case has been filed in five stages. Further, report under Section 157 of the Code has been filed and all these acts had taken place before the alleged loss of the document in the Supreme Court and, therefore, should have formed part of the charge-sheet and the report given under Section 157 of the Code. It has also come on record that later on, the Assistant Commissioner of Police, Crime Branch had sought for approval of the Deputy Commissioner which he granted on 11th of August, 1994. The communication of the Assistant Commissioner of Police (Exh.1173) does not refer to any approval granted by the Deputy Commissioner earlier and, not only that, the Deputy Commissioner while giving approval on 11th of August, 1994 has nowhere whispered that earlier he had already granted the approval. No explanation is forthcoming from the side of the prosecution that when Deputy Commissioner A.R. Suroliya had already granted approval on 9th of June, 1994, what was the occasion to write to him for grant of another approval and the Deputy Commissioner granting the same. To prove prior approval, the prosecution has produced the xerox copy. According to the evidence of Deputy Commissioner A.R. Suroliya, he had got it prepared from the copy kept in his office. We wonder as to how and why when a copy of the approval

was kept in the office of the Deputy Commissioner itself, xerox copy was produced. It is relevant here to state that this witness, in his cross-examination, has admitted that he does not remember whether "there is any such paper in my office or not for grant of approval for which" he had deposed.

22. In the face of what we have observed above the case of the prosecution that prior approval was granted on 9th of June, 1994 is fit to be rejected. It seems that the prosecution has come out with a story of grant of prior approval under Section 20-A(1) of TADA in view of the decision of this Court in the case of *Mohd. Yunus v. State of Gujarat,* (1997) 8 SCC 459. There the prosecution has propounded the theory of oral permission which was rejected. In that case also the prosecution has pressed into service the permission granted on 11th of August, 1994 by the same Deputy Commissioner i.e. A.R. Suroliya and earlier oral permission. While rejecting the same this Court has observed as follows:

> "4. It is, however, contended by the prosecution that on the very date when investigation had been made in this case, the Commissioner of Police, Ahmedabad was present and he had given oral permission under Section 20-A(1) of TADA. We may indicate here that considering the serious consequences in a criminal case initiated under the provisions of TADA, oral permission cannot be accepted. In our view, Section 20-A(1) must be construed by indicating that prior approval of the statutory authority referred to in the said sub-section must be in writing so that there is transparency in the action of the statutory authority and there is no occasion for any subterfuge subsequently by introducing oral permission."

23. From the analysis of the evidence on record, we have no manner of doubt that the Deputy Commissioner A.R. Suroliya did not grant prior approval before registration of the case.

24. As stated earlier, the prosecution has relied on another approval dated 11th of August, 1994 granted by the Deputy Commissioner. In order to prove this, reference is made to the letter of the Assistant Commissioner addressed to the Deputy Commissioner of Police (Exh. 1173). In the said letter, the Assistant Commissioner of Police has observed that the Home Department of the Government has given approval to apply sections of TADA and the approval of the Deputy Commissioner is necessary in this regard. The Deputy Commissioner of Police on the same day granted approval. However, Deputy Commissioner A.R. Suroliya, in his evidence, has nowhere stated about the approval granted on 11th of August, 1994 though he had deposed about the approval granted on 9th of June, 1994. In the face of it, the case of the prosecution that Deputy Commissioner A.R. Suroliya gave another approval on 11th of August, 1994 is fit to be rejected.

25. Another approval said to have been granted by the Additional Chief Secretary, Home Department for "using TADA sections" (Exh. 439) has also been proved by the prosecution to establish compliance of Section 20-A(1) of TADA. Accused has not joined issue on this count and in view of the evidence on record, we have no hesitation in accepting the case of the prosecution that the Additional Chief Secretary, Home Department, on 15th of June, 1994 had given approval. However, its consequences on the conviction of the accused shall be discussed later on.

26. Having found that the Deputy Commissioner has not granted the prior approval, as required under Section 20-A(1) of TADA, we proceed to consider the consequence thereof. For that, we deem it expedient to reproduce Section 20-A of TADA which reads as under:

20-A Cognizance of offence.

(1) Notwithstanding anything contained in the Code, no information about the commission of an offence under this

Act shall be recorded by the police without the prior approval of the District Superintendent of Police.

(2) No court shall take cognizance of any offence under this Act without the previous sanction of the Inspector-General of Police, or as the case may be, the Commissioner of Police.

27. It is worth mentioning here that TADA, as originally enacted, did not contain this provision and it has been inserted by Section 9 of the Terrorist and Disruptive Activities (Prevention) Amendment Act (Act 43 of 1993). From a plain reading of the aforesaid provision it is evident that no information about the commission of an offence shall be recorded by the police without the prior approval of the District Superintendent of Police. The legislature, by using the negative word in Section 20-A(1) of TADA, had made its intention clear. The scheme of TADA is different than that of ordinary criminal statutes and, therefore, its provisions have to be strictly construed. Negative words can rarely be held directory. The plain ordinary grammatical meaning affords the best guide to ascertain the intention of the legislature. Other methods to understand the meaning of the statute is resorted to if the language is ambiguous or leads to absurd result. No such situation exists here. In the face of it, the requirement of prior approval by the District Superintendent of Police, on principle, cannot be said to be directory in nature. There are authorities which support the view we have taken. Reference, in this connection, can be made to a three-Judge Bench decision of this Court in the case of *Anirudhsinhji Karansinhji Jadeja v. State of Gujarat,* (1995) 5 SCC 302. As in the present case, in the said case also the permission granted by the Additional Chief Secretary was considered. The effect of absence of prior approval by the District Superintendent of Police and the grant of approval by the Additional Chief Secretary were not found to be in conformity with the scheme of TADA. Paragraph 11 of the judgment which is relevant for the purpose reads as follows:

"11. The case against the appellants originally was registered on 19-3-1995 under the Arms Act. The DSP did not give any prior approval on his own to record any information about the commission of an offence under TADA. On the contrary, he made a report to the Additional Chief Secretary and asked for permission to proceed under TADA. Why? Was it because he was reluctant to exercise jurisdiction vested in him by the provision of Section 20-A(1)? This is a case of power conferred upon one authority being really exercised by another. If a statutory authority has been vested with jurisdiction, he has to exercise it according to its own discretion. If the discretion is exercised under the direction or in compliance with some higher authority's instruction, then it will be a case of failure to exercise discretion altogether. In other words, the discretion vested in the DSP in this case by Section 20-A(1) was not exercised by the DSP at all."

28. The effect of non-compliance of Section 20-A(1) of TADA also came up for consideration before this Court in the case of *Mukhtiar Ahmed Ansari v. State (NCT of Delhi),* (2005) 5 SCC 258 and while holding that absence of prior approval would vitiate the conviction, the Court observed as under:

"23. We are unable to uphold the argument. In this case, the Deputy Commissioner of Police himself had been examined as prosecution witness (PW 4). In his deposition, he had not stated that he had given any such direction to PW 11 Ram Mehar Singh to register case against the accused under TADA. On the contrary, he had expressly stated that he had granted sanction (which was in writing) which is at Ext. P-4/1. As already adverted earlier, it was under the Arms Act and not under TADA.

24. In our opinion, therefore, from the facts of the case, it cannot be held that prior approval as required by Section 20-A(1) has been accorded by the competent authority under TADA. All proceedings were, therefore, vitiated. The contention of the appellant-accused must be upheld and the conviction of the appellant-accused under TADA must be set aside."

29. In the present case, we have found that no prior approval was granted by the Deputy Commissioner of Police and in the face of the judgments of this Court in the case of *Anirudhsinhji Karansinhji Jadeja* (supra) and *Mukhtiar Ahmed Ansari* (supra), the conviction of the accused cannot be upheld. It is worth mentioning that this Court had taken the same view in the case of *Mohd. Yunus* (supra) and on fact, having found that no permission was granted, the charge was held to have been vitiated. It is worth mentioning here that in *Mohd. Yunus* (supra) this Court observed that no oral permission is permissible but in *Kalpnath Rai v. State,* (1997) 8 SCC 732 this Court held that District Superintendent of Police, in a given contingency, can grant oral approval and that would satisfy the requirement of Section 20-A(1) of TADA.

30. The conflict between the decisions of this Court in *Mohd. Yunus* (supra) and *Kalpnath Rai* (supra) was considered by a three-Judge Bench in the case of *State of A.P. v. A. Sathyanarayana,* (2001) 10 SCC 597 and this Court held that oral approval is permissible and while over-ruling the decision in the case of *Mohd. Yunus* (supra), upheld the ratio laid down in the case of *Kalpnath Rai* (supra) that the prior approval may be either in writing or oral also. But, at the same time, the decision in the case of *Mohd. Yunus* (supra) that prior approval is sine qua non for prosecution, has not been watered down and, in fact, reiterated. This would be evident from paragraph 8 of the judgment which reads as follows:

"8. Having applied our mind to the aforesaid two judgments of this Court, we are in approval of the latter judgment and we hold that it is not the requirement under Section 20-A(1) to have the prior approval only in writing. Prior

approval is a condition precedent for registering a case, but it may be either in writing or oral also, as has been observed by this Court in *Kalpnath Rai* case, 1997 (8) SCC 732 and, therefore, in the case in hand, the learned Designated Judge was wholly in error in refusing to register the case under Sections 4 and 5 of TADA. We, therefore, set aside the impugned order of the learned Designated Judge and direct that the matter should be proceeded with in accordance with law."

(underlining ours)

31. Another question which needs our attention is the effect of approval dated 15th of June, 1994 given by the Additional Chief Secretary, Home Department of the State. Section 20-A of TADA authorises the District Superintendent of Police to grant approval for recording the offence and Additional Chief Secretary of the Home Department or for that matter, State Government does not figure in that. The legislature has put trust on the District Superintendent of Police and therefore it is for him to uphold that trust and nobody else. Hence approval by the Additional Chief Secretary is inconsequential and it will not save the prosecution on this count, if found vulnerable otherwise. We may however observe that in order to prevent the abuse of TADA, the State Government may put other conditions and prescribe approval by the Government or higher officer in the hierarchy but the same cannot substitute the requirement of approval by the District Superintendent of Police. Not only this, the District Superintendent of Police is obliged to grant approval on its own wisdom and outside dictate would vitiate his decision. This view finds support from the decision of this Court in the case of *Anirudhsinhji Karansinhji Jadeja* (Supra).

32. Now we proceed to consider the submission advanced by the State that non-compliance of Section 20-A(1) i.e. absence of approval of the District Superintendent of Police, is a curable defect under Section 465 of the Code. We do not have the slightest hesitation in holding that Section 465 of the

Code shall be attracted in the trial of an offence by the Designated Court under TADA. This would be evident from Section 14 (3) of TADA which reads as follows:

"S.14.Procedure and powers of Designated Courts

xxx xxx xxx

(3) Subject to the other provisions of this Act, a Designated Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before the Court of Session."

33. From a plain reading of the aforesaid provision it is evident that for the purpose of trial Designated Court is a Court of Session. It has all the powers of a Court of Session and while trying the case under TADA, the Designated Court has to follow the procedure prescribed in the Code for the trial before a Court of Session. Section 465 of the Code, which falls in Chapter XXXV, covers cases triable by a Court of Session also. Hence, the prosecution can take shelter behind Section 465 of the Code. But Section 465 of the Code shall not be a panacea for all error, omission or irregularity. Omission to grant prior approval for registration of the case under TADA by the Superintendent of Police is not the kind of omission which is covered under Section 465 of the Code. It is a defect which goes to the root of the matter and it is not one of the curable defects.

34. The submission that absence of sanction under Section 20-A(2) by the Commissioner of Police has been held to be a curable defect and for parity of reasons the absence of approval under Section 20-A(1) would be curable is also without substance and reliance on the decision of *Lal Singh v. State of Gujarat,* (1998) 5 SCC 529, in this connection, is absolutely misconceived. An Act which is harsh, containing

stringent provision and prescribing procedure substantially departing from the prevalent ordinary procedural law cannot be construed liberally. For ensuring rule of law its strict adherence has to be ensured. In the case of *Lal Singh* (supra) relied on by the State, Section 20-A(1) of TADA was not under scanner. Further, this Court in the said judgment nowhere held that absence of sanction under Section 20-A(2) is a curable defect. In *Lal Singh* (supra) the question of sanction was not raised before the Designated Court and sought to be raised before this Court for the first time which was not allowed. This would be evident from the following paragraph of the judgment

> "4. Sub-section (2) makes it clear that when the objection could and should have been raised at an earlier stage in the proceeding and has not been raised, mere error or irregularity in any sanction of prosecution becomes ignorable. We therefore do not permit the appellants to raise the plea of defect in sanction."
>
> (underlining ours)

35. The decision of this Court in the case of *Ahmad Umar Saeed Sheikh v. State of U.P.,* (1996) 11 SCC 61, relied on by the State, instead of supporting its contention clearly goes against it. As observed earlier, the omission to grant approval does not come within the purview of Section 465 of the Code and, hence, the rigors of Section 465 (2) shall be wholly inapplicable. Otherwise also, the accused have raised this point at the earliest. Grant or absence of approval by the District Superintendent of Police is a mixed question of law and fact. The very existence of the approval under Section 20-A(1) of TADA has been questioned by the accused during the course of trial, which is evident from the trend of cross-examination. Not only this, it was raised before the Designated Court during argument and has been rejected. Thus, it cannot be said that it was not raised at the earliest.

36. The plea of the State is that the Commissioner of

Police having granted the sanction under Section 20-A(2) of TADA, the conviction of the accused cannot be held to be bad only on the ground of absence of approval under Section 20-A(1) by the Deputy Commissioner. As observed earlier, the provisions of TADA are stringent and consequences are serious and in order to prevent persecution, the legislature in its wisdom had given various safeguards at different stages. It has mandated that no information about the commission of an offence under TADA shall be recorded by the police without the prior approval of the District Superintendent of Police. Not only this, further safeguard has been provided and restriction has been put on the court not to take cognizance of any offence without the previous sanction of the Inspector-General of Police or as the case may be, the Commissioner of Police. Both operate in different and distinct stages and, therefore, for successful prosecution both the requirements have to be complied with. We have not come across any principle nor we are inclined to lay down that in a case in which different safeguards have been provided at different stages, the adherence to the last safeguard would only be relevant and breach of other safeguards shall have no bearing on the trial. Therefore, we reject the contention of the State that the accused cannot assail their conviction on the ground of absence of approval under Section 20-A(1) of TADA by the Deputy Commissioner, when the Commissioner of Police had granted sanction under Section 20-A(2) of TADA.

37. As regards submission of the State that the Designated Court having taken cognizance and decided to try the case by itself in exercise of the power under Section 18 of TADA, the prior defects, if any, are rendered irrelevant and cannot be raised, has only been noted to be rejected. Section 18 of TADA confers jurisdiction on the Designated Court to transfer such cases for the trial of such offences in which it has no jurisdiction to try and in such cases, the court to which the case is transferred, may proceed with the trial of the offence as if it had taken cognizance of the offence. The power of the

Designated Court to transfer the case to be tried by a court of competent jurisdiction would not mean that in case the Designated Court has decided to proceed with the trial, any defect in trial, cannot be agitated at later stage. Many ingredients which are required to be established to confer jurisdiction on a Designated Court are required to be proved during trial. At the stage of Section 18 the Designated Court has to decide as to whether to try the case itself or transfer the case for trial to another court of competent jurisdiction. For that, the materials collected during the course of investigation have only to be seen. The investigating agency, in the present case, has come out with a case that prior approval was given for registration of the case and the allegations made do constitute an offence under TADA. In the face of it, the Designated Court had no option than to proceed with the trial. However, the decision by the Designated Court to proceed with the trial shall not prevent the accused to contend in future that they cannot be validly prosecuted under TADA. We hasten to add that even in a case which is not fit to be tried by the Designated Court but it decides to do the same instead of referring the case to be tried by a court of competent jurisdiction, it will not prevent the accused to challenge the trial or conviction later on.

38. The submission of the State that the Designated Court having been empowered to take cognizance under Section 14 of TADA irrespective of absence of compliance of Section 20-A(1) of TADA, its non-compliance would not be fatal to the prosecution, does not commend us. Section 14 of TADA confers jurisdiction on a Designated Court to take cognizance of any offence when the accused being committed to it for trial upon receiving a complaint of facts which constitute such offence or upon a police report of such facts. The offence under TADA is to be tried by a Designated Court. The Designated Court has all the powers of Court of Session and it has to try the offence as if it is a Court of Session. The Code provides for commitment of the case for trial by the Court of Session. Section 14(1) of TADA provides that the Designated

Court may take cognizance on receiving a complaint of facts or upon a police report. Had this provision not been there, the cases under TADA would have been tried by the Designated Court only after commitment. In any view of the matter, the accused during the trial under TADA can very well contend that their trial is vitiated on one or the other ground notwithstanding the fact that the Designated Court had taken cognizance. Taking cognizance by the Designated Court shall not make all other provisions inconsequential.

39. Lastly, it has been submitted that absence of approval under Section 20-A(1) of TADA would not vitiate the conviction of the accused under other penal provisions. As stated earlier, the accused persons besides being held guilty under Section 3 and 5 of TADA, have also been found guilty under Section 7 and 25(1A) of the Arms Act and Section 4, 5 and 6 of the Explosive Substances Act. According to the State, the conviction under the Arms Act and the Explosive Substances Act, therefore, cannot be held to be illegal. It is relevant here to state that the Designated Court, besides trying the case under TADA, can also try any other offence with which the accused may be charged at the same trial if the offence is connected with the offence under TADA. When the Designated Court had the power to try offences under TADA as well as other offences, it is implicit that it has the power to convict also and that conviction is permissible to be ordered under TADA or other penal laws or both. In our opinion it is not necessary for the Designated Court to first order conviction under TADA and only thereafter under other penal law. In view of the five-Judge Constitution Bench judgment of this Court in *Prakash Kumar v. State of Gujarat,* (2005) 2 SCC 409, this point does not need further elaboration. In the said case this Court has observed that "the Designated Court is empowered to convict the accused for the offence under any other law notwithstanding the fact that no offence under TADA is made out." This would be evident from paragraph 37 of the judgment which reads as follows:

"37. The legislative intendment underlying Sections 12(1) and (2) is clearly discernible, to empower the Designated Court to try and convict the accused for offences committed under any other law along with offences committed under the Act, if the offence is connected with such other offence. The language "if the offence is connected with such other offence" employed in Section 12(1) of the Act has great significance. The necessary corollary is that once the other offence is connected with the offence under TADA and if the accused is charged under the Code and tried together in the same trial, the Designated Court is empowered to convict the accused for the offence under any other law, notwithstanding the fact that no offence under TADA is made out. This could be the only intendment of the legislature. To hold otherwise, would amount to rewrite or recast legislation and read something into it which is not there."

40. We have held the conviction of the accused to have been vitiated on account of non-compliance of Section 20-A(1) of TADA and thus, it may be permissible in law to maintain the conviction under the Arms Act and the Explosive Substances Act but that shall only be possible when there are legally admissible evidence to establish those charges. The Designated Court has only relied on the confessions recorded under TADA to convict the accused for offences under the Arms Act and the Explosive Substances Act. In view of our finding that their conviction is vitiated on account of non-compliance of the mandatory requirement of prior approval under Section 20-A(1) of TADA, the confessions recorded cannot be looked into to establish the guilt under the aforesaid Acts. Hence, the conviction of the accused under Section 7 and 25(1A) of the Arms Act and Section 4, 5 and 6 of the Explosive Substances Act cannot also be allowed to stand.

