MURUGESAN AND ORS.
v.
STATE THROUGH INSPECTOR OF POLICE
(Criminal Appeal No. 53 of 2009)

OCTOBER 12, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Penal Code, 1860 – ss. 120B, 147, 148, 332 and 302 r/w. ss. 34/109/149 – Prosecution under – Of 23 accused – Acquittal of all the accused by trial court – High Court convicting 19 of the accused u/ss. 120B and 302 r/w. ss. 34/149 – Some of the accused also convicted u/s. 332 r/w s. 149 – Two convicts died – On appeal by the remaining 17 convicts, held: Conviction by High Court not justified – The view taken by the trial court was a possible view, and could not have been interdicted by the High Court – The conclusions reached by High Court were of fragile nature – The evidence of the two eye-witnesses, the FIR and the dying declaration were not trustworthy – Acquittal order passed by trial court confirmed.

Code of Criminal Procedure, 1973 – s. 378 – Appeal against acquittal – Power of High Court – Held: Reversal of acquittal can be done by the High Court only if conclusions recorded by the trial court do not reflect a possible view – So long as the view taken by the trial court is not impossible to be arrived at and reasons therefor, relatable to the evidence and materials on record, are disclosed, any further scrutiny in exercise of the power under s.378 is not called for – Appeal.

Dying Declaration – Efficacy of – Certification by the doctor regarding the condition of the deceased must be carefully balanced with all other surroundings facts and circumstances – Evidence Act, 1872 – s. 32.

Appeal – To Supreme Court u/s.379 Cr.P.C. and u/s. 136 of Constitution of India – Difference between –Explained – Code of Criminal Procedure, 1973 – s. 379 – Constitution of India, 1950 – Article 136.

Words and Phrases – Expression 'possible view' – Meaning of.

The prosecution case was that a land dispute between D-2 and A-1 had led to the murder of A-15's brother for which D-1, D-2 and D-3 were arrayed as accused and they were on bail. It was the further case of the prosecution that another case was also pending against D-1 and D-2 in respect of an incident of bomb attack on the rival party. In that case D-1 and D-2 were arrested and brought to the court by police constables PW5 and PW7, for execution of their bail bonds. PWs 1, 2, 3 and 4 alongwith D-3 had come to meet D-1 and D-2 in the court complex. On the same day, A-14, A-15 and A-16, who were also under arrest in another case, were brought to the court for further remand. While the other accused persons had come to the court complex to meet A-14, A-15 and A-16, the said three accused exhorted the other accused persons to kill D-1 and D-2, at which they inflicted fatal injuries on D-1, D-2 and D-3.

D-1 had run towards the Police Station near the court complex and made a statement (Ex P-1), on the basis of which FIR was registered. In hospital, D-1 made a Dying Declaration on the certification of the Medical Officer (PW-21). While the Dying Declaration was being recorded, D-1 slipped into coma and died thereafter. D-2 and D-3 had died on way to the hospital. The police constables (PWs 5 and 7) were eye-witnesses and they submitted a report (Ex P-2) in this regard.

All the 23 persons arrayed as accused in the instant case (A-1 to A-23) were charged u/ss. 120B, 147, 148, 332 and 302 r/w. ss. 34/109/149 IPC. The trial court acquitted

all the accused of all the charges. High Court set aside the acquittal of A-1 to A-19 and convicted them u/ss. 120B and 302 r/w s. 34/149 IPC. Some of the accused were also found guilty u/ss. 148 and 332 r/w. s. 149 IPC. A-6 and A-11 died in the meanwhile. Hence the present appeal by the remaining 17 convicts (appellants).

Allowing the appeal, the Court

HELD: 1.1 The power of the High Court extends to a review of the entire evidence on the basis of which the order of acquittal had been passed by the trial court and thereafter to reach the necessary conclusion as to whether order of acquittal is required to be maintained or not. An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court. If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court. [Paras 14, 16] [15-G-H; 16-A; 18-E-F]