41. As we have held the conviction and sentence of the accused to be illegal and unsustainable, the appeals filed by

the State against acquittal and inadequacy of sentence have necessarily to be dismissed.

42. We appreciate the anxiety of the police officers entrusted with the task of preventing terrorism and the difficulty faced by them. Terrorism is a crime far serious in nature, more graver in impact and highly dangerous in consequence. It can put the nation in shock, create fear and panic and disrupt communal peace and harmony. This task becomes more difficult when it is done by organized group with outside support. Had the investigating agency not succeeded in seizing the arms and explosives, the destruction would have been enormous. However, while resorting to TADA, the safeguards provided therein must scrupulously be followed. In the country of Mahatma, "means are more important than the end". Invocation of TADA without following the safeguards resulting into acquittal gives an opportunity to many and also to the enemies of the country to propagate that it has been misused and abused. District Superintendent of Police and Inspector General of Police and all others entrusted with the task of operating the law must not do anything which allows its misuse and abuse and ensure that no innocent person has the feeling of sufferance only because "My name is Khan, but I am not a terrorist".

43. The facts of the case might induce mournful reflection how an attempt by the investigating agency charged with the duty of preventing terrorism and securing conviction has been frustrated by what is popularly called a technical error. We emphasize and deem it necessary to repeat that the gravity of the evil to the community from terrorism can never furnish an adequate reason for invading the personal liberty, except in accordance with the procedure established by the Constitution and the laws.

44. We have been told that many of the accused, because of poverty or for the reason that they had already undergone the sentence, have not preferred appeals before this Court.

Further, this Court had not gone into the merits of the appeals preferred by few convicts on the ground that they have already served out the sentence and released thereafter. The view which we have taken goes to the root of the matter and vitiates the conviction and, hence, we deem it expedient to grant benefit of this judgment to all those accused who have been held guilty and not preferred appeal and also those convicts whose appeals have been dismissed by this Court as infructuous on the ground that they had already undergone the sentence awarded.

45. In the result, we allow the appeals preferred by those accused who have been convicted and sentenced by the Designated Court and set aside the judgment and order of their conviction and sentence. However, we dismiss the appeals preferred by the State against the inadequacy of sentence and acquittal of some of the accused persons.

K.K.T. Appeals disposed of.

SCHEDULE - I

List of persons named in Crime No. 1-CR No. 11 of 1994 dated 9th of June, 1994.

Sr. No.	Names of accused persons	Accused Nos.
1	Yusufkhan Khudadatkhan Pathan @ Laplap	Accused No. 1
2	Abdul Latif Abdul Vahab Shaikh	Accused No. 2
3	Rasulkhan @ Yaz	Accused No. 3
4	A.H.C. Sirajmiya Akbarmiya @ Siraj Dadhi	Accused No. 4
5	Imtiyaz	Accused No. 5
6	Gulal	Accused No. 6
7	Sattar Battery @ Sattar Chacha	Accused No. 7

SCHEDULE – II

List of persons named in the First Charge-Sheet dated 16th of December, 1994

Sr.No.	Names of accused persons	Accused Nos.
1	Yusufkhan @ Yusuf Laplap Khudadatkhan Pathan	Accused No. 1
2	Shirajmiya Akbarmiya Thakore	Accused No. 2
3	Abdulkhurdush Abdulgani Shaikh	Accused No. 3
4	Mohmad Farukh @ Farukbawa Allarakha Shaikh	Accused No. 4

5	Sajidali @ Benimohmadali Saiyed	Accused No. 5
6	Anwarkhan Mohmadkhan Pathan	Accused No. 6
7	Mohmad Jalaluddin @ Jalababa Tamizuddin Saiyed	Accused No. 7
8	Gulamkadar Gulamhusain Shaikh	Accused No. 8
9	Mohmad Ismail Abdul Vahab Shaikh	Accused No. 9
10	Haiderkhan Lalkhan Pathan	Accused No. 10
11	Adambhai Yusufbhai Mandli (Shaikh)	Accused No. 11
12.	Mohmad Soyeb @ Soyeb Baba Abdul Gani Shaikh	Accused No. 12
13.	Iqbal @ Bapu Saiyed Husain Saiyed	Accused No. 13
14.	Mohmad Hanif @ Anudin Husain Miya Shaikh	Accused No. 14

SCHEDULE - III

List of persons named in the Second Charge-Sheet dated 23rd of May, 1995

Sr.No.	Names of accused persons	Accused Nos.
1	Gajanfarkhan @ Gajukhan	Accused No. 15
2	Asrafkhan @ Babu	Accused No. 16

SCHEDULE – IV

List of persons named in the Third Charge-Sheet dated 17th of April, 1996

Sr.No.	Names of accused persons	Accused Nos.
1	Munavar Ullakhan @ Imtiyaz Ullakhan @ Pappu	Accused No. 17
2	Fanes Aehmohmad Ansari	Accused No. 18
3	Afzalhusain	Accused No. 19
4	Samimulla @ Sammu	Accused No. 20
5	Barikkhan @ Abdulsalim	Accused No. 21
6	Babukhan @ Lala	Accused No. 22
7	Maksud Ahmed Fatehahmed Shaikh	Accused No. 23
8	Mohmedsafi Abdul Rahman Saikh	Accused No. 24
9	Hafizudin Fajiudin Kaji	Accused No. 25
10	Sohrabduin @ Salim	Accused No. 26
11	Abdulgafar @ Gafar	Accused No. 27
12	Abdulkayam Nizamudin Shaikh	Accused No. 28
13	Mohmed Rafik @ Haji Rafikbhai Kapadia	Accused No. 29
14	Usmangani Musabhai Vohra	Accused No. 30
15	Abdulvahab Abdulmajid Baloch	Accused No. 31
16	Abdul Sattar @ Sattar Battery	Accused No. 32

17	Abdulrauf @ Rauf	Accused No. 33
18	Imtiyazahmed Nurharanmiya Kadri	Accused No. 34
19	Abdullatif Abdulvahab Shaikh	Accused No. 35
20	Sabbirhusain Husainmiya Shaikh	Accused No. 36
21	Mustak Ahmed Istiyak Ahmed Pathan	Accused No. 37
22	Ikbal Jabbarkhan Pathan	Accused No. 38
23	Ayub @ Lala	Accused No. 39
24	Kadarbhai Musabhai Mandli	Accused No. 40
25	Musabhai Yusufbhai Madli	Accused No. 41
26	Daubhai Musabhia Shaikh	Accused No. 42
27	Mohmedamin @ Amin Chobeli	Accused No. 43
28	Musrafkhan Gorekhan Pathan	Accused No. 44
29	Mehmood @ Pepa Pelhwan Husenkhan Nilgaramal	Accused No. 45
30	Sahibudin @ Konjibaba	Accused No. 46
31	Husanbhai @ Bhajia	Accused No. 47
32	Ahmedbhai Haji Kasambhai Ajmeri	Accused No. 48
33	Gulam Mohmed @ Gulu	Accused No. 49

SCHEDULE – V

List of persons named in the Fourth Charge-Sheet dated 20th of December, 1996

Sr.No.	Names of accused persons	Accused Nos.
1	Mahebub Bag @ Mehbub Senior	Accused No. 50
2	Mohmad Rafik @ R.D. @ Mustak @ Nazim	Accused No. 51
3	Gulam Mohmad@ Gulal @ Arif	Accused No. 52
4	Imtiyaz @ Fatush	Accused No. 53
5	Parminder Singh @ Kaka	Accused No. 54
6	Aminkhan @ Alamkhan	Accused No. 55
7	Firoz @ Firoz Kankani	Accused No. 56
8	Mohmad Harun @ Munna @ Riyaz @ Chhote Rahim	Accused No. 57
9	Mujfarkhan @ Nasir Luhar	Accused No. 58
10	Mohmad Yakil @ Yakil	Accused No. 59
11	Jay Prakash Singh @ Bachhi Sing	Accused No. 60

SCHEDULE – VI

List of persons named in the Fifth Charge-Sheet dated 24th of May, 1994

Sr.No.	Names of accused persons	Accused Nos.
1	Jahangir Khan Fazalkhan Pathan	Accused No. 61
2	Mohmad Anwarkhan @ Rushi Pathan	Accused No. 62

SCHEDULE – VII

List of persons convicted by Designated Court vide its order dated 31st of January, 2002

Sr.No.	Names of accused persons	Accused Nos.
1	Yusufkhan @ Yusuf Laplap Khudadadkhan Pathan	Accused No. 1
2	Shirajmiya Akbarmiya Thakore	Accused No. 2
3	Sajidali @ Deni Mohammedali Saiyed	Accused No. 5
4	Iqbal @ Bapu Saiyedhussein Saiyed	Accused No. 13
5	Gajnafarkhan @ Gajjukhan Sabdrkhan Pathan	Accused No. 15
6	Asharafkhan @ Babu Munnakhan Pathan	Accused No. 16
7	Shohrabuddin @ Salim Anvaruddin Shaikh	Accused No. 26
8	Abdulsattar @ Sattar Battery Abdulgani Shaikh	Accused No. 32
9	Abdul Raoof @ Raoof Abdul Kadar Shaikh	Accused No. 33
10	Hussainbhai @ Bhajiya Mohammedbhai Patani	Accused No. 47
11	Mujffarkhan @ Nashir Luhar Umardarajkhan Pathan	Accused No. 58

SCHEDULE – VIII

List of persons acquitted by Designated Court vide its order dated 31st of January, 2002

Sr.No.	Names of accused persons	Accused Nos.
1	Abdul Khurdush Abdul Gani Shaikh	Accused No. 3
2	Mohammed Faruq @ Faruqbava Allarakha	Accused No. 4
3	Anvarkhan Mohammedkhan Pathan	Accused No. 6
4	Mohammed Jalaluddin @ Jalalbaba Tamijuddin Saiyed	Accused No. 7
5	Gulam Kadar Gulam Hussain Shaikh	Accused No. 8
6	Hyderkhan Lalkhan Pathan	Accused No. 10
7	Mohammed Soeb @ Soebbava Abdul Gani Shaikh	Accused No. 12
8	Mohammed Hanif @ Anudi Husseinmiya Shaikh	Accused No. 14
9	Munavarullakhan @ Imtiyazullakhan @ Pappu Mohammed Safiullakhan	Accused No. 17
10	Afzalhussain Ajgarhussein Rangrej	Accused No. 19
11	Shamtullakhan @ Sammu Mohammed Safiulla Pathan	Accused No. 20
12	Bariqkhan @ Abdul Salim Hussein Khan @ Abdul Hussein Shaikh	Accused No. 21

13	Babukhan @ Lala Niyajkhan @ Niyajmohammed Pathan	Accused No. 22
14	Maksud Ahmed Fatehmohammed Shaikh	Accused No. 23
15	Mohammed Safi Abdul Rehman Saikh	Accused No. 24
16	Hafizuddin Fazluddin Kazi	Accused No. 25
17	Abdulgafar @ Gafar Party Mohammed Rafiq Shaikh	Accused No. 27
18	Abdul Kaiyum Nizamuddin Shaikh	Accused No. 28
19	Mohammed Rafiq @ Haji Rafiqbhai Husseinbhai Kapadia	Accused No. 29
20	Usmangani Musabhai Vora	Accused No. 30
21	Abdul Wahab Abdul Majid Baloch	Accused No. 31
22	Imtieaz Ahmed Noorhadanmiya Kadari	Accused No. 34
23	Sabbirhussein Husseinmiya Shaikh	Accused No. 36
24	Mustaq Ahmed Istiyaq Ahmed Pathan	Accused No. 37
25	Aiyub @ Lala Yusufbhai Mandali	Accused No. 39
26	Kadarbhai Musabhai Mandali	Accused No. 40
27	Musabhai Yusufbhai Mandali	Accused No. 41
28	Daoodbhai Musabhai Shaikh	Accused No. 42

29	Mohammed Amin @ Amin Chotely Rahimmiya	Accused No. 43
30	Musharrafkhan Gorekhan Pathan	Accused No. 44
31	Mehmood @ Pepa Pahelvan Hussainkhan Nilgadamal	Accused No. 45
32	Shahbuddin @ Kanijbaba Badruddin Shaikh	Accused No. 46
33	Ahmedbhai Haji Kasambhai Ajmeri	Accused No. 48
34	Gulammohammed @ Gulu Gulam Hyder Momin	Accused No. 49
35	Mehboobbeg @ Mehboob Senior Chhotubeg Mogal	Accused No. 50
36	Mohammed Rafiq @ R.D. @ Mustaq @ Nazim Majidkhan	Accused No. 51
37	Gulam Mohammed @ Gulal @ Arif Abdul Kadar Shaikh	Accused No. 52
38	Imtiyaz @ Fetas Ibrahim Ismial Bhathiyara	Accused No. 53
39	Parmindarsing @ Kaka Maliksing Sikh	Accused No. 54
40	Aminkhan @ Alamkhan Mojkhan Pathan	Accused No. 55
41	Mohammed Yaakil @ Aakil Maiyuddin Malek	Accused No. 59

SURINDER SINGH BRAR AND OTHERS ETC.ETC.

v.

UNION OF INDIA AND OTHERS

(Civil Appeal Nos.7454-59 of 2012)

OCTOBER 11, 2012

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

Land Acquisition Act, 1894 – ss.4, 5A and 6 – Land Acquisition in Union Territory of Chandigarh – Power of the Administrator of the Union Territory of Chandigarh to sanction acquisition – Held: Acquisition of land for and on behalf of Union Territories must be sanctioned by the Administrator of the particular Union Territory – No other officer competent to exercise the power vested in 'the appropriate Government' under the Act and the Rules framed thereunder – Nothing in language of s.3(1) of the 1987 Act from which it can be inferred that the Administrator of the Union Territory of Chandigarh could delegate the power exercisable by 'the appropriate Government' under the Act which was specifically entrusted to him by the President u/Article 239(1) of the Constitution – Notification dated 14.8.1989 was issued u/Article 239(1) in supersession of all previous notifications relating to the exercise of power and functions under the Act by the Administrators of various Union Territories – Therefore, even if it is assumed that vide Notification dated 25.2.1988 (issued u/s.3(1) of the 1987 Act), the Administrator of the Union Territory of Chandigarh had authorised its Advisor to exercise the power of 'the appropriate Government' under the Act, after issuance of Notification dated 14.8.1989, the said delegation will be deemed to have ceased insofar as the exercise of power of 'the appropriate Government' under the Act and the Rules framed thereunder is concerned – In absence of fresh

delegation by the Administrator, the Advisor could not have exercised the power of the appropriate Government – The Advisor to the Administrator of the Union Territory of Chandigarh was not competent to accord approval to initiation of the acquisition proceedings or take decision on the reports submitted by the Land Acquisition Officer (LAO) u/s.5A(2) and record his satisfaction that the land was needed for the specified public purpose – Land Acquisition (Companies) Rules, 1963 – Chandigarh (Delegation of Powers) Act, 1987 – s.3(1) – Constitution of India, 1950 – Article 239.

Land Acquisition Act, 1894 – s.5A – Acquisition of land – Procedural safeguards – Reports prepared by the Land Acquisition Officer (LAO) u/s.5A(2) – If vitiated due to non-consideration of the objections filed by the landowners – Held: LAO made misleading and false statement about his having seen the revenue records and conducted spot inspection – That apart, the reports of LAO did not contain any iota of consideration of the objections filed by the landowners – Mere reproduction of the substance of the objections cannot be equated with objective consideration thereof – Violation of the mandate of s.5A(2) writ large on the face of the reports prepared by the LAO – LAO failed to discharge the statutory duty cast upon him to prepare a report after objectively considering the objections filed u/s.5A(1) and submissions made by the objectors during the course of personal hearing – The hearing required to be given u/s.5A(2) to a person who is sought to be deprived of his land and who has filed objections u/s.5A(1) must be effective and not an empty formality.

The questions which arose for consideration in the present appeals in respect of the land acquisition in question in the Union Territory of Chandigarh were, (i) whether the Advisor to the Administrator of the Union Territory of Chandigarh had the jurisdiction to approve

the acquisition of the appellants' land; (ii) whether the reports prepared by the Land Acquisition Officer (LAO) under Section 5A(2) of the Land Acquisition Act, 1894 were vitiated due to non-consideration of the objections filed by the landowners and the same could not be made basis for deciding whether the land was really needed for the particular public purpose

Allowing the appeals, the Court

HELD: 1.1. By notification dated 1.11.1966, the President generally delegated the powers and functions of the State Government under various laws in force immediately before 1.11.1966 to the Administrator. By all other notifications, the power exercisable by 'the appropriate Government' under the Land Acquisition Act, 1894 and the Land Acquisition (Companies) Rules, 1963 were delegated to the Administrator. With a view to avoid any possibility of misuse of power by the executive authorities, it has been repeatedly ordained that powers and functions vested in 'the appropriate Government' under the Act and the 1963 Rules shall be exercised only by the Administrator. The seriousness with which the Central Government has viewed such type of acquisition is also reflected from the decision taken by the Home Minister on 23.9.2010 in the context of the report of the Special Auditor and the One-Man Committee. Thus, the acquisition of land for and on behalf of Union Territories must be sanctioned by the Administrator of the particular Union Territory and no other officer is competent to exercise the power vested in 'the appropriate Government' under the Act and the Rules framed thereunder. [Para 41] [1150-C-D, F-H; 1151-A-B]

1.2. Vide Notification dated 25.2.1988 issued under Section 3(1) of the Chandigarh (Delegation of Powers) Act, 1987, the Administrator directed that any power,

authority or jurisdiction or any duty which he could exercise or discharge by or under the provisions of any law, rules or regulations as applicable to the Union Territory of Chandigarh shall be exercised or discharged by the Advisor except in cases or class of cases enumerated in the Schedule. There is nothing in the language of Section 3(1) of the 1987 Act from which it can be inferred that the Administrator can delegate the power exercisable by 'the appropriate Government' under the Act which was specifically entrusted to him by the President under Article 239(1) of the Constitution. Therefore, notification dated 25.2.1988 cannot be relied upon for contending that the Administrator had delegated the power of 'the appropriate Government' to the Adviser. [Para 42] [1151-B-E]

1.3. The issue deserves to be considered from another angle. While delegating the power, authority or jurisdiction vested in him by or under any law, rules or regulations as applicable to the Union Territory of Chandigarh, the Administrator had used the expression 'on the date of this notification'. This necessarily implies that the power of 'the appropriate Government' conferred upon or entrusted to the Administrator by the President under Article 239(1) after 25.2.1988 were not delegated to the Adviser. It is also apposite to note that Notification dated 14.8.1989 was issued under Article 239(1) in supersession of all previous notifications relating to the exercise of power and functions under the Act by the Administrators of various Union Territories. Therefore, even if it is assumed that vide Notification dated 25.2.1988 the Administrator had authorised the Adviser to exercise the power of 'the appropriate Government' under the Act, after the issuance of Notification dated 14.8.1989, the said delegation will be deemed to have ceased insofar as the exercise of power of 'the appropriate Government' under

the Act and the Rules framed thereunder is concerned and in the absence of fresh delegation by the Administrator, the Adviser could not have exercised the power of the appropriate Government and sanctioned the acquisition of land for the purposes specified in Notifications dated 26.6.2006 and 2.8.2006 nor could he symbolically accept the recommendations of the LAO and record his satisfaction on the issue of need of land for the specified public purposes. [Para 43] [1151-E-H; 1152-A-C]

1.4. The Adviser to the Administrator was not competent to accord approval to the initiation of the acquisition proceedings or take decision on the reports submitted by the LAO under Section 5-A (2) of the Act and record his satisfaction that the land was needed for the specified public purpose. [Para 44] [1152-C-D]

2.1. A cursory reading of the reports of the LAO may give an impression that he had applied mind to the objections filed under Section 5A(1) and assigned reasons for not entertaining the same, but a careful analysis thereof leaves no doubt that the officer concerned had not at all applied mind to the objections of the landowners and merely created a facade of doing so. In both the reports, the LAO had made a misleading and false statement about his having seen the revenue records and conducted spot inspection. That apart, the reports do not contain any iota of consideration of the objections filed by the landowners. Mere reproduction of the substance of the objections cannot be equated with objective consideration thereof in the light of the submission made by the objectors during the course of hearing. Thus, the violation of the mandate of Section 5A(2) is writ large on the face of the reports prepared by the LAO. The reason why the LAO did not apply his mind to the objections filed by the appellants and other

landowners is obvious. He was a minion in the hierarchy of the administration of the Union Territory of Chandigarh and could not have even thought of making recommendations contrary to what was contained in the letter sent by the Administrator. If he had shown the courage of acting independently and made recommendation against the acquisition of land, he would have surely been shifted from that post and his career would have been jeopardized. Therefore, the LAO cannot be blamed for having acted as an obedient subordinate of the superior authorities, including the Administrator. However, that cannot be a legitimate ground to approve the reports prepared by him without even a semblance of consideration of the objections filed by the appellants and other landowners and thus it is held that the LAO failed to discharge the statutory duty cast upon him to prepare a report after objectively considering the objections filed under Section 5A(1) and submissions made by the objectors during the course of personal hearing. [Paras 45, 46, 47] [1152-F-G; 1153-C-G; 1154-A-C]

2.2. The Special Secretary, Finance and the Adviser to the Administrator also failed to act in consonance with the mandate of Section 5A(2) read with Section 6(1). They could not muster courage of expressing an independent opinion on the issue of compliance of Section 5A and need of the land for the specified public purposes. The noting recorded by the Special Secretary, Finance shows that the officer had virtually reproduced what the Administrator had mentioned in his letter dated 31.7.2006. The Adviser went a step further. He merely appended his signatures on the note recorded by the Special Secretary, Finance forgetting that in terms of the aforementioned two sections 'the appropriate Government' is required to take decision after considering the report of the LAO. The

least which can be said about the manner in which the Adviser approved the note prepared by the Special Secretary, Finance is that there was abject failure on the part of the concerned officer to discharge his duty despite the fact that he was entrusted with the onerous task of taking a decision on behalf of 'the appropriate Government' after considering the reports of the LAO. The casual manner in which the senior officers of the Chandigarh Administration dealt with the serious issue of the acquisition of land of citizens signifies their total lack of respect for the constitutional provision contained in Article 300A, the law enacted by Parliament, that is, the Act and interpretation thereof by the Courts. It seems that the officers were overawed by the view expressed by the Administrator and the instinct of self-preservation prompted them not to go against the wishes of the Administrator who wanted that additional land be acquired in the name of expansion of IT Park despite the fact that a substantial portion of the land acquired for Phase II had been allotted to a private developer. [Para 48] [1154-C-H; 1155-A-B]

2.3. The hearing required to be given under Section 5A(2) to a person who is sought to be deprived of his land and who has filed objections under Section 5A(1) must be effective and not an empty formality. The Collector who is enjoined with the task of hearing the objectors has the freedom of making further enquiry as he may think necessary. In either eventuality, he has to make report in respect of the land notified under Section 4(1) or make different reports in respect of different parcels of such land to the appropriate Government containing his recommendations on the objections and submit the same to the appropriate Government along with the record of proceedings held by him for the latter's decision. The appropriate Government is obliged to consider the report, if any, made under Section 5A(2) and then record its satisfaction that the particular land is needed for a public purpose. This exercise culminates into making a declaration that the land is needed for a public purpose and the declaration is to be signed by a Secretary to the Government or some other officer duly authorised to certify its orders. The formation of opinion on the issue of need of land for a public purpose and suitability thereof is *sine qua non* for issue of a declaration under Section 6(1). Any violation of the substantive right of the landowners and/or other interested persons to file objections or denial of opportunity of personal hearing to the objector(s) vitiates the recommendations made by the Collector and the decision taken by the appropriate Government on such recommendations. The recommendations made by the Collector without duly considering the objections filed under Section 5A(1) and submissions made at the hearing given under Section 5A(2) or failure of the appropriate Government to take objective decision on such objections in the light of the recommendations made by the Collector will denude the decision of the appropriate Government of statutory finality. To put it differently, the satisfaction recorded by the appropriate Government that the particular land is needed for a public purpose and the declaration made under Section 6(1) will be devoid of legal sanctity if statutorily engrafted procedural safeguards are not adhered to by the concerned authorities or there is violation of the principles of natural justice. The cases herein are illustrative of flagrant violation of the mandate of Sections 5A(2) and 6(1). [Para 58] [1163-E-H; 1154-A-F]

2.4. The satisfaction of the appropriate Government envisaged in Section 6(1) must be preceded by consideration of the report prepared by the Collector after considering the objections filed under Section 5A and hearing the objectors. This necessarily implies that the

Government must objectively apply its mind to the report of the Collector and the objections filed by the landowners and then take a decision whether or not the land is needed for the specified public purpose. A mechanical endorsement of the report of the Collector cannot be a substitute for the requirement of application of mind by the Government which must be clearly reflected in the record. [Para 61] [1168-F-H; 1169-A]

Nandeshwar Prasad and Anr. v. The State of Uttar Pradesh and Ors. **(1964) 3 SCR 425;** *State of Punjab v. Gurdial Singh* **(1980) 2 SCC 471: 1980 (1) SCR 1071;** *Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai* **(2005) 7 SCC 627: 2005 (3) Suppl. SCR 388;** *Somawanti v. State of Punjab* **AIR 1963 SC 151: 1963 SCR 774 and** *Ganga Bishnu Swaika v. Calcutta Pinjrapole Society* **AIR 1968 SC 615: 1968 SCR 117 – relied on.**

Aflatoon v. Lt. Governor of Delhi **(1975) 4 SCC 285: 1975 (1) SCR 802;** *Gandhi Grah Nirman Sahkari Samiti Ltd. v. State of Rajasthan* **(1993) 2 SCC 662: 1993 (2) SCR 788;** *State of T.N. v. L. Krishnan* **(1996) 1 SCC 250: 1995 (4) Suppl. SCR 663;** *Ajay Krishan Shinghal v. Union of India* **(1996) 10 SCC 721: 1996 (4) Suppl. SCR 319;** *Sooraram Pratap Reddy v. District Collector, Ranga Reddy District* **(2008) 9 SCC 552: 2008 (13) SCR 126 and** *Munshi Singh v. Union of India* **(1973) 2 SCC 337: 1973 (1) SCR 973 – referred to.**

3. A reading of the declarations issued under Section 6(1) makes it clear that the authority issuing the same was totally unmindful of the requirement of the statute. This could be the only reason why instead of recording satisfaction of the appropriate Government that the land is needed for a public purpose, the notification uses the expressions "appears to the Administrator" and "likely to be needed". This only adds to the casualness with

which the entire issue of acquisition has been dealt with by the higher functionaries of the Chandigarh Administration. [Para 62] [1169-B-C]

4. The High Court has not examined the substantive grounds on which the appellants had challenged the acquisition of their land with the required seriousness and failed to notice that the LAO had not at all considered several objections including those relating to adverse impact on the environment and ecology of the area raised by the landowners and mechanically recommended the acquisition of land notified under Section 4(1), that the reports of the LAO were not placed before the competent authority and that even the Advisor had not objectively considered the reports of the LAO in the light of the objections filed under Section 5A(1) and simply appended his signatures on the note prepared by the Secretary (Finance). This omission on the High Court's part has resulted in miscarriage of justice. [Para 63] [1169-D-F]

5. In the result, the Notifications dated 26.6.2006, 2.8.2006 and 28.2.2007 issued by the Chandigarh Administration under Sections 4(1) and 6(1) of the Act are quashed. [Para 65] [1170-A-B]

Case Law Reference:

1975 (1) SCR 802	**referred to**	**Para 26**
1993 (2) SCR 788	**referred to**	**Para 26**
1995 (4) Suppl. SCR 663	**referred to**	**Para 26**
1996 (4) Suppl. SCR 319	**referred to**	**Para 26**
2008 (13) SCR 126	**referred to**	**Para 26**
1963 SCR 774	**relied on**	**Para 26**
1968 SCR 117	**relied on**	**Para 26**

(1964) 3 SCR 425	**relied on**	**Para 55**
1973 (1) SCR 973	**referred to**	**Para 55**
1980 (1) SCR 1071	**relied on**	**Para 56**
2005 (3) Suppl. SCR 388	**relied on**	**Para 57**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7454-7459 of 2012.

From the Judgment and Order dated 18.03.2011 of the High Court of Punjab and Haryana at Chandigarh in CWP Nos. 5065 of 2007, 6077 of 2008, 11250 of 2007, 5840 of 2008, 9039 of 2007 and 5384 of 2007.

WITH

C.A. Nos. 7460-7463, 7464, 7465, 7466, 7467, 7468, 7469, 7470, 7471, 7472, 7473, 7474-7475, 7476, 7477, 7478, 7479, 7480, 7481, 7482, 7483, 7484-7485, 7486, 7487 and 7489 of 2012.

Rakesh Khanna, ASG, Rakesh Dwivedi, Dinesh Dwivedi, Neeraj Kumar Jain, Dr. Rajeev Dhawan, T.S. Doabia, T. Srinivasa Murthy, Senthil Jagadeesan, Pankhuri Bhardwaj, Sansriti Pathak, S. Janani, Prateek Dwivedi, Sanjay Singh, Ugra Shankar Prasad, D.M. Nargolkar, Anil K. Jha, Chhaya Kumari, Alka Jha, Naresh Bakshi, Shish Pal Laler, N.P. Midha, Balbir Singh Gupta, R.C. Kaushik, Shree Pal Singh, Mohit Chaudhary, Puja Sharma, Jyoti Mendiratta, A.V. Palli, Rekha Palli, Anupam Raina, Aman Singh Rahi, Rajeev Kr. Singh, Rajiv Kataria, Debjani Das P., Maninder Singh, Sermon Rawat, Aekta Vats, Riju Raj Jamwal, Madhusmita Bora, Kiran Bhardwaj, Shailendra Sharma, Sudhir Walia, Varsh Juneja, Niharika Ahluwalia, Jatinder Kumar Bhatia, Rekha Pandey, Sadhana Sandhu, D.S. Mahra, Udita Singh, Ravi Prakash, L.R. Singh, Subhasis Bhowmick for the Appearing Parties.

The Judgment of the Court was delivered by

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

2. Chandigarh, which is known all over the world as 'the City Beautiful', was planned by French Architect Monsieur Le Corbusier. The plan prepared by Le Corbusier in collaboration with two other architects, namely, Maxwell Fry and Jane Drew envisaged division of the city of Chandigarh into residential sectors with provision for markets, educational institutions, hospitals and other facilities.

3. After finalisation of the plan, the Government of Punjab acquired land of various villages for establishing Chandigarh as the new capital of the State and also constituted various committees including Land Scape Committee for implementing the plan. In the meeting of the Land Scape Committee held on 3.9.1954, the Divisional Forest Officer, Rupar (now Ropar) suggested that the land lying along the right bank of Sukhna Choe and the left bank of Patiala Ki Rao where plantation had been started by the Forest Department should be declared as reserved forest under Section 4 of the Punjab Land Preservation Act, 1900. This was approved by the Land Scape Committee, and Chief Engineer, P.W.D. was asked to furnish the details of the area. On receipt of necessary details of khasra numbers together with the plan of the area, which included residential and commercial plots, preliminary notification under Section 4 of the Indian Forest Act, 1927 was issued by the State Government on 28.2.1956 and final notification under Section 20 of that Act was issued on 3.2.1961 declaring 6724.19 acres land including about 6000 acres land which had already been utilised for construction of the first phase of Chandigarh, and about 280 acres land falling in the revenue estates of village Hallo Majra and village Dalheri Rajputan as reserved forest. The State Government also acquired hilly area measuring 6172.09 acres of Sukhna lake catchment during 1961-62, 1962-63 and 1963-64 for carrying out soil conservation works to reduce the silt in-flow into the lake. The

Forest Department acquired 536.64 acres of land of various villages along Sukhna Choe during 1963-64 to carry out soil conservation and other improvemental works.

4. In 1966, the State of Punjab was reorganised under the Punjab Reorganisation Act, 1966 (for short, 'the 1966 Act') leading to the creation of the new State of Haryana and the Union Territory of Chandigarh and transfer of some territories to State of Himachal Pradesh. With this, 6706 acres land out of 6724.19 acres land declared as reserved forest vide notification dated 3.2.1961 was transferred to the Union Territory of Chandigarh and 6127.09 acres of land constituting hilly catchment came to vest in the Central Government by virtue of Section 48(5) of the 1966 Act.

5. With the passage of time, Chandigarh became an important destination for education and attracted students from all over the country. However, the employment opportunities available in the city did not match the educational facilities and this resulted in exodus of talent from Chandigarh to other cities. In the beginning of 21st Century the Chandigarh Administration took steps to provide various incentives including allotment of land to the entrepreneurs desirous of setting up industries in the field of information technology because that was expected to generate huge employment. In the first instance, the Administration decided that 111 acres land, which had been acquired between 1950 and 1977 and was lying vacant, may be utilised for establishing a world class Information Technology Park in the name of Late Prime Minister Shri Rajiv Gandhi (for short, 'the IT Park'). This area was designated as Phase-I of the IT Park and the plots were allotted to the following:

6. Between 2000-2004 over 267 acres land was acquired for Phase-II of the IT Park and the plots were allotted to nine industries, the details of which are given below:

7. The land allotted to Wipro Technologies Ltd. (30 acres), Rolta India Ltd. (2.98 acres) and e-Sys Technologies Ltd. (6 acres) was subsequently resumed because they failed to set up their units.

8. Out of the remaining land of Phase-II, 135 acres was transferred to the Chandigarh Housing Board (for short, 'the Board') vide order dated 15.11.2005/1.12.2005 issued by the Finance Secretary, Chandigarh Administration for development of residential and other infrastructural facilities in the IT Park. The relevant portions of that order are extracted below:

> "1. The Administrator, Union Territory, Chandigarh-, is pleased to order to the transfer of 135 acres of land in the Chandigarh Technology Park at Kishangarh in favour of the Chandigarh Housing Board, Chandigarh, on free hold basis, for the execution of the project of development and residential and other infrastructural facilities in the said park. The price of the land, details of the land use and other terms and conditions of transfer of this land will be decided later on.
>
> 2. The Administrator, Union Territory, Chandigarh is further pleased to designate the Chandigarh Housing Board, Chandigarh as the Nodal Agency for executing the aforesaid project by engaging SBI Caps as consultants who would help fine tune the financial package, as also prepare the old document.
>
> 3. Broad guidelines are spelt out hereunder:-
>
> I. The whole exercise would involve a joint venture with the private party through an agreement, but without creating a joint venture company.
>
> II. No capital expenditure would be involved on

the part of the Chandigarh Administration.

III. The building and sale of all property would be left to the private party but all money will be received in the first instant by the Chandigarh Housing Board so that there is no under reporting of gross revenues.

4. The Chandigarh Housing Board will complete the process preliminary to the inviting of bids in 12 weeks or so and complete the work construction of the building within a period of 18 months or so."

9. Though, the ostensible object of transferring land to the Board was development of residential and other infrastructural facilities in the IT Park, the real purpose was to benefit the private developers and this became evident from the decision taken in the meeting of the officers of the Chandigarh Administration held on 30.3.2006. Paragraphs 1(a), 8 and 9 of the minutes of that meeting are reproduced below:

"1. **Land Allotment.**

(a) The entire land including land under commercial will be allotted to CHB on free hold basis, however CHB will transfer the land under commercial use on lease hold basis as per the prevalent policy of Chandigarh Administration.

8. **Modalities of disposal of service/studio apartments and commercial property**

The service/studio apartments and the commercial property shall be transferred to the developer on lease hold basis. The developer would be quoting and paying to CHB one time cost of the service / studio apartments and the commercial property. 30% share will not be taken of the subsequent

revenues from these two properties.

9. **10% Reservation for allotment to I.T. professionals.**

10% dwelling units may be allowed to be purchased by I.T. companies established in Chandigarh or its employees. The detailed modalities will be worked out by CHB separately."

10. In furtherance of the aforesaid decision, the Board invited bids for disposal of the land. M/s Parsvnath Developers Limited, who gave the bid of Rs.821.21 crores was allotted 123.79 acres land. However, after issuing a glamorous advertisement with the title Parsvnath – PRIDE ASIA, Chandigarh (An Address for Aristocratic Living) to attract prospective buyers of residential and commercial properties, M/s Parsvnath Developers appears to have abandoned the project and raised certain disputes which are pending before the arbitrator.

11. Soon after transfer of almost half of the land acquired for Phase-II to a private developer, Land Acquisition Officer, Union Territory, Chandigarh (hereinafter described as, 'the LAO') sent Memo No. Teh.(LA)/LAO/2005/37365 dated 15.12.2005 to the Director, Information Technology, Chandigarh with reference to some meeting held on 9.12.2005 under the Chairmanship of the Finance Secretary-cum-Secretary Information Technology, Chandigarh and asked him to provide the drawing of 50 acres land adjoining the IT Park for facilitating its acquisition. That memo reads under:

"From

The Land Acquisition Officer,
UT, Chandigarh.

To

The Director Information Technology,
Chandigarh Administration,
Chandigarh.

Memo No. Teh (LA)/LAO/2005/37366
Dated, Chandigarh, the 15/12/05

Subject : Acquisition of land in Village Manimajra for 2nd phase of I.T. Park.

This refers to minutes of the meeting held on 09.12.2005 under the chairmanship of Sh. S.K. Sandhu, Finance Secretary/Secretary Information Technology, Chandigarh Administration, wherein it was emphasized to acquire 50 acres of land adjoining to the present I.T. Park in Kishangarh (Manimajra) for construction of 2nd phase of IT. Park.

You are, therefore, requested to provide drawing of the land required to be acquired so that further action to acquire the land is initiated.

Sd/-
Land Acquisition Officer,
UT, Chandigarh."