Sheo Swarup v. King Emperor **AIR 1934 PC 227 (2);** ***T****ulsiram Kanu v. State* **AIR 1954 SC 1;** *Balbir Singh v. State of Punjab* **AIR 1957 SC 216;** *M.G. Agarwal v. State of Maharashtra* **AIR 1963 SC 200: 1963 SCR 405;** *Khedu Mohton v. State of Bihar* **(1970) 2 SCC 450: 1971 (1) SCR 839;** *Sambasivan v. State of Kerala* **(1998) 5 SCC 412: 1998 (3) SCR 280;** *Bhagwan Singh v. State of M.P.* **(2002) 4 SCC 85;** *State of Goa v. Sanjay Thakran* **(2007) 3 SCC 755: 2007 (3) SCR 507;** *Chandrappa and Ors. v. State*

of Karnataka **2007 (4) SCC 415: 2007 (2) SCR 630 – relied on.**

1.2 The inhibition to interfere must be perceived only in a situation where the view taken by the trial court is not a possible view. The use of the expression "possible view" is conscious and not without good reasons. The said expression is in contradistinction to expressions such as "erroneous view" or "wrong view" which, at first blush, may seem to convey a similar meaning though a fine and subtle difference would be clearly discernible. A possible view denotes an opinion which can exist or be formed irrespective of the correctness or otherwise of such an opinion. A view taken by a court lower in the hierarchical structure may be termed as erroneous or wrong by a superior court upon a mere disagreement. But such a conclusion of the higher court would not take the view rendered by the subordinate court outside the arena of a possible view. The correctness or otherwise of any conclusion reached by a court has to be tested on the basis of what the superior judicial authority perceives to be the correct conclusion. A possible view, on the other hand, denotes a conclusion which can reasonably be arrived at, regardless of the fact where it is agreed upon or not by the higher court. The fundamental distinction between the two situations have to be kept in mind. So long as the view taken by the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, the view taken by the trial court cannot be interdicted and that of the High Court supplanted over and above the view of the trial court. [Paras 25 and 27] [24-G; 25-A-D-H; 26-A]

Oxford English Dictionary – **referred to.**

1.3. The reversal of the acquittal can be done by the High Court only if the conclusions recorded by the trial court did not reflect a possible view. A consideration on

the basis on which the trial court had founded its order of acquittal in the present case clearly reflects a possible view. There may, however, be disagreement on the correctness of the same. But that is not the test. So long as the view taken is not impossible to be arrived at and reasons therefor, relatable to the evidence and materials on record, are disclosed, any further scrutiny in exercise of the power under Section 378 CrPC is not called for. [Paras 25 and 28] [24-G; 26-A-B]

2.1 An appeal to this Court against an order of the High Court affirming or reversing the order of conviction recorded by the trial court is contingent on grant of leave by this Court under Article 136 of the Constitution. However, if an order of acquittal passed by the trial court is to be altered by the High Court to an order of conviction and the accused is to be sentenced to death or to undergo life imprisonment or imprisonment for more than 10 years, leave to appeal to this Court has been dispensed with and Section 379 Cr.P.C. provides a statutory right of appeal to the accused in such a case. The aforesaid distinction, therefore, has to be kept in mind and due notice must be had of the legislative intent to confer a special status to an appeal before this Court against an order of the High Court altering the acquittal made by the trial court. [Para 17] [19-A-C]

State of Rajasthan v. Abdul Mannan **2011 (8) SCC 65: 2011 (7) SCR 1099 – relied on.**

2.2 The conviction of the accused appellants recorded by the High Court under the different provisions of the IPC and the sentences imposed cannot be sustained. To prove the charge of criminal conspiracy u/s. 120B IPC, the prosecution had examined PWs 15, 16 and 17, who did not support the prosecution case in any manner at all. The view taken by the trial Judge in

acquitting the accused was a possible view. As against the same, the High Court came to the conclusion that, notwithstanding the evidence of PWs 15, 16 and 17, the charge of criminal conspiracy has been established as the prosecution had succeeded in proving that the accused persons (except A-14, A-15 and A-16) had come to the place of occurrence armed with dangerous weapons and at the mere call of the said accused, they had attacked D-1, D-2 and D-3 with the weapons that they had brought. The conclusion of the High Court is not argreeable. Firstly, if the conclusion recorded by the trial court was a possible conclusion, the High Court ought not to have ventured further in the matter. Secondly, the aforesaid exercise, did not also occasion a correct conclusion inasmuch as the presence of the accused at the spot armed with weapons and responding to the call of A-14, A-15 and A-16 to attack the deceased, even if assumed, in the absence of any further evidence, cannot establish a prior arrangement/agreement or a meeting of minds amongst the accused to commit the offence of murder so as to sustain a charge of criminal conspiracy under Section 120B IPC. [Paras 32, 19 and 20] [28-D-E; 20-C, E-G; 21-A-C]