12. The aforesaid memo sent by the LAO was clearly misleading because in the meeting held on 9.12.2005 no decision was taken for the acquisition of 50 acres land adjoining the IT Park. This is evinced from the contents of the minutes of the meeting held on 9.12.2005, which are reproduced below:

"Minutes of the meeting held on 9.12.2005 under the Chairmanship of Sh. S.K. Sandhu, Finance Secretary/ Secretary Information Technology, Chandigarh Administration.

A meeting was held under the Chairmanship of Sh. S.K. Sandhu. Finance Secretary/Secretary Information

Technology to review the progress of development of the first & second phases of Rajiv Gandhi Chandigarh Technology Park. The following officers were present :-

1. Smt. Renu Saigal, Chief Architect

2. Sh. V.K. Bhardwaj, Chief Engineer

3. Sh. Wazeer Singh Goyat, Land Acquisition Officer

4. Sh. Vivek Atray, Director Information Technology

5. Sh. N.S. Brar, Assistant Estate Officer.

6. Dr. Sanjay Tyagi, Director STPI Mohali.

7. Sh. M.L Arora, Senior Town Planner

8. Sh. Vaibhav Mittal, Promotion & Information Officer

The following decisions were taken:-

1. It was decided that the infrastructure development for the second phase consisting of 120 acres for I.T. services and 130 acres for non IT service may be taken up by the Engineering Department as per the lay out plan prepared by the Urban Planning Department.

2. It was decided to start the work of construction of the internal road which leads to Build to Suit Sites at CTP Phase-1 on an urgent basis. The road next to Infosys is to be shifted as already urgently.

3. It was decided that the Build to Suit Sites which have already been allotted would be formally handed over to the allottees and their construction may begin by next month.

4. It was also decided that the power line in the entire area comprising CTP Phase-I and Phase-II may be shifted underground along the roads.

5. Five new Build to Suit Sites have also been earmarked as per the plan in the CTP Phase-I. This plan was approved.

6. Regarding land scaping it was decided that Chief Architect UT, Chief Engineer UT and Director Information Technology will decide the final plan from the 3 plans received from Chandigarh College of Architecture.

7. The Porta Structure for the Reception/Help Desk would be set up by CE/UT immediately.

8. It was decided to close the access from Mansa Devi side & from Indira Colony urgently.

9. Zoning of the Build to Suit Sites would be Finalized by 12.12.2005.

Meeting ended with a vote of thanks to the chair.

(S.K.Sandhu)
FS/SIT"

13. The Director, Information Technology sent DO No. 107 dated 12.1.2006 to the LAO and requested him to take action as per the minutes of the meeting held on 9.12.2005. In turn, the LAO sent DO No.1294-95 dated 16.01.2006 to the Director and reiterated the instructions contained in memo dated 15.12.2005. After 4 days, he sent letter dated 16.1.2006 to the Finance Secretary in the context of some meeting held on 4.1.2006 and pointed out that 280 acres land including 50 acres land already decided to be acquired for IT Park was available for acquisition. That letter reads as under:

"From

The Land Acquisition Officer,
UT, Chandigarh

To,

The Finance Secretary,
Chandigarh Administration,
Chandigarh.

Memo No. Kgo (LA)/LAO/2006/1296
Dated, Chandigarh, the 16/1/06

Subject: Acquisition of remaining land in Village Manimajra,

T, Chandigarh. This refers to the minutes of the eeting held on 29.12.2005 under the chairmanship of the Finance Secretary-cum-Secretary, Informat on Technology, Chandigarh Administration, Chandigarh, wherein it was decided to acquire 50 acres of land adjoining to the present I.T. Park in village Kishangarh (Manimajra) for construction of 2nd phase of I.T. Park.

Accordingly, the Director Information Technology, UT, Chandigarh, vide this office Memo No.37365 dated 15.12.2005 was requested to provide drawing of the land required to be acquired so that further action is initiated, but no communication has been received till date.

Subsequently, in a meeting held on 04.01.2006, it was desired to acquire the land of Village Manimajra as maximum as can be. Accordingly, an intensive survey of the area has been got conducted, according to which it has been found that 280 acres of land in Village Manimajra is available for acquisition. It is clarified here that this 280 acres include 50 acres of land already decided to be acquired for I.T. Park. However, there are about 275 structures in the shape of small houses in the locality called 'Shastri Nagar', 32 Farm-houses, 2 Nurseries and 2 Poultry-farms. The proposed land to be acquired has been shown on the map enclosed herewith.

If this land is decided to be acquired, a sum of Rs. 165

crores (approximately) would be required on account of compensation for land and trees/structures. It is pertinent to mention here that the farm-houses, in fact, are orchards having costly fruit-bearing trees, hence compensation of these fruit-bearing trees would be invariably very high.

You are, therefore, requested to convey the decision on the aforesaid proposal.

Land Acquisition Officer
UT, Chandigarh.
Dated: 16/1/06"

14. Since, there was some confusion about the date of the meeting mentioned in the first line of the aforementioned letter, Dr Rajeev Dhawan, learned senior counsel for the Union Territory of Chandigarh gave an assurance on 6.9.2012, i.e., the date on which the order was reserved, that the relevant minutes will be handed over to the Court Master. Thereafter, Shri S. K. Setia, Joint Secretary (Estates), Chandigarh Administration filed affidavit dated 10.9.2012, paragraph 4 whereof reads as under:

"4. That in response to courts query, the deponent respectfully submits as under:

There was no meeting held on 29.12.2005. This is a typographical error in the letter dated 16.01.2006. The correct date of the meeting is 09.12.2005. This is self evident from various letters on the original file which refer to 09.12.2005 which are explained and annexed below.

There was a meeting held on 04.01.2006, which was attended by Land Acquisition Officer; Director, IT and Jt. Secretary (Finance). However, no minutes were recorded for that meeting, which is referred to in the letter dated 16.01.2006."

15. After three months, the Finance Secretary sent memo

dated 18.4.2006 to the LAO requiring him to submit draft notification for the acquisition of 280 acres land in two parts. That letter reads as under:

"From

The Finance Secretary,
Chandigarh Administration,

No. PA/LAO/1019
Dt:20.4.06

To

The Land Acquisition Officer,
U.T. Chandigarh.

Memo No.43/3/157-UTFI(5)-06/2123
Dated, Chandigarh the 18.4.06

Subject: - Acquisition of land measuring 280 acres in village Kishangarh (Manimajra).

The matter regarding acquisition of land measuring 280 acres in village Kishangarh Manimajra has been discussed for the development of 2nd Phase of I.T. Park. It has been decided that the said land may be acquired in 2 parts, i.e. (140 acres + 140 acres). Your are therefore requested to take immediate necessary action and send draft notification U/s 4 of the Land Acquisition Act immediately so that the process of acquisition is started.

Superintendent Finance-I
for Finance Secretary,
Chandigarh Administration."

16. In compliance of the directive given by the Finance Secretary, the LAO sent the draft notification under Section 4(1) of the Land Acquisition Act, 1894 (for short, 'the Act') for the acquisition of 104.83 acres land. The Adviser to the

Administrator, Union Territory, Chandigarh (hereinafter described as, 'the Adviser') accorded his approval on 27.6.2006 and on the same day, the notification was sent for publication in the official gazette and the newspapers. The public purpose specified in the notification was "the provision of city level infrastructure, the regulated urban development of the area between Chandigarh and Mani Majra and the planned development and expansion of the Chandigarh Technology Park". The first four paragraphs of the notification read as under:

"CHANDIGARH ADMINISTRATION FINANCE DEPARTMENT

NOTIFICATION

No.43/3/229-UTF(5)-2006/ Dated:

Whereas it appears to the Administrator, Union Territory, Chandigarh, that the land in the locality specified below is likely to be needed for a public purpose namely for "the provision of city level infrastructure, the regulated urban development of the area between Chandigarh and Mani Majra; the planned development and expansion of Chandigarh Technology Park' in the village Mani Majra, H.B.No.375, Union Territory, Chandigarh.

Now, therefore, this Notification under the provisions of Section 4 of the Land Acquisition Act, 1894 for the information of all concerned that it is hereby notified that the land in the said locality is to be needed for the said purpose.

And in exercise of the powers conferred by the aforesaid Section read with Government of India, Ministry of Home Affairs, Notification Number 3612 dated 8th October, 1968, the Administrator, Union Territory, Chandigarh, is pleased to authorize the Officers for the time being engaged in

undertaking this work with their servants and workmen to enter upon and survey the land in the locality and do all other acts required or permitted by that Section.

The person interested can file their objections under Section 5-A of the Land Acquisition Act, 1894, within one month from the publication of the Notification before the Land Acquisition Collector, Union Territory, Chandigarh."

17. On 2.8.2006, another notification was issued for the acquisition of 167.50 acres land for the same purpose.

18. Surinder Singh Brar, who is one of the appellants in the lead case submitted representation dated 12.7.2006 to the Administrator, Union Territory, Chandigarh (hereinafter described as, 'the Administrator') and prayed that the land in question may not be acquired because large number of trees had been grown by the landowners and cutting of the same will adversely impact the environment and ecology of the area. Shri Brar emphasized that the land already acquired for IT Park was lying unutilized and, therefore, there was no justification to acquire additional land. The Administrator rejected the representation of Shri Brar vide his letter dated 31.7.2006, which is reproduced below:

"General (Retd.) S.F. Rodrigues PVSM, VSM
Governor of Punjab
and
Administrator
Union Territory, Chandigarh

RAJ BHAVAN
CHANDIGARH 160019
JULY 31, 2006

I am in receipt of your representation dated 12.7.2006 regarding land acquisition & related issues. The issues raised mostly pertain to changes in the existing law, for which decisions are to be taken at different levels. The Administration has to perform its duty within the existing laws and therefore, there are a number of factors which

have to be taken into account. The Administration has been acquiring the land for various development projects being implemented for the public good. You will agree that the future of U.T., Chandigarh does not lie in agriculture. Rather, we have to concentrate and invest in those sectors, where the factor productivity is relatively higher, and which offer our youth opportunities for advancement.

Land is the primary and essential requirement for any project and therefore the Administration has to go for its acquisition. The rate of compensation is determined as per the existing provisions of law and keeping in view the judgements of Hon'ble Supreme Court and High Courts. The collector rates in Chandigarh have been revised twice, during the last year and the compensation has recently been paid to the tune of Rs. 40 to Rs. 45 lacs per acre. The award is further subject to legal scrutiny by courts, as the land owner has the liberty to approach them. You would appreciate that the Government is not a profit making organization and no surpluses are being generated from the acquisition of land. In fact, the so called surplus is the value addition due to the change of land use, which is invested for the development of the U.T. It would also be worthwhile to remind you that the Administration has to incur huge expenditure for the creation of public utility services and a large portion of the acquired land has to be kept vacant, to maintain the character of the city.

Apart from the above, Chandigarh Housing Board is taking care of the oustees, under its scheme of 1996. There really is no scope for any discretion in the process.

Yours sincerely,

[General (Retd.) S.F. Rodrigues
PVSM, VSM]."

19. Some of the landowners including Brig. Kuldip Singh

Kehlon, who is one of the appellants in the appeal arising out of SLP (C) Nos.13518-13521/2011 filed an application under the Right to Information Act, 2005 ('RTI' Act) and sought information on various issues which had direct bearing on the acquisition of their land. Senior Town Planner-cum-Central Public Information Officer, Chandigarh Administration sent reply dated 22.7.2007, the relevant portions of which are extracted below:

"The information of the paras relating to this office is as under:-

3 (vii) FAR Allowed in IT Park Area:

Built to suit site (BTS)	1.25
Campus sites	0.5

However, FAR can be increased to 0.75 on payment.

4(c) The Development Plan of the area being acquired: -

Planning for Ph.-1 and Ph.-II of Rajiv Gandhi Technology Park has been done. However the III phase of Chandigarh Technology Park is being acquired and planning for the same will be done after the acquisition and on receipt of survey plan from the Engineering Department, U.T., Chandigarh.

4(d) The area in question is not yet planned hence, detail of area cannot be provided.

4(1) THE PLANNING OF Phase I & II of the Rajiv Gandhi Technology Park has been completed. In the side area the planning has been done for IT and other related services/ uses to IT Park i.e., Hotel, Grid Sub Station, Tube Wells, Commercial Area, reserve etc.

4(j,k) It is a policy matter to be decided at higher level.

5 (a) Originally the Chandigarh was planned for five lacs of population. As per the 2001 census the total population of Chandigarh is 9 lacs and it is envisaged that in the year 2021 the approximate population of Chandigarh will be 18 lacs approximately on the basis of growth rate projections.

(c) There is no legal master plan of the city. However, the planning of the land available within the jurisdiction of Chandigarh is being undertaken as per the future demands and needs of the city."

(emphasis supplied)

20. The appellants and other landowners filed objections under Section 5A(1) of the Act, the salient features of which were:

"(a) The purpose for which the land is proposed to be acquired is not in fact 'public-purpose'.

(b) The proposed acquisition is not in consonance with the Environment Law and proposed development will certainly damage the ecology of Sukhna Choe catchments area.

(c) This acquisition is against the provisions of the Forest (Conservation) Act, 1980, which does not allow deforestation leading to environmental deterioration.

(d) The Chandigarh Administration has not obtained permission of the Government of India for changing the land use of the land sought to be acquired.

(e) The acquisition of land would involve chopping down of hundreds of fruit and non-fruit bearing trees of more than 15 years age.

(f) This area works as lungs to the residents of the City. After acquisition of this area and construction of high buildings, no breathing area will left for the residents of Chandigarh.

(g) The land is being acquired for four different purposes, but the Administration itself does not know as to how much area would be utilized for each and individual purpose.

(h) The Chandigarh Administration has acquired large chunks of land over past 15 years, most of which is still lying unutilized or encroached. He enumerated a number of notifications issued by the Chandigarh Administration vide which the lands have been acquired by the Chandigarh Administration.

(i) The land is being acquired with the intention or profiteering.

(j) The Chandigarh Administration has not been able to provide a proper plan for the development and utilization of the land to be acquired.

(k) The Administration has not framed any scheme for rehabilitation of the landowners whose land is acquired and they have been uprooted more than once.

(l) Only 10% of the flats would be built on 129 acres of land given to Parsvanath Developers and the developer is likely to accrue immense tax relief on the basis of the units being built in the SEZ.

(m) Most of the land stands already acquired and reserved for I.T Park has not so far utilized then what is the necessity to acquire this land.

(n) Where the acquisition of this land will uproot the farmers from their livelihood and abode, it would immensely damage the green cover of the city and about 50000 fully grown trees would also be chopped down. The Administration on one hand does not allow even a tree to be cut, though it is on the mettalled road in terms of Forest

Act, then how the Administration would afford to cut the 20 years old fruit/non-fruit bearing trees.

(o) The acquisition of land is in violation of the Punjab New Capital (Periphery) Control Act, 1952. The Periphery Control Act was enacted to ensure the outskirts of the city as green belt."

21. For the sake of reference, some of the objections filed by Shri Surinder Singh Brar and Shri Kuldip Singh Kahlon are reproduced below:

Surinder Singh Brar:

"Notification not proper hence liable to be quashed:

The impugned notification is liable to be quashed as the public purpose mentioned therein is vague as it is not possible for the right holders to raise objections against the same under section 5-A of the Land Acquisition Act, 1894 effectively. The total area under acquisition is less than 168 acres. There are four purposes mentioned for which the land is sought to be acquired without specifying as to how much land is needed for each purpose. The four purposes mentioned are:

(i) the provision of city level infrastructure

(ii) the regulated urban development of area between Chandigarh and Mani Majra

(iii) the planned development

(iv) expansion of Chandigarh Technology Park.

The petitioner does not know as to how much area is needed for either of these purposes, what is the meaning of city level infrastructure and what is the difference between regulated urban development and planned development. In fact 100 acres of land is not big enough an area for either of the purposes in itself. Therefore, to enable the right holders to raise objections effectively they must know as to how much area is required for each purpose and how the purposes mentioned are different from each other, particularly item numbers (i), (ii) and (iii).

The impugned acquisition proceedings have been undertaken without the concurrence of the Defence Ministry, Government of India. Chandigarh is surrounded by strategic defence installations like the Mullapur Garibdas Air Force Station, Head Quarters of the Western Command at Chandimandir, Chandigarh Air Force Station, Kasauli Air Force Station, etc. Infact the Mullapur Garibdas Air Force Station houses most modern missiles and radars while Chandimandir houses a strategic communication centre. Thus, urbanising the area in Village Mani Majra, District Chandigarh may lead to compromising with the security of the nation.

Violation of the Periphery Act:

The impugned notification itself is violative of the provisions of the Periphery Control Act in so far as the permissions required under the said Act have not been obtained by the Chandigarh Administration. The Chandigarh Administration is a separate entity from the authorities exercising the powers under the Periphery Control Act. To the knowledge of the objectors no permission has been obtained, as of date, by the Chandigarh Administration for the development of the aforementioned land from the authority under the Periphery Control Act and consequently the entire acquisition proceedings are illegal, null and void.

Over the past 15 years the Chandigarh Administration has compulsorily acquired huge chunks of land in Village Manimajra, District Chandigarh purportedly for various

public purposes. However, in most cases the areas acquired have not been fully utilized and are either lying vacant or have been encroached upon. In this scenario the action of the Chandigarh Administration to acquire another huge chunk of land in Village Manimajra under the impugned notification is incomprehensible and cannot be justified. The details of the notifications issued under Sections 4 and 6 of the Land Acquisition Act, 1894 whereunder land has earlier been acquired by Chandigarh Administration in Village Manimajra, District Chandigarh but large chunks whereof are still lying unutilized or under encroachment are as under:

- Notification No.3/117-UTFI(4)-89/12204 dated 11.9.1989 issued under Section 6 of the LA Act covering 29.07 acres of land in Village Manimajra, District Chandigarh for the public purpose of "resident-cum-commercial complex scheme no.2";
- Notification No.3/117-UTFI(4)-89/12209 dated 11.9.1989 issued under Section 6 of the LA Act covering 39.27 acres of land in Village Manimajra, District Chandigarh for the public purpose of "residential-cum-commercial complex scheme no.2 and construction of multi-specialty hospital";
- Notification No.3/117-UTFI(4)-89/12539 dated 18.10.1989 issued under Section 6 of the LA Act covering 29.75 acres of land in Village Manimajra, District Chandigarh for the public purpose of "residential-cum-commercial complex scheme no.2"
- Notification No.3/117-UTFI(4)-89/12544 dated 18.10.1989 issued under Section 6 of the LA Act covering 37.55 acres of land in Village Manimajra, District Chandigarh for the public purpose of "residential-cum-commercial complex scheme no.2";
- Notification No.3/117-UTFI(4) 1361 dated 13/14.2.1990 issued under Section 6 of the LA Act covering 36.37 acres of land in Village Manimajra, District Chandigarh for the public purpose of "residential-cum-commercial complex scheme no.2";
- Notification No.3/117-UTFI(4)-90/1366 dated 13/14.2.1990 issued under Section 6 of the LA Act covering 21.51 acres of land in Village Manimajra, District Chandigarh for the public purpose of "residential-cum-commercial complex scheme no.2";
- Notification No.3/117-UTFI(4)-91/7628 dated 8.8.1991 issued under Section 6 of the LA Act covering 40.84 acres of land in Village Manimajra, District Chandigarh for the public purpose of "residential-cum-commercial; complex scheme no.3";
- Notification No. UTFI(4)-93/903 dated 29.1.1993 issued under Section 6 of the LA Act covering 54.37 acres of land in Village Manimajra, District Chandigarh for the public purpose of "residential-cum-commercial complex and for the construction of a college building and sports stadium etc. scheme no.3";
- Notification No.UTFI(4)-93/906 dated 29.1.1993 issued under Section 6 of the LA Act covering 39.96 acres of land in Village Manimajra, District Chandigarh for the public purpose of "residential-cum-commercial complex and for the construction of municipal park and public utility building scheme no.3";

- Notification no.A-32017/15/PI/91/28 dated 27.11.1991 issued under Section 4 of the LA Act covering 56.14 acres of land in Village Manimajra, District Chandigarh for the public purpose of "setting up nurseries".