2.3 The plea of *alibi* set up on behalf of A-4 and A-12 on the basis of the evidence of DWs 1, 2 and 3 was accepted by the trial court by holding that the defence evidence tendered in the case was established. Reading the evidence of DWs 1, 2 and 3 and the documents exhibited in this regard (Ex. D-4, D-5, D-8, D-9, D-10) it is possible to take a view that aforesaid two accused were not present at the place of occurrence at the relevant time. The exercise undertaken by the High Court, overlooks the basic principle of law in the matter of exercise of jurisdiction while hearing an appeal against an order of acquittal. Therefore the manner in which the

High Court had dealt with this aspect of the case, cannot be approved. [Para 21] [21-D-F; 22-A-B]

2.4 So far as the conviction of the accused appellants under Section 302 and the other provisions of the IPC are concerned, the conclusions reached by the High Court in the present case are of fragile nature. The view taken by the High Court on the aspects of the evaluation of the evidence of PW1, PW2, PW3 and PW4 and the evidence of PW5 and PW7 is not acceptable. The evidence of PW-1, PW-2, PW-3 and PW-4, at best, shows the presence of the convicted accused and the deceased at the place of occurrence on the day of the incident. Not mentioning the name of any of the accused in the report submitted to the court i.e. Ex. P-2, particularly, when according to PW-5 and PW-7, the accused persons were known to them is a vital lacuna which cannot be explained by confining the scope of the said report as has been done by the High Court. At the same time, the narration of the names of several of the accused in the examination of PW-5 and PW-7 in court, would amount to an improvement or an exaggeration on the part of the prime witnesses of the prosecution thereby casting a serious doubt on their reliability. The failure on the part of PW-5 and PW-7 to use the fire arms issued to them despite an assault committed by as many as 23 persons resulting to the death of three, as the prosecution has alleged, is both mysterious and inexplicable. So is the registration of the FIR under Section 302 IPC at 3.15 p.m. when the deceased persons were still alive. [Paras 29, 30 and 31] [26-F-H; 27-A-E-G; 28-A-B]

2.5 The efficacy of the dying declaration (Ex. P-4) when the maker thereof had slipped into a coma, even before completing the statement, would have a serious effect on the capacity of D-1 to make such a statement. The certification made by PW-21 with regard to the

condition of the deceased is definitely not the last word. Though ordinarily and in the normal course, such an opinion should be accepted and acted upon by the court, in cases, where the circumstances so demand such opinions must be carefully balanced with all other surrounding facts and circumstances. [Para 31] [28-B-D]

Case Law Reference:

AIR 1934 PC 227 (2)	**Relied on**	**Para 15**
AIR 1954 SC 1	**Relied on**	**Para 15**
AIR 1957 SC 216	**Relied on**	**Para 15**
1963 SCR 405	**Relied on**	**Para 15**
1971 (1) SCR 839	**Relied on**	**Para 15**
1998 (3) SCR 280	**Relied on**	**Para 15**
(2002) 4 SCC 85	**Relied on**	**Para 15**
2007 (3) SCR 507	**Relied on**	**Para 15**
2007 (2) SCR 630	**Relied on**	**Para 16**
2011 (7) SCR 1099	**Relied on**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 53 of 2009.

From the Judgment & Order dated 04.09.2008/19.09.2008 of the Madurai Bench of Madras High Court in Criminal Appeal No. 713 of 2000.