Public purpose not defined:

In the impugned notification the Chandigarh Administration has proposed to acquire the land for the alleged public purpose of:

> "....the provision of city level infrastructure, the regulated urban development of the area between Chandigarh and Mani Majra, the planned development and expansion of Chandigarh Technology Park" in village Manimajra.

The setting-up or expansion of a technology park, for which the land in dispute is also sought to be acquired, is not a public purpose. In fact, the Chandigarh Administration itself has neither developed nor is it running the technology park but has allotted the land to DLF Ltd., a private entrepreneur for this purpose. DLF Ltd. has profiteered by selling the area further to other private companies. Thus the whole idea behind the impugned acquisition proceedings is to assist a private entrepreneur to profiteer. No person from the ordinary public will be benefited in any way. In today's age and economy a private entrepreneur can very well purchase land by private negotiations instead of the State assisting him.

If the Chandigarh Administration is bent upon urbanising the green belt against all respect for the ecology and environment, then why are the landowners themselves not allowed to develop their land within the set development plan as opposed to taking the land away from the small agriculturists and selling it further to private developers at a huge profit, thus playing the role of land brokers.

As no real public purpose has clearly been defined by the Chandigarh Administration in the impugned notification i.e building roads for common use etc. it is clear that it is for the purpose of a particular industry only. The Chandigarh Administration ought to define in clear terms as to what it means by public purpose. How does a particular private industry become a "public purpose".

The purported purposes for which the land in dispute is sought to be acquired under the impugned notification are the provision of city level infrastructure, the regulated development of the area between Chandigarh and Manimajra, the planned development and expansion of Chandigarh Technology Park. The said alleged public purposes mentioned in the impugned notification are extremely vague and non-specific leaving one completely in the dark as to what actually the Chandigarh Administration intends to do with the acquired land. No particular residential or commercial scheme has been drawn up by the Chandigarh Administration for acquiring the land in dispute. The acquisition of valuable land under the impugned notification thus amounts to a colourable exercise of power by the Chandigarh Administration.

Under the impugned notification the purported public purpose for which the land in dispute is being acquired is stated to be planned and regular development as well as provision of city level infrastructure. It is not understandable as to how the same land can be developed to provide city level infrastructure which necessarily means urbanization. The concern for the ecology and environment is completely necessary. Rather the acquisition under the impugned notification would lead to complete destruction of the land sought to be acquired under the impugned notification.

The public purpose must not only be specified in the

notification issued under Section 4 of the Land Acquisition Act, 1894 but in order to enable an objector to effectively object under Section 5-A the details of the public purpose, alongwith the details of the scheme, the plans etc. must be available in the office of the Land Acquisition Collector for perusal of the objector. In the present case as no such plan/scheme is available in the office of the Land Acquisition Collector or any other office, it is apparent that the alleged public purpose is merely an attempt by the Chandigarh Administration to acquire the land with the sole object of using it at a later date for whatsoever purpose that may be required.

No public purpose has been spelt out nor any public purpose has been established for the proposed acquisition. In any case the proposed construction of the IT Park is not a conducive measure because of the fact that it is closer to the defence area adjoining Chandimandir and can interfere in the communication system and sensitive defence installations. The public purpose mentioned is vague and as such it is not possible for the right holders to raise objections against the same, under section 5-A of the Land Acquisition Act, 1894 effectively.

Violation of Environmental and Forest Laws:

The land in dispute is very close to the Sukhna Lake and adjacent to the Sukhna Choe and the area declared as a reserved forest. If the land in dispute and its surrounding areas are allowed to be urbanised it will result in the degradation of the habitat and disturb the thousands of migratory birds which come every year to the Sukhna Lake. It may be mentioned here that the Sukhna Lake is a wetland declared by the Central Government and is a protected area and is known as the Sukhna Wildlife Sanctuary. If high rise buildings are allowed to be constructed on the land being acquired under the impugned

notification it will affect the migratory route of the thousands of birds which make their nests in the Sukhna Lake area after migrating from as far as Siberia in Russia. Permitting urbanisation next to the Sukhna Lake and next to the surrounding reserve forest will be a death knell for the precious wildlife and fauna existing there. Though trees may be able to survive the onslaught of urbanisation, wild animals and birds certainly will not be able to do so and they would have to move to safer habitats away from human habitation.

It would also be pertinent to mention here that the land sought to be acquired is forest land as also agricultural land. The proposed acquisition will result in the extinction, uprooting & leveling of these trees which are in the prime of life. The proposed acquisition is violative of the climate and environmental laws.

The acquisition of the land in dispute would involve chopping down of fruit bearing trees and non fruit bearing trees. Under the provisions of the Forest Act no tree in Chandigarh can be cut without permission of the Central Government. In case the Central Government decides not to grant the permission to the Chandigarh Administration to chop down trees standing on the land in dispute, the entire acquisition proceedings would end up in a nullity with wastage of huge sums of money and man-hours.

The land sought to be acquired under the impugned notification is basically agricultural land on which, apart from crops, there are hundreds of fruit bearing trees and non-fruit bearing trees standing. This green area acts as a barrier between the urbanized areas in Chandigarh and Panchkula in Haryana. This green and forested area also helps in stopping soil erosion into the Sukhna Choe. The removal of this green and forested area would result in soil erosion which is like to cause flash floods in the rainy season thus putting in danger the city of Chandigarh itself.

As such the dangers to the ecology and subsequently to the city itself can well be imagined if the acquisition under the impugned notification is allowed to stand. The havoc caused along the banks of the choe and in the village of Kishangarh in particular during the recent rainy season is not something to be taken lightly. With the urbanization and choking of Sukhna Choe/Lake catchment area Chandigarh itself will be liable to immense danger of floods which can be life threatening to its citizen as we have seen in the recent past. The Chandigarh Administration needs to define its role viz a viz the citizen, is it here to protect us or to endanger our lives. Chandigarh needs to be protected and that is what the Chandigarh Administration should be doing.

That in any case, no resolution for change has been passed for conversion of the proposed land from the zoning area which is forest land area/green belt prior to the date of the publication of the notice. Thus the notification is vitiated on this ground alone.

The proposed acquisition will also disturb the ecological plants and flora and fauna of the area because the proposed acquisition will also disturb the dense forest area having more than 50,000 grown trees which are more than 30 years old. Forests and orchards are the lungs of a city and have a very important environmental function to perform. Such lands cannot be acquired under the provisions of Land Acquisition Act, 1894.

The Chandigarh Administration has not carried out an Environmental Impact Assessment study which is extremely necessary before an exercise of this magnitude is carried out. Further more it needs to be pointed out that if the recent happenings in the country are any indication, it is essential to carry out a geological study of the area and conduct surveys before deciding to demolish the green belt around Chandigarh which the Chandigarh Administration has not done. Every place cannot be suitable for the multi-storied monsters of steel and concrete that are bound to come up on the land once acquired. Nature is beautiful but it does demand obedience to its ordinances. When violated the earth erupts and we have earthquakes. Man cannot continue to 'pick nature's pocket'. He must discipline himself.

No Planning/Scheme exists and Discrimination:

The impugned notification is illegal and void in as much as no plans are available in the office of the Land Acquisition Collector with respect to the alleged city level infrastructure to be set up. There is no plan available for the protection of the ecology and environment and for setting up/expansion of the Chandigarh Technology Park.

The petitioner reserve their rights to file such objections as and when these plans are made available.

On enquiry, the petitioner was informed that no the plans for the Chandigarh Technology Park and the scheme for protection of ecology and environment of Sukhna Choe Watershed was available in the office of the Land Acquisition Collector. A representative of the petitioner was informed by the office of the Chief Architect that none of the above particulars/scheme/site plans were available with them as none have been framed/drawn up by the Chandigarh Administration nor is relevant urban planning data available. It is thus apparent that in the absence of any detail plans and data with respect to the avowed public purpose, the alleged public purpose is a mere sham and, therefore, violates the rights of the petitioner to effectively object to the proposed acquisition in terms of Section 5-A of the Land Acquisition Act, 1894. Consequently the entire proceedings are illegal, null and void.

The Chandigarh Administration has not even designated

a planning agency that could have shown how the area under acquisition is to be developed and utilized. The Chandigarh Administration has not been able to produce a proper plan for the development of the so-called Technology Park. No consideration seems to have been taken of the following points:

(a) geographical features that is physiography, climate, water, soils and other physical resources;

(b) means of communication and accessibility;

(c) distribution of the present and future population;

(d) industrial location and growth trends;

(e) economic base and commercial activities;

(f) preservation of historical and cultural heritage;

(g) urban expansion and periphery management;

(h) ecological and environmental balance;

(i) balanced regional development of the City Beautiful;

(j) dispersal of economic activities to alleviate pressure on the city.

It is clear that no such plan existed at the time issuance of the impugned notification and therefore the petitioner have been denied a basic right of examining the plans and other documents asked for."

Kuldip Singh Kahlon:

"VIOLATION OF PERIPHERY CONTROL ACT:

The land in question falls within the periphery of Chandigarh and the Periphery Control Act, 1951 regulates its use. The purpose of this legislation is to prohibit any activity that is non-agricultural and to that extent even prohibits the landowners from constructing houses for their own living. The UT Administration, has been forcefully implementing this Act and penalizing those who violate any of its provisions.

The provisions of the Periphery Control Act cannot apply differently for the public and differently the Administration. This would be arbitrary and discriminatory and be violative of all settled principles and tenets of law. The public purpose for which the land is being acquired is not covered or permitted by the periphery control act, and therefore, the notification is void ab initio. The State cannot be the violator of its own laws to the detriment of the public. The notification deserves to be withdrawn on this account alone.

MARKET VALUE, MAKING UNDUE AND ILLEGAL PROFIT BY THE UT ADMINISTRTION/ITS AGENCIES:

The sole purpose of the Administration appears to be is to use public funds to acquire land and sell it at high profits. The market value of land is artificially suppressed by disallowing any activity, other than agriculture, by the UT Administration. The market forces are not allowed to operate so long as land is in the hands of the landowners.

The Collector Tate therefore cannot and does not reflect the market value of the land. This situation changes when the land is in the hands of the UT Administration or its Agencies, This is proved from the fact that 129 acres of land in village Manimajra was acquired in the year 2002 and compensation between Rs. 9-12 lacs per acre was paid by the UT Administration. The same was transferred to Chandigarh Housing Board at no cost, which further sold at profit to developers namely: Parsvanath Developer Private Limited for a sum of Rs. 821.21 crores or approx.

630 lacs per acre. This is approximately 70 times the collector's rate.

It is important to note that undeveloped land was sold to this company, which means that the UT Administration acquired land at low price and without making any investment on it sold it at a higher profit. This is extremely unfair to the farmers who have struggled rate does not reflect a realistic/actual value of the land, in this area. Going by the sale mentioned above, the market value of the land in village Manimajra is not less than Rs.630 lacs per acre.

VIOLATION OF MASTER PLAN:

The development of Chandigarh is regulated by its Master plan. The land proposed to be acquired falls in the ecologically fragile green belt along the lake and Sukhna choe. Any land use change will not only threaten the environment of the city but will also disturb the habitat of a large species of flora arid fauna. It is public knowledge that no lay out plan for this area has been neither prepared nor other formalities completed as mandated by the land acquisition Act and the FCs Standing Order 28. Acquisition of land without first amending the master Plan by following due procedure prescribed by law and without clearance from the Ministry of Environment and Forests will be bad in law."

22. The LAO heard the objectors, briefly noticed the substance of their objections but did not deal with any one of them and submitted separate reports in relation to the two notifications with identical observations, which are extracted below:

"OBSERVATIONS:

After seeing the revenue record and spot inspection, I find no merits in the objections raised by the Objectors.

Because, for the future extension of the Capital and to ensure healthy & planned development, and further, to prevent growth of slums and ramshackle construction on the land lying on the periphery of the 'new city', area of 10 miles on all sides from the outer boundary of the land was declared as 'controlled area'. In order to have legal authority to control and regulate the use of the land, the Punjab New Capital (Periphery) Control Act was enacted in 1952. The structures as existed on the site called Shastri Nagar have been raised in violation of the Punjab New Capital (Periphery) Control Act, 1952. The Capital of Punjab (Development and Regulation) Act, 1952 and the Punjab New Capital (Periphery) Control Act, 1952 (two Acts governing the planning and development of UT, Chandigarh) envisaged Chandigarh as urbanized town or capital city in which ramshackle construction is antithetical to the very concept and planning of Chandigarh. This is clear from the Statement of Objects and Reasons and Section 1(2) of the latter act which are reproduced hereunder for ready reference that whole of the area of UT was part of 'Capital Project' and was kept reserved for future expansion to be required and acquired:-

"Statement of Objects and Reasons.- The Punjab Government are constructing a New Capital named "Chandigarh". The master plan providing for the future extension of the Capital will extend over a much greater area than the area acquired so far the construction of the first phase of the Capital. To ensure healthy and planned development of the new city it is necessary to prevent growth of slums and ramshackle construction on the land lying on the periphery of the new city. To achieve this object it is necessary to have legal authority to regulate the use of the said land for purposes other than the purposes for which it is used at present."

1(2) It extends to that area of the State of Punjab

which is adjacent to and is within a distance of ten miles on all sides from the outer boundary of the land acquired for the Capital of the State at Chandigarh as that Capital and State existed immediately before the 1st November, 1966."

"5. Restrictions in a controlled area. - Except as provided hereinafter, no person shall erect any building or make or extend any excavation, or lay out any means of access to a road, in the controlled area save in accordance with the plans and restrictions and with the previous permission of the Deputy Commissioner in writing."

His Excellency the Governor of Punjab and Administrator, UT, Chandigarh has already conveyed his version, vide letter dated 31.07.2006 to one of the Objector - Sh. S.S. Brar, IPS (Retd.) that the Administration has been acquiring the land for various development projects being implemented for the public good. He further emphasized that the future of Union Territory, Chandigarh does not lie in agriculture, but we have to concentrate and invest in those sectors, where the factor productivity is relatively higher, and, which offer our youth opportunities for advancement. For that matter, the land is primary and essential requirement for any project, and therefore, the Administration has to go for its acquisition.

The objection that the Administration has made huge profits out of land acquisition is baseless. The rate of compensation is determined as per the existing provisions of law, The determination of compensation of land is based on a very sound principle of average as enunciated and upheld by the Hon'ble Supreme Court in various judgements as a sound basis for calculating market value. The Collector rates for agricultural land have been revised twice in the last year. While acquiring the land, the land

owners are not only paid the award calculated on the basis of Collector's rate, but solatium @ 30% on the value assessed on the basis of Collector's rate and additional market-value @ 12% per annum on the value assessed on the basis of Collector's rates is also paid through the award. It is worth mentioning that the same parameters are being followed while making the assessment of compensation in the other states also in the country. The award is further subject to legal scrutiny by courts, as the land owner has the liberty to approach them.

The Administration is not a profit-making organization and no surpluses are being generated from acquisition or from further allotment of land. In fact, lot of funds are spent on public utility services like water-supply, sewerage, electricity-supply, laying of roads, power-plants, welfare-activities, public amenities, public-toilets, dumping-grounds, sewerage-treatment plants, Educational Institutions, Hospitals, Electricity Grid Station, Tubewell and Community Centres, etc. Some land is allotted at subsidized rates also in public interest for religious, charitable, community/institutional purposes and for rehabilitation of slum-dwellers."

23. Thereafter, the office of the Finance Secretary prepared a note incorporating therein the observations of the LAO. The Finance Secretary recorded his comments and the Adviser appended his signature signifying his approval to the recommendations of the LAO. For the sake of reference, the office note and the comments of the Finance Secretary are reproduced below:

"Subject: Report u/s 5-A for acquisition of land measuring 104.83 acres in Manimajra – Notification u/s 6.

The Land Acquisition Officer has requested to accord Administrative approval for the issuance of

notification Under Section of the Land Acquisition Act and also for the acceptance of recommendations after receiving objections Under Section 5 A from the Land Owner with regard to acquisition land measuring 104.83 acres acquisition of land for the purpose namely "the provision of city level infrastructure, the regulated urban development of the area between Chandigarh and Manimajra: the planned development and expansion to Chandigarh Technology Park in Village Manimajra, U.T. Chandigarh.

The Administration had issued notification Under Section 4 of the Act for the acquisition of said land. The Land Acquisition Officer has invited objections and sixteen land owners have filled their objections.

Sh. P.C. Dhiman appeared on behalf of some land owners objected to the acquisition of land on the ground that there are large number of fruit bearing trees on the agriculture land. The illiterate land owners have only the sole mode for their livelihood. Most of the land acquired by the administration earlier has not been utilized. It has further been objected that emaciate compensation is being given to the land owners whereas the slum dwellers occupying government land are being rehabilitated and the land owners are being made home less. The Administration is acquiring land for the public purpose for pocketing hefty profits by giving the land to private developers. No rehabilitation scheme for the land owners have been framed.

Some other land owners have also raised the similar objections. Mrs. Ritu Joshi objected that the land is being acquired is being given for the commercial activities whereas, she has not permitted the land for the hotel project when she applied once.

The Land Acquisition Officer after examining

objections has found no merits, because for future extension of capital and to ensure healthy and planned development and further to prevent growth of slums, this was required to be acquired. The Land Acquisition Officer has further stated that the structure existing on the site called Shastri Nagar has been raised in violation of the periphery control act. The objection that the Administration is paying meager compensation is baseless as reported by the Land Acquisition Officer. The compensation is determined as per the existing provision of the law. The landowners are not only paid to award calculated on the basis of the collector rate but also solatium @ of 30% and additional market value @ rate of 12 % per annum. The award has further subject to the legal scrutiny by courts, as the land owners has the liberty to approach them.

The Administration is not a profit-making organization and no surpluses are being generated from acquisition or from further allotment of land. In fact, lot of funds are spent on public utility services like water-supply, sewerage, electricity-supply, laying of roads, power-plants, welfare-activities, public amenities, public-toilets, dumping-grounds, sewerage-treatment plants, Education Institutions, Hospitals, Electricity Grid Station, Tube well and Community Centers etc. some land is allotted at subsidized rates also in public interest for religious, charitable, community/institutional purposes and for rehabilitation of slum-dwellers. As regards rehabilitation of landowners is concerned, though, there is no provision in the land Acquisition Act to provide houses to the villagers whose land has been acquired, but the Chandigarh Housing Board is taking care of such Oustees under the Chandigarh Allotment of Dwelling Units to the Oustees of Chandigarh Scheme, 1996.

Keeping in view the recommendations made by the Land Acquisition Officer after receiving objections Under

Section 5- A for the acquiring land measuring 104.83 acres in village Manimajra may be accepted and the case may kindly be sent the AA for according approval and issuance of notification under Section 6 is added below at flag 'Y'.

Submitted for order please."

"Subject: Land Acquisition Case: Village Manimajra, Hadbast No.375, Union Territory, Chandigarh.

Reference PUC, the Land Acquisition Officer has sent a report under section 5-A for acquiring land in the revenue estate of Village Manimajra for public purposes namely "the provision of city level infrastructure, the regulated urban development of the area between Chandigarh and Manimajra, the planned development and expansion of Chandigarh Technology Park". This acquisition is for the Phase III of the Rajiv Gandhi Technology Park.

In this case, the notification for acquiring land measuring 104.83 acres under section 4 was issued on 27.6.2006. The Land Acquisition Officer invited objections from land owners. 16 persons filed their objections in all.

The Land Acquisition Officer heard the pleadings of the objectors/their counsels. The gist of their pleadings have been cited by the LAO from pages 412-415 of his report (PUC).

The findings of the LAO in respect of each set of objections can be read at pages 416-418 of his report. The LAO has found no merits in the objections of the land-owners (objectors). The LAO has filed the objections as being devoid of merit and has finally recommended that the land notified under section 4 be acquired.

On examination of these reports, it is found that the LAO's findings are in order. Therefore, approval may be granted to the proposal to issue a notification under section 6 (placed at flag 'Y') in respect of land measuring 104.83 acres in Village Manimajra, Hadbast No.375, U.T., Chandigarh.

A.A.'s approval would be required in this case.

SSF
28.2.2007

AA

Sd
28.2.2007"

24. On the same day, the declarations issued under Section 6(1) were published in official gazette dated 28.2.2007, the relevant portions of which are extracted below:

"Whereas it appears to the Administrator, Union Territory, Chandigarh that the land in the locality specified below is likely to be needed for a public purpose & namely "the provision of city level infrastructure, the regulated urban development of the area between Chandigarh and Manimajra the planned development and expansion of Chandigarh Technology Park in Village Manimajra, H. B. No. 375, Union Territory, Chandigarh. Now, therefore, this declaration is made under the provision of Section 6 of the Land Acquisition Act, 1894 and with Govt. of India, Ministry of Home affairs. Notification No. SO 3612 dated 8th October, 1968 informing all to whom it may concern that the land mentioned in the specifications noted below is needed for the above mentioned public purpose. The Land Acquisition Collector Chandigarh is hereby directed to take further action for the acquisition of the said land under Section 7 of the Land Acquisition Act, 1894.

The plans of the land may be inspected in the office of

Land Acquisition Collector, UT, Chandigarh."

(emphasis supplied)

25. The appellants challenged the acquisition proceedings in Writ Petition No.5065/2007 and batch and prayed that Notifications dated 26.6.2006, 2.8.2006 and 28.2.2007 be quashed. They pleaded that the acquisition of their land was vitiated due to violation of the mandate of Sections 4, 5A and 6 of the Act inasmuch as in the garb of acquiring land for a public purpose, the Chandigarh Administration wanted to favour private developers; that the purpose specified in the notifications issued under Section 4(1) was vague and on that account they could not effectively avail the opportunity of filing objections under Section 5A(1); that the objections filed by them were not considered by the LAO and the competent authority and the declarations under Section 6(1) were issued without application of mind; that the acquisition was vitiated because the matter was not considered by the committee constituted under the notification issued by the Government of India under Section 3(3) of the Environment (Protection) Act, 1986 (for short, 'the 1986 Act') and Rule 5(3) of the Environment (Protection) Rules, 1986 (for short, 'the 1986 Rules').

26. The Division Bench of the High Court relied upon the judgments of this Court in *Aflatoon v. Lt. Governor of Delhi* (1975) 4 SCC 285*, Gandhi Grah Nirman Sahkari Samiti Ltd. v. State of Rajasthan* (1993) 2 SCC 662, *State of T.N. v. L. Krishnan* (1996) 1 SCC 250, *Ajay Krishan Shinghal v. Union of India* (1996) 10 SCC 721 and *Sooraram Pratap Reddy v. District Collector, Ranga Reddy District* (2008) 9 SCC 552 and held that the public purpose specified in Notifications dated 26.6.2006 and 2.8.2006 was not vague; that the Chandigarh Administration had complied with the provisions of Sections 4, 5A and 6(1) of the Act; that the existence of a definite plan was not a condition precedent for the acquisition of land; that the landowners had been given opportunity to file objections and

that the declaration was issued after considering the same. The High Court also referred to the judgments of this Court in *Somawanti v. State of Punjab* AIR 1963 SC 151 and *Ganga Bishnu Swaika v. Calcutta Pinjrapole Society* AIR 1968 SC 615 and held that the declaration issued under Section 6(1) was conclusive and was not open to judicial review. The High Court further held that the special audit got conducted by the Government of India in the context of the acquisition of land for Phases I and II of the IT Park did not have any bearing on the acquisition of land for Phase III; that the decision taken by the Ministry of Home Affairs, Government of India to put the acquisition proceedings on hold did not adversely affect the declaration issued under Section 6(1) because final decision in the matter was required to be taken by the Chandigarh Administration and further that non-compliance of the National Rehabilitation Policy was inconsequential.

27. Shri Rakesh Dwivedi, learned senior counsel appearing for the appellants Surinder Singh Brar and others, relied upon Notification dated 14.8.1989 issued under Article 239(1) of the Constitution to show that the power vested in the appropriate Government under Sections 4(1) and 6(1) of the Act, which is exercisable by the President in relation to the Union Territories was delegated to the Administrator and argued that in the absence of delegation of power to the Adviser by the President, the latter could not have sanctioned the impugned acquisition by approving the recommendations of the LAO. Learned senior counsel emphasized that in view of Notification dated 14.8.1989, only the Administrator could exercise powers under the Act and that too subject to the control of the President and no other authority could have exercised that power. Shri Dwivedi further argued that the declaration issued under Section 6(1), is not in consonance with the plain language of the section because even the Adviser did not consider the reports submitted by the LAO under Section 5A(2) along with the record of proceedings and did not record his

satisfaction that the land was needed for a public purpose. Learned senior counsel submitted that use of the expressions 'it appears' and 'likely to be needed' in the notifications issued on 20.8.2007 show that the Adviser, whose approval preceded the issuance of declaration under Section 6(1), had not applied mind to the reports of the LAO. Shri Dwivedi then argued that the reports prepared by the LAO are vitiated due to non-application of mind because he did not objectively consider the objections filed under Section 5A(1) and mechanically made recommendations for the acquisition of land for Phase III ignoring that about half of the land acquired for Phase II had been alienated to the private developers, namely, Parsvnath Developer and Kujjal Builders to enable them to construct residential complex and hotel respectively which had nothing to do with the public purpose specified in the notifications issued under Sections 4(1) and 6(1). Learned senior counsel further argued that the existence of a plan is sine qua non for the acquisition of land for planned development of the area between Chandigarh and Mani Majra and expansion of IT Park and, in the absence of a definite plan, there was no justification to acquire the land in question. He sought support for this argument from the reply given by the Central Public Information Officer to Brig Kuldip Singh Kehlon and pointed out that the Chandigarh Administration was not following the "Chandigarh Inter-State Capital Regional Plan, 2001" approved by the Coordination Committee set up by the Ministry of Urban Development in 1984. Learned senior counsel also referred to the findings recorded in the Special Audit Report and the One-Man Committee headed by Shri Arun Ramanathan, which was appointed by the Government of India, to show that the land acquired for Phases I and II of IT Park had not been utilized and submitted that there is no justification whatsoever for the acquisition of additional land.

28. Shri Dinesh Dwivedi, learned senior counsel appearing for some other appellants, pointed out that general delegation

of power by the President to the Administrator vide Notification dated 1.11.1966 issued under Article 239(1) of the Constitution stood superseded by Notifications dated 8.10.1968, 1.1.1970 and 14.8.1989 insofar as the exercise of power under the Act is concerned and the Adviser, to whom the powers were delegated by the Administrator under Section 3 of the Chandigarh (Delegation of Powers) Act, 1987 (for short, 'the 1987 Act'), was not entitled to exercise the power vested in the appropriate Government under Sections 4(1) and 6(1) of the Act.

29. Shri Shekhar Naphade, learned senior counsel who appeared for the appellants in the appeals arising out of SLP(C)Nos.13518-13521/2011 referred to the objections filed by his clients under Section 5A(1) of the Act and argued that the High Court committed serious error by refusing to quash the acquisition proceedings ignoring that the Chandigarh Administration had not sought clearance from the designated committee constituted under Notifications dated 27.1.1994 and 14.9.2006 issued under Section 3(3) of the 1986 Act read with Rule 5(3) of the 1986 Rules. Shri Naphade relied upon the judgment of this Court in Karnataka Industrial Areas Development Board v. C. Kenchappa, (2006) 6 SCC 371 and argued that non-consideration of the appellants' plea that the acquisition would adversely impact the environment and ecology of the area is sufficient for quashing the notifications impugned in the writ petitions. Learned senior counsel submitted that the satisfaction envisaged in Section 6(1) of the Act pre-supposes that 'the appropriate Government' has taken an informed decision after due application of mind to the record and was satisfied about the need of the land for a public purpose and in these cases, the competent authority had not at all applied mind to the recommendations made by the LAO and the objections filed by the landowners.

30. Shri Neeraj Jain, learned senior counsel argued that the High Court committed serious error by negating the

appellants' challenge to the acquisition of their land ignoring its impact on the environment and the fact that the declaration under Section 6 could not have been issued without objectively considering this important aspect. Learned senior counsel also highlighted that a major chunk of the land acquired for Phase II had been transferred to the developers for residential and commercial purposes and argued that there was no justification for the acquisition of additional land in the name of expanding the IT Park.

31. Learned counsel appearing for the other appellants largely adopted the arguments of Shri Rakesh Dwivedi, Shri Dinesh Dwivedi and Shri Shekhar Naphade and submitted that the entire acquisition should be quashed because the functionaries of the Chandigarh Administration did not apply mind to the relevant issues including adverse impact of the acquisition on the environment and ecology of the area.

32. Shri Rakesh Khanna, learned Additional Solicitor General, produced copy of Notification dated 8.10.1968 issued under Article 239(1) of the Constitution and xerox copies of the notings recorded by the officers of the Ministry of Home Affairs on the report prepared by the Inquiry Officer in the light of the Special Audit Report. He also produced the decision taken by the Home Minister on 23.9.2010, which reads as under:

> "I have seen the notes as well as the final recommendations of AS(CS) on pages 31 and 32/n. I am in broad agreement with the recommendations on pages 31 and 32/n subject to the following:
>
> (i) If any Advisory is required to be issued to the UT Administration, a draft of the Advisory may be put up to me first through HS.
>
> (ii) Where the Inquiry Officer has agreed with the audit findings, they may be reduced to the form of a preliminary show cause notice and the preliminary show cause notice may be issued to those who have been found, prima facie, responsible and the comments obtained on why disciplinary proceedings and such other action as permissible under law should not be taken against them. The show cause notice may be drawn up and issued by 30.9.2010 and they may be given time until 15.10.2010 to reply to the preliminary show cause notices.
>
> (iii) Where the IO has not agreed with the findings of the audit, they may be referred to the CCA(H) for his comments. This may be done by 30.9.2010 and the CCA(H) may be requested to offer his comments by 15.10.2010.
>
> (iv) Any review of the powers delegated to the Administrator of Chandigarh may be done only in consultation with the Administrator. The proposals may be put up to me first through HS and then I shall give directions on how the Administrator should be consulted.
>
> (v) The Inquiry Report may also be forwarded to the CVC for such action as CVC may deem fit."

33. Dr. Rajeev Dhawan, learned senior counsel appearing for the Union Territory of Chandigarh relied upon Notification dated 1.11.1966 by which the President conferred the powers and functions of the State Government upon the Administrator and Notification dated 25.2.1988 issued under Section 3(1) of the 1987 Act vide which the Administrator delegated the powers vested in him under various State laws to the Adviser and argued that the impugned acquisition cannot be nullified on the ground that the notifications under Sections 4(1) and 6(1) were issued without the approval of the Administrator. Dr. Dhawan submitted that the notifications challenged before the High Court cannot be declared illegal on the ground that the Administrator had not accorded sanction to the acquisition of land for Phase III of IT Park because no such point was argued

on behalf of the appellants. He then submitted that the Advisor to the Administrator is equivalent to the Chief Commissioner and the Chief Commissioner and the Administrator of a Union Territory are of coordinate rank. Learned senior counsel then argued that the acquisition of the appellants' land cannot be quashed on the ground that the purpose specified in Notifications dated 26.6.2006 and 2.8.2006 was not a public purpose or that the same was vague. He submitted that the appellants cannot make a complaint on this score because they had filed detailed objections under Section 5A(1), which were duly considered by the LAO. Dr. Dhawan emphasised that the declaration issued under Section 6(1) is in consonance with the language of the statute and argued that the High Court did not commit any error by refusing to quash Notifications dated 28.2.2007 on the ground that in the first part thereof the satisfaction of the appropriate Government has not been recorded. Learned senior counsel further argued that the existence of a master plan or lay-out plan is not sine qua non for the acquisition of land because the purposes specified in Section 4(1) notification were identified public purposes. He pointed out that substantial portion of the land acquired for Phase I and Phase II of IT Park had been allotted to IT industries and the remaining portion was used for roads, parks, etc., and argued that the cancellation of allotment of three IT companies cannot lead to an inference that the acquired land has not been utilised for development of IT Park. In the end, Dr. Dhawan argued that the findings recorded by the Special Audit Team and the One-Man Committee cannot be made basis for quashing the acquisition of land for Phase III of IT Park. In support of his arguments, learned senior counsel relied upon the judgments in *Somawanti v. State of Punjab* (supra), *Ganga Bishnu Swaika v. Calcutta Pinjrapole Society* (supra), *Aflatoon v. Lt. Governor of Delhi* (supra), *Gandhi Grah Nirman Sahkari Samiti Ltd. v. State of Rajasthan* (supra), *State of T.N. v. L. Krishnan* (supra) and *Ajay Krishan Shinghal v. Union of India* (supra).

34. We have given serious thought to the respective arguments and carefully scrutinized the record of these petitions as also the files made available by Shri Sudhir Walia, learned counsel for the Chandigarh Administration.

35. We shall first consider the question whether the Advisor to the Administrator had the jurisdiction to approve the acquisition of the appellants' land. For deciding this question, it will be useful to notice the provisions of Article 239 of the Constitution (amended and unamended) and the notifications issued under that Article. The same read as under:

"Prior to 1-11-56 "After 1-11-56

Art. 239. Administration of States in Part C of the First Schedule. - (1) Subject to the other provisions of this Part a State specified in Part C of the First Schedule shall be administered by the President acting to such extent as he thinks fit, though a Chief Commissioner or a Lieutenant Governor to be appointed by him or though the Government of a neighbouring State.

Provided that the President shall not act thorough the Government of a neighbouring State save after –

(a) consulting the Government concerned and

(b) ascertaining in such manner as the President considers most appropriate the views of the people of the State to be so administered.

(2) In this article, references to a State shall include references to a part of a State."

239. Administration of Union territories. - (1) Save as otherwise provided by Parliament by law, every Union territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator appointed by him with such designation as he may specify.

(2) Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the administrator of an adjoining Union territory, and where a Governor is so appointed, he shall exercise his functions as such Administrator independently of his Council of Ministers.

Substituted by the Constitution (Seventh Amendment) Act, 1956."

"MINISTRY OF HOME AFFAIRS

New Delhi, the 1st November, 1966

S.O.3269.- Whereas under section 4 of the Punjab Reorganisation Act, 1966 (31 of 1966), the territories specified therein form the Union territory of Chandigarh on and from the 1st day of November, 1966.

And whereas under section 88 of the said Act, the provisions of Part II of the said Act shall not be deemed to have effected any change in the territories to which any law in force immediately before the 1st day of November, 1966, extends or applies, and territorial references in any such law to the State of Punjab shall, until otherwise provided by a competent legislature or other competent authority, be construed as meaning the territories within that State immediately before the said day;

And whereas the powers exercisable by the State Government under any such law as aforesaid are now exercisable by the Central Government;

Now, therefore, in pursuance of clause (1) of article 239 of the Constitution, and all other powers enabling him in this behalf, the President hereby directs that, subject to his control and until further orders, the Administrator of the Union territory of Chandigarh shall, in relation to the said territory, exercise and discharge, with effect from the 1st

day of November, 1966, the powers and functions of the State Government under any such law.

[No.l3/l/66-CHD]"

"No.5/1/66-CHD
GOVERNMENT OF INDIA
MINISTRY OF HOME AFFAIRS
NEW DELHI-II, the 1st November, 1966.

NOTIFICATION

G.S.R.1675-In exercise of the powers conferred by clause (1) of article 239 of the Constitution, the President hereby directs that all orders and other instruments made and executed in the name of Chief Commissioner of Union Territory of Chandigarh shall be authenticated by the signature of a Secretary/a Deputy Secretary an Under Secretary, an Assistant Secretary in any of the departments of the Chandigarh Administration.

Sd/-
A.D.Pande,
JOINT SECRETARY"

"NOTIFICATION

New Delhi, the 8 October, 1968,

S.O. 3612 – In pursuance of clause (1) of article 239 of the Constitution, and in partial modification of the notification of the Government of India in the Ministry of Home Affairs No.S.O. 3269 dated the 1st November, 1966, in so far as it relates to the exercise of powers and functions under the Land Acquisition Act, 1894 (1 of 1894) by the Administrator of the Union territory of Chandigarh, the President hereby directs that, subject to his control and until further orders, the powers and functions of the

appropriate Government under -

(i) the Land Acquisition Act, 1894 (l of 1894), except those of the Central Government under the provisos to sub-section (1) of section 55, and

(ii) the Land Acquisition (Companies) Rules, 1963,

shall also be exercised and discharged by the Administrator of the Union territory of Chandigarh, within the said Union territory.

[No.F.2/8/68-UTL]

Sd/-
(K.R. Prabhu)
Joint Secretary to the Govt. of India."

"GOVERNMENT OF INDIA
MINISTRY OF HOME AFFAIRS

NEW DELHI-1, the 1st January, 1970

11th Pausa, 1891

NOTIFICATION

S.O. 157 – In pursuance of clause (1) of article 239 of the Constitution, and in partial modification of the notification of the Government of India in the Ministry of Home Affairs No.S.O. 3371, dated the 1st November, 1966, in so far as it relates to the exercise of powers and functions under the Land Acquisition Act, 1894(1 of 1894) by the Administrator of the Union territory of Himachal Pradesh, and in supersession of the notifications of the Government of India in the Ministry of External Affairs No. S.0. 3165, dated the 5th November, 1963, and in the Ministry of Home Affairs Nos. S.O. 190, dated the 8th January, 1964, S.0. 3953, dated the 21st December, 1966 and S.O. 3612, dated the 8th October, 1968, the President hereby directs that,

subject his control and until further orders, the powers and functions of the appropriate Government under-

(i) the Land Acquisition Act, 1894 (l of 1894), except those of the Central Government under the provisos to sub-section (1) of section 55, and

(ii) the Land Acquisition. (Companies) Rules, 1963,

shall also be exercised and discharged by the Administrator of every Union territory (whether known as the Administrator, Chief Commissioner or the Lieutenant Governor), within the respective Union territories.