V. Kanagaraj, V.G. Pragasam, S.J. Aristotle, Praburamasubramanian for the Appellants.

Guru Krishna Kumar, AAG, B. Balaji, Prasana Venkat, Veeramani for the Respondent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. This appeal, under Section 379

of the Code of Criminal Procedure, 1973 is against the order of the High Court of Madras reversing the acquittal of the appellants and convicting and sentencing each one of them under different Sections of the Indian Penal Code (hereinafter shall be referred to as 'IPC'). All the accused persons have been convicted under Section 120 B of the IPC and sentenced to undergo rigorous imprisonment for a period of seven years each. The accused appellants have also been found guilty under Section 302 of IPC for their individual acts or constructively under Section 34/149 IPC for commission of the said offence. They have been accordingly sentenced to undergo rigorous imprisonment for life. Some of the appellants have also been found guilty of the offences under Section 148 and Section 332 read with Section 149 IPC for which sentence of rigorous imprisonment of three years have been imposed. Aggrieved the present appeal has been filed.

2. For the sake of clarity reference to the accused is hereinafter being made in the chronological order arranged in the proceedings of the trial and the three deceased, i.e., Veeraperumal, Karumpuli and Madaswamy are being referred to as D-1, D-2 and D-3 respectively.

The case of the prosecution, in short, is that there was a land dispute between Karumpuli (D-2) and his family and A-1, Thirumani, and his party. There were civil litigations between the parties over the said property. According to the prosecution, on account of the aforesaid dispute, the younger brother of the accused No.15 was murdered and in the said case D-1, D-2 and D-3 were arrayed as accused. At the relevant point of time, the three deceased persons were on bail. There was another case pending against D-1 and D-2 in respect of an incident of a bomb attack on the rival party. In connection with the said case, the aforesaid two deceased who were arrested were brought to the court of the Judicial Magistrate, Vilathikulam on the day of the occurrence, i.e. 22.09.1991 for execution of the bail bonds etc. so as to enable them to be released on bail. Thiru Bagavati (PW-1), Alagar (PW-2), Periyasami (PW-3) and

Kalimuthu (PW-4) along with D-3 had come to meet D-1 and D-2 in the court complex. On the same day, A-14, A-15, and A-16 who were also under arrest in another case were brought by the police to the court complex for purpose of further remand. The other accused persons had come to see A-14, A-15, and A-16. Both the groups, including the deceased and the accused who were brought from jail, were engaged in their respective conversations. According to the prosecution, at a point of time between 2.00 p.m. and 3.00 p.m., A-14, A-15 and A-16 asked the other members of the accused party who had come to meet them to finish off D-1 and D-2. On being so instigated, according to the prosecution, the other members of the accused party inflicted fatal injuries on D-1, D-2 and D-3. It is the further case of the prosecution that D-1, on being inflicted injuries by the accused persons, ran towards the Police Station, situated near the court complex and made a statement (Ex. P-1) based on which the FIR (Ex. 22) was registered by PW-27. Thereafter, the FIR was sent to the Court of Judicial Magistrate, Vilathikulam which was received at about 5.00. p.m. on the same day.

The injured D-1 was shifted to the Government Hospital and on an intimation being sent by PW-20 Dr. Rajaram (Raj Mohan), Assistant Civil Surgeon attached to Government Hospital, the learned Judicial Magistrate (PW-6) came to the hospital to record the dying declaration of the injured, Veeraperumal. According to the prosecution, while his statement was being recorded, D-1, slipped into a coma and, thereafter, died at about 4.07 p.m. The dying declaration (Exh P-4) was recorded in the presence of Paulsama, Medical Officer (PW-21) who had certified that the injured (D-1) was in a fit condition to make the statement. It is the further case of the prosecution that the other injured namely, Karumpulli and Madasamy were also brought to the hospital but had died on the way.

It is further alleged by the prosecution that D-1 and D-2 were brought to the court complex from the jail premises by

Police Constables Sankaranarayanan (PW-5) and Shanmugaraj (PW-7). Both the aforesaid police constables, according to the prosecution, were eye-witnesses to the occurrence and they had submitted a report to the Judicial Magistrate, Vilathikulam (Ex. P-2) in this regard. The prosecution has further alleged that in the course of the attack by A-1 Thirumani, A-5 had also sustained injuries for which A-5 had filed a complaint and he was medically examined. The prosecution also claims that at the instance of A-7, five aruvals were recovered.

3. On the completion of the investigation, charge sheet was submitted against all the accused under different Sections of the IPC. The offences alleged being triable by the Court of Sessions, the case was committed for trial to the Court of the learned Sessions Judge, Tuticorin. The learned trial court framed charges against the present appellants (17 in number) and six others under Sections 120 B, 147, 148, 332 and 302 read with Section 34/109/149 of the IPC. The accused having pleaded not guilty were tried. In the trial held, 30 witnesses were examined by the prosecution who had also exhibited a large number of documents besides as many as 20 material objects. Three witnesses were examined on behalf of the defence and as many as 10 documents were also exhibited. The learned trial Judge by the judgment and order dated 16.04.1988 held that the charges levelled against the accused persons have not been proved beyond all reasonable doubt. Accordingly, all the 23 accused were acquitted. On an appeal being filed by the State, the High Court by the impugned judgment and order dated 04-09-2008/19-09-2008 had set aside the acquittal of A-1 to A-19 and convicted them under different Sections of the IPC. The acquittal ordered by the learned trial court in respect of A-20, A-21, A-22, and A-23 was, however, maintained by the High Court. Of the 19 accused who have been convicted by the High Court, A-6 and A-11 have died in the mean time. Consequently, it is the 17 accused persons against whom the order of conviction continues to be effective who have instituted the present appeal.

4. A reading of the judgment dated 16.04.1998 passed by the learned trial court indicates that the learned court did not consider it prudent to act on the evidence of PW-1 inasmuch as it was found that there are certain innovations in the evidence tendered by the said witness who is also closely related to at least two of the deceased persons. PW-2, PW-3 and PW-4 not having supported the prosecution case and having been declared hostile, the learned trial court thought it proper not to place any reliance whatsoever on the testimony of the said witnesses. The evidence of PW-5 and PW-7, the Police constables who had escorted D-1 and D-2 to the court complex from the prison, was elaborately considered by the learned trial court before coming to the conclusion that the evidence of the two aforesaid witnesses did not inspire the confidence of the court. The detailed reasons which had persuaded the trial court to take the above view will be noticed in the discussions that will follow.

5. Coming to Ex. P-1, (complaint lodged by D-1 in the police station immediately after the incident) and the formal FIR lodged on that basis (Ex. P-22) the learned trial court was of the opinion that the said documents do not accurately reflect the situation as claimed to have taken place in view of the fact that FIR under Section 302 IPC was registered at 3.15 pm when the victims of the alleged assault were still alive.

6. In so far as Ex. P-2, i.e., the report lodged by PWs-5 and 7 before the Judicial Magistrate is concerned, the learned trial court was of the view that the involvement of any of the accused have not been mentioned in the said report which renders the same open to grave suspicion and doubt, besides affecting the oral testimony of PW-5 and PW-7 tendered in court later i.e. after five years wherein the names of the alleged attackers, i.e., the accused have been mentioned with complete certainty and precise accuracy. The dying declaration (Ex. P-4) of D-1 was also considered unsafe to be relied upon in view

of the fact that the names of only three of the accused have been recorded in the dying declaration in contrast to the names of 11 accused that finds mention in Ex. P-1 and that charge sheet was eventually filed against 23 accused persons.

7. The learned trial court also considered the evidence of DW-1, DW-2, and DW-3 to hold that the said evidence proved and established the presence of A-4 in the office of the Sub-Registrar and A-12 in ITI, Thoothukudi rather than at the place of the occurrence at the time of the incident. The learned trial court, on the said finding, held the prosecution case to be false to the extent disproved by the defence evidence. It is on the aforesaid broad basis that the learned trial court thought it fit to come to the conclusion that in the present case the involvement of any of the accused has not been proved beyond reasonable doubt. Consequently, the learned court thought it proper to acquit all the accused persons from all such charges that had been levelled against them by the prosecution.

8. Specifically in so far as the charge of criminal conspiracy under Section 120 B IPC is concerned, the learned trial court took into account the evidence of A-15, A-16 and A-17, all of whom denied what the prosecution had alleged, namely, that on the day previous to the incident i.e. 21.09.1991, there was a meeting in the village where all the accused persons (except A-14, A-15 and A-16) had planned and conspired to murder D-1 and D-2 on the next day when they were to be brought to Court. In this regard, the learned trial court also took into account the statement made by the learned Public Prosecutor virtually admitting that, on the evidence adduced, no case of criminal conspiracy have been made out against any of the accused. In so far as A-20 to A-23 are concerned the learned trial court specifically came to the conclusion that no evidence whatsoever had been adduced by the prosecution to show the presence of any of the aforesaid accused persons at the time and place of occurrence.