(No.F.2/8/68-UTL)

Sd/-
(P.N. KAUL)
DEPUTY SECRETARY TO THE GOVT. OF INDIA"

"BHARAT SARKAR / GOVERNMENT OF INDIA
GRIH MANTRALAYA / MINISTRY OF HOME AFFAIRS

New Delhi, the 14th Aug, 89

NOTIFICATION

S.O. 642(E) In pursuance of clause (1) of Article 239 of the Constitution and in suppression of all previous notifications relating to the exercise of power; and functions under the Land Acquisition Act, 1894 (1 of 1894) by the Administrator of various Union Territories except as respects things done or omitted to be done before such suppression, the president hereby directs that subject to his control and until further orders, the powers and functions of the appropriate government in relation to a Union Territory shall also be exercised and discharged by the

administrator of such Union Territory (Whether known as Administrator, Chief Commissioner or lieutenant governor) within the respective union territory under:-

(i) the land acquisition Act 1894 (1 of 1894) except the functions exercisable by the Central Government under the provision to sub-section (1) of section 55 of the said Act; and

(ii) the land acquisition (Companies) Rules, 1963.

NO.U-11030/1/89-UTL/
Sd/-
(Ashok Nath)
Joint Secretary to the Govt. of India"

36. Notification dated 25.2.1988 issued under Section 3(1) of the 1987 Act as also Notifications dated 2.6.1984, 30.5.1985, 27.11.1999, 8.5.2003, 1.10.2004, 4.11.2004 and 17.11.2004 on which reliance was placed by Dr. Rajeev Dhawan are reproduced below:

"CHANDIGARH ADMINISTRATION
HOME DEPARTMENT

Notification
The 25th February. 1988.

No. LD-88/1302.—In. exercise of the powers conferred by sub-section (1) of section 3 of the Chandigarh (Delegation of Powers) Act, 1987 (No. 2 of 1988), the Administrator, Union Territory, Chandigarh is pleased to direct that any power, authority or jurisdiction or any duty which the Administrator may exercise or discharge by or under the provisions of any law, rules or regulations as are applicable in the Union Territory, Chandigarh on the date of this notification shall be exercised or discharged by the Adviser to the Administrator except in cases or class of cases (as men-tioned in the Schedule annexed hereto) which shall

be submitted to the Administrator for final orders:—

SCHEDULE

(i) Proposals regarding suspension, remission of sentences under section 432 of the Code of Criminal Procedure.

(ii) Cases raising question of policy and cases of administrative importance.

(iii) Cases which effect or are likely to effect peace and tranquility of the State.

(iv) Cases which effect the relations of Union Territory Administration with other State Governments, the Supreme Court or the High Court.

(v) Constitution of Advisory Boards under the various laws providing for detention of persons without trial.

(vi) Proposals for the prosecution, dismissal, removal or compulsory retirement of any Class-I Officer.

(vii) Proposals for the appointment of any Class-I Officer.

(viii) Proposals regarding framing of rules of Class-I Officers including amendment of these rules.

(ix) Cases relating to the application of Acts of Parliament or extension of any State Act under section 87 of the Punjab Reorganisation Act to the Union Territory, Chandigarh.

(x) Cases where modification of the orders passed by the predecessors of the present Administrator are involved.

(xi) Proposals for the creation or abolition of Class-I posts.

(xii) Such other cases or class of cases as the Administrator may consider necessary or such other cases where his orders are necessarily to be he obtained under a Statute, for instance granting sanction to the launching of prosecution under section 196 Cr PC or any other Criminal Law.

By order and in the name
of Administrator
(Sd.)
P. K. VERMA,
Home Secretary,
Chandigarh Administration."

"No.U.14020/17/84 - UTS
Government of India
Ministry of Home Affairs

New Delhi-110001, the 2nd June, 1984.

NOTIFICATION

Consequent upon the concurrent appointment of Shri B.D. Pande, Governor of Punjab, as Administrator of the Union Territory of Chandigarh, Shri K. Banarji, IAS (UT : 1954 1/2), Chief Commissioner, Chandigarh will be redesignated as Adviser to the Administrator of the Union Territory of Chandigarh.

(Baleshwar Rai)
Deputy Secretary to the Government of India."

"(FOR PUBLICATION IN THE GAZETTE OF INDIA

PART I SECTION 2)

No.U.14020/17/84 – UTS. Pt.

Government of India

Ministry of Home Affairs

New Delhi-110001, the 30th May, 1985.

NOTIFICATION

Consequent upon the concurrent appointment of Shri Arjun Singh, Governor of Punjab, as Administrator of the Union Territory of Chandigarh, Shri K. Banarji, IAS (UT : 1954 1/2), Chief Commissioner, Chandigarh will be redesignated as Adviser to the Administrator of the Union Territory of Chandigarh.

(Baleshwar Rai)
Director."

"CHANDIGARH ADMINISTRATION
DEPARTMENT OF PERSONNEL

NOTIFICATION

The 27 November, 1999

No.1015-GOI-IH (4)-99/22972

Consequent upon the appointment of Lieutenant-General (Retd.) Jack Frederick Ralph Jacob, PVSM, Governor of Punjab as Administrator of the Union Territory of Chandigarh in addition to his duties as Governor of Punjab vide order of the President of India, dated the 19th November, 1999 conveyed vide Rashtrapati Bhawan communication bearing No.F.29-CA(I)/99, dated the 19th November, 1999, Lieutenant General (retd.) Jack Frederick Ralph Jacob, PVSM has assumed charge as Administrator of the Union Territory of Chandigarh on the forenoon of 27th November, 1999.

N.K. Jain
Home Secretary
Chandigarh Administration."

"CHANDIGARH ADMINISTRATION
DEPARTMENT OF PERSONNEL

NOTIFICATION

The 8th May, 2003

No.IH (4)-2003/8264

Consequent upon the appointment of Shri Justice Om Prakash Verma (Retd.), Governor of Punjab as Administrator of the Union Territory of Chandigarh in addition to his duties as Governor of Punjab vide order of the President of India, dated the 2nd May, 2003, conveyed vide Rashtrapati Bhawan communication bearing No.F.31-CA(I)/2003, dated the 2nd May, 2003. Justice Om Prakash Verma (Retd.) has assumed charge as Administrator of the Union Territory of Chandigarh on the forenoon of 8th May, 2003.

R.S. Gujral,
Home Secretary]
Chandigarh Administration."

"CHANDIGARH ADMINISTRATION
DEPARTMENT OF PERSONNEL

NOTIFICATION

September, 2004
Ist Oct. 2004

No.IH (4)-2004/18018

Consequent upon the appointment of Dr. Akhlaq-ur-

Rahman Kidwai, Governor of Punjab as Administrator of the Union Territory of Chandigarh in addition to his duties as Governor of Punjab vide order of the President of India, dated the 28th September, 2004 conveyed vide Rashtrapati Bhawan communication bearing No.F.31-CA(I)/2004, dated the 28th September, 2004, Dr. Akhlaq-ur-Rahman Kidwai has assumed charge as Administrator of the Union Territory of Chandigarh on the afternoon of 30th September, 2004.

R.S. Gujral,
Home Secretary
Chandigarh Administration."

"CHANDIGARH ADMINISTRATION
DEPARTMENT OF PERSONNEL

NOTIFICATION

4.11.2004

No.22/S/39/IH (4)-2004/20197

Consequent upon the appointment of Dr. Akhlaq-ur-Rahman Kidwai, Governor of Punjab as Administrator of the Union Territory of Chandigarh in addition to his duties as Governor of Punjab vide order of the President of India, dated the 30th October, 2004 conveyed vide Rashtrapati Bhawan communication bearing No.F.31-CA(I)/2004, dated the 30th October, 2004, Dr. Akhlaq-ur-Rahman Kidwai has assumed charge as Administrator of the Union Territory of Chandigarh on the forenoon of the 3rd November, 2004.

R. S. Gujral,
Home Secretary
Chandigarh Administration."

"CHANDIGARH ADMINISTRATION
DEPARTMENT OF PERSONNEL

NOTIFICATION

The 17th November, 2004

No.22/S/39/IH (4)-2004/20890

Consequent upon the appointment of General (Retd.) S. F. Rodrigues, PVSM, VSM, Governor of Punjab as Administrator of the Union Territory of Chandigarh in addition to his duties as Governor of Punjab vide order of the President of India, dated the 8th November, 2004, conveyed vide Rashtrapati Bhawan communication bearing No.F.31-CA(I)/2004, dated the 8th November, 2004, General (Retd.) S. F. Rodrigues, PVSM, VSM, has assumed charge as Administrator of the Union Territory of Chandigarh on the afternoon of 18th November, 2004.

R. S. Gujral,
Home Secretary
Chandigarh Administration."

37. We may also take cognizance of Notifications dated 12.1.2001, 15.1.2003, 11.9.2003, 21.11.2003, 1.1.2007 by which different officers of Indian Administrative Service were appointed/given charge of the post of Adviser, Union Territory, Chandigarh. The same read as under:

"CHANDIGARH ADMINISTRATION

DEPARTMENT OF PERSONNEL

NOTIFICATION

Dated, the 12th January, 2001.

No.59(GOI)-IH (4)-2001/786

Consequent upon her appointment as Adviser to the

Administrator, Union Territory, Chandigarh, Ms. Neeru Nanda, IAS (AGMU:71) took over charge of the said post with effect from 12.01.2001 (forenoon) from Smt. Vineeta Rai, IAS (AGMU:68).

R.S. Gujral,
Home Secretary
Chandigarh Administration."

"CHANDIGARH ADMINISTRATION
DEPARTMENT OF PERSONNEL

NOTIFICATION

Dated, the 15.1.2003.

No.IH (4)-2002/913

Consequent upon his appointment as Adviser to the Administrator, Union Territory, Chandigarh, Sh. Virendra Singh, IAS (AGMU:1969) took over charge of the said post with effect from the forenoon of 8.1.2003.

R.S. Gujral,
Home Secretary
Chandigarh Administration."

"CHANDIGARH ADMINISTRATION
DEPARTMENT OF PERSONNEL

ORDER

In pursuance of the Government of India, Ministry of Home Affairs, New Delhi's order bearing Endst. No. 14020/ 9/2002-UTS.I, dated the 10th September, 2003, the Administrator, Union Territory. Chandigarh is pleased to relieve Sh. Virendra Singh, IAS (AGMU:69), of the charge of Adviser to the Administrator, Union Territory, Chandigarh, with immediate effect.

2. In pursuance of the aforesaid orders of the Government of India dated the 10th September, 2003, the Administrator, Union Territory, Chandigarh, is further pleased to entrust the current charge of the post of Adviser to the Administrator, Union Territory, Chandigarh to Sh. R.S. Gujral, IAS (HY:76), Home Secretary, Chandigarh Administration, in addition to his own duties, until further orders.

Chandigarh, dated
The 11th September, 2003

(By order and in the name of Administrator, Union Territory, Chandigarh)

Ashok Sangwan,
Joint Secretary Personnel,
Chandigarh Administration"

"CHANDIGARH ADMINISTRATION
DEPARTMENT OF PERSONNEL

NOTIFICATION

Dated, the 21.11.2003.

No.IH (4)-2003/21655

Consequent upon his appointment as Adviser to the Administrator, Union Territory, Chandigarh, Sh. Lalit Sharma, IAS (AGMU:1971) has taken over the charge of the said post with effect from the afternoon of 21.11.2003, relieving Sh. R.S. Gujral, IAS (HY-1976), Home Secretary, Chandigarh Administration, of this additional charge.

R.S. Gujral,
Home Secretary
Chandigarh Administration."

"CHANDIGARH ADMINISTRATION
DEPARTMENT OF PERSONNEL

NOTIFICATION

Dated, the 01.01.07

No.22/2/47-IH (4)-2007/19619

Consequent upon his appointment as Adviser to the Administrator, Union Territory, Chandigarh, Sh. Pradip Mehra, IAS (AGMU:1975) assumed the charge of the said post with effect from the afternoon of 30.09.2007.

Krishna Mohan,
Home Secretary
Chandigarh Administration."

38. The unamended Article 239 envisaged administration of the States specified in Part C of the First Schedule of the Constitution by the President through a Chief Commissioner or a Lieutenant Governor to be appointed by him or through the Government of a neighbouring State. This was subject to other provisions of Part VIII of the Constitution. As against this, amended Article 239 lays down that subject to any law enacted by Parliament every Union Territory shall be administered by the President acting through an Administrator appointed by him with such designation as he may specify. In terms of Clause (2) of Article 239 (amended), the President can appoint the Governor of a State as an Administrator of an adjoining Union territory and on his appointment, the Governor is required to exercise his function as an Administrator independently of his Council of Ministers. The difference in the language of the unamended and amended Article 239 makes it clear that prior to 1.11.1956, the President could administer Part C State through a Chief Commissioner or a Lieutenant Governor, but, after the amendment, every Union Territory is required to be administered by the President through an Administrator appointed by him with such designation as he may specify. In terms of Clause 2 of Article 239 (amended), the President is empowered to appoint the Governor of State as the

Administrator to an adjoining Union Territory and once appointed, the Governor, in his capacity as Administrator, has to act independently of the Council of Ministers of the State of which he is the Governor.

39. A reading of the Notification issued on 1.11.1966 shows that in exercise of the power vested in him under Article 239(1), the President directed that the Administrator shall exercise the power and discharge the functions of the State Government under the laws which were in force immediately before formation of the Union Territory of Chandigarh. This was subject to the President's own control and until further orders. By another notification issued on the same day, the President directed that all orders and other instruments made and executed in the name of the Chief Commissioner of Union Territory of Chandigarh shall be authenticated by the signatures of the specified officers. These notifications clearly brought out the distinction between the position of the Administrator and the Chief Commissioner insofar as the Union Territory of Chandigarh was concerned. Subsequently, the President appointed the Governor of Punjab as Administrator of the Union Territory of Chandigarh and separate notifications were issued for appointment of Adviser to the Administrator. The officers appointed as Adviser are invariably members of the Indian Administrative Service.

40. After about 2 years of the issuance of the first notification under Article 239(1) of the Constitution, by which the powers and functions exercisable by the State Government under various laws were generally entrusted to the Administrator, Notification dated 8.10.1968 was issued and the earlier notification was modified insofar as it related to the exercise of powers and functions by the Administrator under the Act and the President directed that subject to his control and until further orders, the powers and functions of 'the appropriate Government' shall also be exercised and discharged by the Administrator. Notification dated 8.10.1968 was superseded

by Notification dated 1.1.1970 and the President directed that subject to his control and until further orders, the powers and functions of 'the appropriate Government' shall also be exercised and discharged by the Administrator of every Union Territory whether known as the Administrator, the Chief Commissioner or the Lieutenant Governor. The last notification in the series was issued on 14.8.1989 superseding all previous Notifications. The language of that notification is identical to the language of Notification dated 1.1.1970.

41. There is marked distinction in the language of the notifications issued under Article 239(1) of the Constitution. By notification dated 1.11.1966, the President generally delegated the powers and functions of the State Government under various laws in force immediately before 1.11.1966 to the Administrator. By all other notifications, the power exercisable by 'the appropriate Government' under the Act and the Land Acquisition (Companies) Rules, 1963 were delegated to the Administrator. It is not too difficult to fathom the reasons for this departure from notification dated 1.11.1966. The Council of Ministers whose advice constitutes the foundation of the decision taken by the President was very much conscious of the fact that compulsory acquisition of land, though sanctioned by the provision of the Act not only impacts lives and livelihood of the farmers and other small landholders, but also adversely affect the agricultural and environment and ecology of the area. Therefore, with a view to avoid any possibility of misuse of power by the executive authorities, it has been repeatedly ordained that powers and functions vested in 'the appropriate Government' under the Act and the 1963 Rules shall be exercised only by the Administrator. The use of the expression 'shall also be exercised and discharged' in Notifications dated 8.10.1968, 1.1.1970 and 14.8.1989 is a clear pointer in this direction. The seriousness with which the Central Government has viewed such type of acquisition is also reflected from the decision taken by the Home Minister on 23.9.2010 in the

context of the report of the Special Auditor and the One-Man Committee. Thus, the acquisition of land for and on behalf of Union Territories must be sanctioned by the Administrator of the particular Union Territory and no other officer is competent to exercise the power vested in 'the appropriate Government' under the Act and the Rules framed thereunder.

42. We may now advert to Notification dated 25.2.1988 issued under Section 3(1) of the 1987 Act, vide which the Administrator directed that any power, authority or jurisdiction or any duty which he could exercise or discharge by or under the provisions of any law, rules or regulations as applicable to the Union Territory of Chandigarh shall be exercised or discharged by the Adviser except in cases or class of cases enumerated in the Schedule. There is nothing in the language of Section 3(1) of the 1987 Act from which it can be inferred that the Administrator can delegate the power exercisable by 'the appropriate Government' under the Act which was specifically entrusted to him by the President under Article 239(1) of the Constitution. Therefore, notification dated 25.2.1988 cannot be relied upon for contending that the Administrator had delegated the power of 'the appropriate Government' to the Adviser.

43. The issue deserves to be considered from another angle. While delegating the power, authority or jurisdiction vested in him by or under any law, rules or regulations as applicable to the Union Territory of Chandigarh, the Administrator had used the expression 'on the date of this notification'. This necessarily implies that the power of 'the appropriate Government' conferred upon or entrusted to the Administrator by the President under Article 239(1) after 25.2.1988 were not delegated to the Adviser. It is also apposite to note that Notification dated 14.8.1989 was issued under Article 239(1) in supersession of all previous notifications relating to the exercise of power and functions under the Act by the Administrators of various Union Territories. Therefore, even if it is assumed that vide Notification dated 25.2.1988 the Administrator had authorised the Adviser to exercise the power of 'the appropriate Government' under the Act, after the issuance of Notification dated 14.8.1989, the said delegation will be deemed to have ceased insofar as the exercise of power of 'the appropriate Government' under the Act and the Rules framed thereunder is concerned and in the absence of fresh delegation by the Administrator, the Adviser could not have exercised the power of the appropriate Government and sanctioned the acquisition of land for the purposes specified in Notifications dated 26.6.2006 and 2.8.2006 nor could he symbolically accept the recommendations of the LAO and record his satisfaction on the issue of need of land for the specified public purposes.

44. In view of the above discussion, we hold that the Adviser to the Administrator was not competent to accord approval to the initiation of the acquisition proceedings or take decision on the reports submitted by the LAO under Section 5-A (2) of the Act and record his satisfaction that the land was needed for the specified public purpose.

45. The next question which requires determination is whether the reports prepared by the LAO under Section 5A(2) were vitiated due to non-consideration of the objections filed by the landowners and the same could not be made basis for deciding whether the land was really needed for the particular public purpose. A cursory reading of the reports of the LAO may give an impression that he had applied mind to the objections filed under Section 5A(1) and assigned reasons for not entertaining the same, but a careful analysis thereof leaves no doubt that the officer concerned had not at all applied mind to the objections of the landowners and merely created a facade of doing so. In the opening paragraph under the heading "Observations", the LAO recorded that he had seen the revenue records and conducted spot inspection. He then reproduced the Statement of Objects and Reasons contained in the Bill

which led to the enactment of the Punjab New Capital (Periphery) Control Act, 1952 and proceed to extract some portion of reply dated 31.7.2006 sent by the Administrator to Surinder Singh Brar.

46. In the context of the statement contained in the first line of the paragraph titled "Observations", we repeatedly asked Shri Sudhir Walia, learned counsel assisting Dr. Rajiv Dhawan to show as to when the LAO had summoned the revenue records and when he had conducted spot inspection but the learned counsel could not produce any document to substantiate the statement contained in the two reports of the LAO. This leads to an inference that, in both the reports, the LAO had made a misleading and false statement about his having seen the revenue records and conducted spot inspection. That apart, the reports do not contain any iota of consideration of the objections filed by the landowners. Mere reproduction of the substance of the objections cannot be equated with objective consideration thereof in the light of the submission made by the objectors during the course of hearing. Thus, the violation of the mandate of Section 5A(2) is writ large on the face of the reports prepared by the LAO.

47. The reason why the LAO did not apply his mind to the objections filed by the appellants and other landowners is obvious. He was a minion in the hierarchy of the administration of the Union Territory of Chandigarh and could not have even thought of making recommendations contrary to what was contained in the letter sent by the Administrator to Surinder Singh Brar. If he had shown the courage of acting independently and made recommendation against the acquisition of land, he would have surely been shifted from that post and his career would have been jeopardized. In the system of governance which we have today, junior officers in the administration cannot even think of, what to say of, acting against the wishes/dictates of their superiors. One who violates this unwritten code of conduct does so at his own peril and is

described as a foolhardy. Even those constituting higher strata of services follow the path of least resistance and find it most convenient to tow the line of their superiors. Therefore, the LAO cannot be blamed for having acted as an obedient subordinate of the superior authorities, including the Administrator. However, that cannot be a legitimate ground to approve the reports prepared by him without even a semblance of consideration of the objections filed by the appellants and other landowners and we have no hesitation to hold that the LAO failed to discharge the statutory duty cast upon him to prepare a report after objectively considering the objections filed under Section 5A(1) and submissions made by the objectors during the course of personal hearing.

48. The Special Secretary, Finance and the Adviser to the Administrator also failed to act in consonance with the mandate of Section 5A(2) read with Section 6(1). They could not muster courage of expressing an independent opinion on the issue of compliance of Section 5A and need of the land for the specified public purposes. The noting recorded by the Special Secretary, Finance, which has been extracted hereinabove shows that the officer had virtually reproduced what the Administrator had mentioned in his letter dated 31.7.2006. The Adviser went a step further. He merely appended his signatures on the note recorded by the Special Secretary, Finance forgetting that in terms of the aforementioned two sections 'the appropriate Government' is required to take decision after considering the report of the LAO. The least which can be said about the manner in which the Adviser approved the note prepared by the Special Secretary, Finance is that there was abject failure on the part of the concerned officer to discharge his duty despite the fact that he was entrusted with the onerous task of taking a decision on behalf of 'the appropriate Government' after considering the reports of the LAO. The casual manner in which the senior officers of the Chandigarh Administration dealt with the serious issue of the acquisition of land of citizens signifies their total lack of

respect for the constitutional provision contained in Article 300A, the law enacted by Parliament, that is, the Act and interpretation thereof by the Courts. It seems that the officers were overawed by the view expressed by the Administrator and the instinct of self-preservation prompted them not to go against the wishes of the Administrator who wanted that additional land be acquired in the name of expansion of IT Park despite the fact that a substantial portion of the land acquired for Phase II had been allotted to a private developer.

49. At this stage, it will be useful to notice the provisions of Sections 3(ee), 3(f) (as substituted by Act No.68 of 1984), 4(1), 5A and 6(1). The same read as under:

"3(ee) the expression "appropriate Government" means, in relation to acquisition of land for the purposes of the Union, the Central Government, and, in relation to acquisition of land for any other purposes, the State Government;

3 (f) the expression 'public purpose' includes-

(i) the provision of village- sites, or the extension, planned development or improvement of existing village- sites;

(ii) the provision of land for town or rural planning;

(iii) the provision of land for planned development of land from public funds in pursuance of any scheme or policy of Government and subsequent disposal thereof in whole or in part by lease, assignment or outright sale with the object of securing further development as planned;

(iv) the provision of land for a corporation owned or controlled by the State;

(v) the provision of land for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by Government, any local authority or a corporation owned or controlled by the State;

(vi) the provision of land for carrying out any educational, housing, health or slum clearance scheme sponsored by Government or by any authority established by Government for carrying out any such scheme, or with the prior approval of the appropriate Government, by a local authority, or a society registered under the Societies Registration Act, 1860 (21 of 1860), or under any corresponding law for the time being in force in a state, or a co- operative society within the meaning of any law relating to co- operative societies for the time being in force in any State;

(vii) the provision of land for any other scheme of development sponsored by Government or with the prior approval of the appropriate Government, by a local authority;

(viii) the provision of any premises or building for locating a public office, but does not include acquisition of land for companies;

4. Publication of preliminary notification and power of officers thereupon.-

(1) Whenever it appears to the appropriate Government the land in any locality is needed or is likely to be needed for any public purpose or for a company, a notification to that effect shall be published in the Official Gazette and in two daily newspapers circulating in that locality of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the notification.

xxx xxx xxx

5A. Hearing of objections.-

(1) Any person interested in any land which has been notified under section 4, sub- section (1), as being needed or likely to be needed for a public purpose or for a Company may, within thirty days from the date of the publication of the notification, object to the acquisition of the land or of any land in the locality, as the case may be.

(2) Every objection under sub- section (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard[in person or by any person authorized by him in this behalf] or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, either make a report in respect of the land which has been notified under section 4, sub- section (1), or make different reports in respect of different parcels of such land, to the appropriate Government, containing his recommendations on the objections, together with the record of the proceedings held by him, for the decision of that Government. The decision of the appropriate Government on the objections shall be final.

(3) For the purpose of this section, a person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act.

6. Declaration that land is required for a public purpose.-

(1) Subject to the provision of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under section 5A, sub- section (2), that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect

under the signature of a Secretary to such Government or of some officer duly authorized to certify its orders and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under section 4, sub- section (I) irrespective of whether one report or different reports has or have been made (wherever required) under section 5A, sub-section (2):

Provided that no declaration in respect of any particular land covered by a notification under section 4, sub-section (1),—

(i) published after the commencement of the Land Acquisition (Amendment and Validation) Ordinance, 1967 (1 of 1967), but before the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of three years from the date of the publication of the notification; or

(ii) published after the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of one year from the date of the publication of the notification:

Provided further that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly put of public revenues or some fund controlled or managed by a local authority.

Explanation I.—In computing any of the periods referred to in the first proviso, the period during which any action or proceeding to be taken in pursuance of the notification issued under section 4, sub-section (1), is stayed by an order of a Court shall be excluded.

Explanation 2.—Where the compensation to be awarded

for such property is to be paid out of the funds of a corporation owned or controlled by the State, such compensation shall be deemed to be compensation paid out of public revenues.

(2) Every declaration shall be published in the Official Gazette, and in two daily newspapers circulating in the locality in which the land is situate of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such declaration to be given at convenient places in the said locality (the last of the date of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the declaration), and such declaration shall state the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected.

(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a Company, as the case may be; and, after making such declaration, the appropriate Government may acquire the land in manner hereinafter appearing."

50. Section 4(1) lays down that whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose or for a company, then a notification to that effect is required to be published in the Official Gazette and two daily newspapers having circulation in the locality. Of these, one paper has to be in the regional language. A duty is also cast on the Collector, as defined in Section 3(c), to cause public notice of the substance of such notification to be given at convenient places in the locality. The last date of publication and giving of public notice is treated as the date of publication of the notification.

51. Section 5A, which embodies the most important dimension of the rules of natural justice, lays down that any person interested in any land notified under Section 4(1) may, within 30 days of publication of the notification, submit objection in writing against the proposed acquisition of land or of any land in the locality to the Collector. The Collector is required to give the objector an opportunity of being heard either in person or by any person authorised by him or by pleader. After hearing the objector(s) and making such further inquiry, as he may think necessary, the Collector has to make a report in respect of land notified under Section 4(1) with his recommendations on the objections and forward the same to the Government along with the record of the proceedings held by him. The Collector can make different reports in respect of different parcels of land proposed to be acquired.

52. Upon receipt of the Collector's report, the appropriate Government is required to take action under Section 6(1) which lays down that after considering the report, if any, made under Section 5-A(2), the appropriate Government is satisfied that any particular land is needed for a public purpose, then a declaration to that effect is required to be made under the signatures of a Secretary to the Government or of some officer duly authorised to certify its orders. This section also envisages making of different declarations from time to time in respect of different parcels of land covered by the same notification issued under Section 5(1). In terms of clause (ii) of the proviso to Section 6(1), no declaration in respect of any particular land covered by a notification issued under Section 4(1), which is published after 24-9-1989 can be made after expiry of one year from the date of publication of the notification. To put it differently, a declaration is required to be made under Section 6(1) within one year from the date of publication of the notification under Section 4(1).

53. In terms of Section 6(2), every declaration made under Section 6(1) is required to be published in the Official Gazette

and in two daily newspapers having circulation in the locality in which the land proposed to be acquired is situated. Of these, at least one must be in the regional language. The Collector is also required to cause public notice of the substance of such declaration to be given at convenient places in the locality. The declaration to be published under Section 6(2) must contain the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area or a plan is made in respect of land and the place where such plan can be inspected.

54. Section 6(3) lays down that the declaration made under Section 6(1) shall be conclusive evidence of the fact that land is needed for a public purpose. After publication of the declaration under Section 6, the Collector is required to take order from the State Government for the acquisition of land to be carved out and measured and planned (Sections 7 and 8). The next stage as envisaged is issue of public notice and individual notice to the persons interested in the land to file their claim for compensation. Section 11 envisages holding of an enquiry into the claim and passing of an award by the Collector who is required to take into consideration the provisions contained in Section 23.

55. In *Nandeshwar Prasad and Anr. v. The State of Uttar Pradesh and Ors. (*1964) 3 SCR 425, this Court observed that the right to file objections under Section 5-A is a substantial right when a person's property is being threatened with acquisition. In *Munshi Singh v. Union of India* (1973) 2 SCC 337, the importance of the rule of hearing embodied in Section 5-A was highlighted in the following words:

> "Section 5-A embodies a very just and wholesome principle that a person whose property is being or is intended to be acquired should have a proper and reasonable opportunity of persuading the authorities concerned that acquisition of the property belonging to that person should not be made. We may refer to the observation of this court in Nandeshwar Prasad v. State of U.P that the right to file objections under Section 5-A is a substantial right when a person's property is being threatened with acquisition and that right cannot be taken away as if by a side wind. Sub-section (2) of Section 5-A makes it obligatory on the Collector to give an objector an opportunity of being heard. After hearing all objections and making further inquiry he is to make a report to the appropriate Government containing his recommendation on the objections. The decision of the appropriate Government on the objections is then final. The declaration under Section 6 has to be made after the appropriate Government is satisfied, on a consideration of the report, if any, made by the Collector under Section 5-A(2). The legislature has, therefore, made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections."
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> (emphasis supplied)

56. In *State of Punjab v. Gurdial Singh* (1980) 2 SCC 471, the Court observed:

> "……it is fundamental that compulsory taking of a man's property is a serious matter and the smaller the man the more serious the matter. Hearing him before depriving him is both reasonable and pre-emptive of arbitrariness, and denial of this administrative fairness is constitutional anathema except for good reasons."

57. In *Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai* (2005) 7 SCC 627, this Court analysed Section 5-A in the following words:

> "……..Section 5-A of the Act is in two parts. Upon receipt of objections, the Collector is required to make such further enquiry as he may think necessary whereupon

he must submit a report to the appropriate Government in respect of the land which is the subject-matter of notification under Section 4(1) of the Act. The said report would also contain recommendations on the objections filed by the owner of the land. He is required to forward the records of the proceedings held by him together with the report. On receipt of such a report together with the records of the case, the Government is to render a decision thereupon. It is now well settled in view of a catena of decisions that the declaration made under Section 6 of the Act need not contain any reason. ..... However, considerations of the objections by the owner of the land and the acceptance of the recommendations by the Government, it is trite, must precede a proper application of mind on the part of the Government. ..... Furthermore, the State is required to apply its mind not only on the objections filed by the owner of the land but also on the report which is submitted by the Collector upon making other and further enquiries therefor as also the recommendations made by him in that behalf. The State Government may further inquire into the matter, if any case is made out therefor, for arriving at its own satisfaction that it is necessary to deprive a citizen of his right to property."

58. What needs to be emphasised is that hearing required to be given under Section 5A(2) to a person who is sought to be deprived of his land and who has filed objections under Section 5A(1) must be effective and not an empty formality. The Collector who is enjoined with the task of hearing the objectors has the freedom of making further enquiry as he may think necessary. In either eventuality, he has to make report in respect of the land notified under Section 4(1) or make different reports in respect of different parcels of such land to the appropriate Government containing his recommendations on the objections and submit the same to the appropriate Government along with the record of proceedings held by him for the latter's decision. The appropriate Government is obliged to consider the report,

if any, made under Section 5A(2) and then record its satisfaction that the particular land is needed for a public purpose. This exercise culminates into making a declaration that the land is needed for a public purpose and the declaration is to be signed by a Secretary to the Government or some other officer duly authorised to certify its orders. The formation of opinion on the issue of need of land for a public purpose and suitability thereof is sine qua non for issue of a declaration under Section 6(1). Any violation of the substantive right of the landowners and/or other interested persons to file objections or denial of opportunity of personal hearing to the objector(s) vitiates the recommendations made by the Collector and the decision taken by the appropriate Government on such recommendations. The recommendations made by the Collector without duly considering the objections filed under Section 5A(1) and submissions made at the hearing given under Section 5A(2) or failure of the appropriate Government to take objective decision on such objections in the light of the recommendations made by the Collector will denude the decision of the appropriate Government of statutory finality. To put it differently, the satisfaction recorded by the appropriate Government that the particular land is needed for a public purpose and the declaration made under Section 6(1) will be devoid of legal sanctity if statutorily engrafted procedural safeguards are not adhered to by the concerned authorities or there is violation of the principles of natural justice. The cases before us are illustrative of flagrant violation of the mandate of Sections 5A(2) and 6(1). Therefore, the second question is answered in affirmative.

59. Before parting with this aspect of the case, we consider it proper to deal with the two judgments relied upon by Dr. Dhawan in support of his submission that the declaration issued under Section 6(1) is conclusive and the satisfaction recorded by the competent authority cannot be subjected to judicial review. In *Somawanti v. State of Punjab* (supra), after analysing the relevant provisions, the majority of the Constitution

Bench observed:

"The scheme of the Act is that normally the provisions of Section 5-A have to be complied with. Where, in pursuance of the provisions, objections are lodged, these objections will have to be decided by the Government. For deciding them the Government will have before it the Collector's proceedings. It would, therefore, be clear that the declaration that a particular land is needed for a public purpose for a company is not to be made by the Government arbitrarily, but on the basis of material placed before it by the Collector. The provision of sub-section (2) of Section 5-A make the decision of the Government on the objections final while those of sub-section (1) of Section 6 enable the Government to arrive at its satisfaction. Sub-section (3) of Section 6 goes further and says that such a declaration shall be conclusive evidence that the land is needed for a public purpose or for a company.

The Government has to be satisfied about both the elements contained in the expression "needed for a public purpose or a company". Where it is so satisfied, it is entitled to make a declaration. Once such a declaration is made sub-section (3) invests it with conclusiveness. That conclusiveness is not merely regarding the fact that the Government is satisfied but also with regard to the question that the land is needed for a public purpose or is needed for a company, as the case may be. Then again, the conclusiveness must necessarily attach not merely to the need but also to the question whether the purpose is a public purpose or what is said to be a company is a company. There can be no "need" in the abstract. It must be a need for a "public purpose" or for a company.

The Act has empowered the Government to determine the question of the need of land for a public purpose or for a company and the jurisdiction conferred upon it to do so is not made conditional upon the existence of a collateral or extraneous fact. It is the existence of the need for a public purpose which gives jurisdiction to the Government to make a declaration under Section 6(1) and makes it the sole judge whether there is in fact a need and whether the purpose for which there is that need is a public purpose. The provisions of sub-section (3) preclude a court from ascertaining whether either of these ingredients of the declaration exists."

(emphasis supplied)

60. In *Ganga Bishnu Swaika v. Calcutta Pinjrapole Society* (supra), the two-Judge Bench considered the amendment made in the Act in 1923 and observed:

"As sub-section (1) stood prior to 1923 the words were "subject to the provisions of Part VII of the Act, when it appears to the Local Government that any particular land is needed for a public purpose or for a Company, a declaration shall be made etc. The amendment of 1923 dropped these words and substituted the words "when the Local Government is satisfied after considering the report, if any, made under Section 5-A, sub-section (2)" etc. It seems that the amendment was considered necessary because the same Amendment Act inserted Section 5-A for the first time in the Act which gave a right to persons interested in the land to be acquired to file objections and of being heard thereon by the Collector. The new section enjoined upon the Collector to consider such objections and make a report to the Government, whose decision on such objections was made final. One reason why the word "satisfaction" was substituted for the word "appears" seems to be that since it was the Government who after considering the objections and the report of the Collector thereon was to arrive at its decision and then make the declaration required by sub-section (2), the appropriate words would be "when the Local Government is satisfied"

rather than the words "when it appears to the Local Government". The other reason which presumably led to the change in the language was to bring the words in sub-section (1) of Section 6 in line with the words used in Section 40 where the Government before granting its consent to the acquisition for a Company has to "be satisfied" on an inquiry held as provided thereinafter. Since the Amendment Act 38 of 1923 provided an inquiry into the objections of persons interested in the land under Section 5-A, Section 40 also was amended by adding therein the words "either on the report of the Collector under Section 5-A or". Section 41 which requires the acquiring Company to enter into an agreement with the Government also required satisfaction of the Government after considering the report on the inquiry held under Section 40. The Amendment Act 38 of 1923 now added in Section 41 the report of the Collector under Section 5-A, if any. These amendments show that even prior to the 1923 Amendment Act, whenever the Government was required by the Act to consider a report, the legislature had used the word satisfaction on the part of the Government. Since the Amendment Act 1923 introduced Section 5-A requiring the Collector to hold an inquiry and to make a report and required the Government to consider that report and the objections dealt with in it, the legislature presumably thought it appropriate to use the same expression which it had used in Sections 40 and 41 where also an inquiry was provided for and the Government had to consider the report of the officer making such inquiry before giving its consent.

Sub-section (1) provides that when the Government is satisfied that a particular land is needed for a public purpose or for a Company, a declaration shall be made "to that effect". Satisfaction of the Government after consideration of the report, if any, made under Section 5-A is undoubtedly a condition precedent to a valid

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