9. The very elaborate judgment of the learned trial court

has been considered in an equally elaborate and exhaustive discourse by the High Court in the appeal filed by the State of Tamil Nadu. In so far as the charge under Section 120B is concerned, the High Court was of the view that the materials on record had established that all the accused persons (except A-14, A-15 and A-16) had come to the court complex armed with dangerous weapons which was indiscriminately used on the victims merely at the call of A-14 to A-16. The said evidence, according to the High Court, conclusively proved the commission of the offence under Section 120 B of the IPC. The High Court was of the view that such a conclusion is the inevitable result of the process of inference by which proof of commission of the offence of criminal conspiracy was required to be reached in the present case.

10. In so far as the other offences are concerned, the High Court, after noticing the evidence adduced by the prosecution witnesses and the several documents brought on record, took the view that PW-2, PW-3 and PW-4, though were declared hostile, had supported the prosecution, at least to the extent that the three deceased persons and all the convicted accused were present in the court complex on the date and at the time when the occurrence is alleged to have taken place. Reliance to the aforesaid extent on the evidence tendered by the hostile witnesses, according to the High Court, is permissible in law and therefore the aforesaid part of the evidence could not be discarded in toto. The High Court, for the reasons set out in the impugned judgment, came to the conclusion that the evidence tendered by PW-5 and PW-7 is trustworthy and reliable. While the detailed reasons in this regard will be noticed in the subsequent paragraphs of this order along with the reasons set out by the learned trial court for taking the opposite view, once the aforesaid conclusion i.e. that PW-5 and PW-7 are reliable and trustworthy was reached by the High Court, the prosecution case had assumed an entirely different complexion. Proceeding further, the High Court also considered the evidentiary worth of the documents exhibited by the prosecution

as Ex.P-1, Ex.P-2 and Ex.P-4 and held the said documents to be aiding the prosecution case. The doubts expressed by the learned trial court with regard to the said documents were answered by the High Court to be of no consequence for reasons that we will shortly notice and consider.

11. Coming to the defence evidence, the High Court was of the view that the evidence tendered by DW-1, DW-2, DW-3 did not conclusively prove the plea of alibi advanced on behalf of A-4 and A-12, inasmuch as such evidence did not establish the presence of the aforesaid two accused at the places claimed by them. However, in so far as A-20 to A-23 are concerned the High Court agreed with the findings of the learned trial court. Accordingly, while maintaining the acquittal of the aforesaid accused persons, i.e. A-20 to A-23, the High Court was of the view that the acquittal of all the other accused should be reversed and they are liable to be convicted for different offences, details of which have already been noticed. Thereafter, upon hearing each of the accused persons, the sentences in question, as already noted, were awarded.

12. We have heard Shri V. Kanagaraj, learned senior counsel for the appellants and Shri Guru Krishna Kumar, AAG for the State. We have given our anxious consideration to the submissions made on behalf of the rival parties and we have carefully considered the oral and documentary evidence adduced by the parties in the course of the trial.

13. Before proceeding any further it will be useful to recall the broad principles of law governing the power of the High Court under Section 378 Cr.PC, while hearing an appeal against an order of acquittal passed by a trial Judge.

14. An early but exhaustive consideration of the law in this regard is to be found in the decision of *Sheo Swarup v. King Emperor*[1] wherein it was held that the power of the High Court extends to a review of the entire evidence on the basis of which

1. AIR 1934 PC 227 (2).

the order of acquittal had been passed by the trial court and thereafter to reach the necessary conclusion as to whether order of acquittal is required to be maintained or not. In the opinion of the Privy Council no limitation on the exercise of power of the High Court in this regard has been imposed by the Code though certain principles are required to be kept in mind by the High Court while exercising jurisdiction in an appeal against an order of acquittal. The following two passages from the report in *Sheo Swarup* (supra) adequately sum up the situation:

> "There is in their opinion no foundation for the view, apparently supported by the judgments of some Courts in India, that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact, except in cases in which the lower Court has "obstinately blundered," or has "through incompetence, stupidity or perversity" reached such "distorted conclusions as to produce a positive miscarriage of justice," or has in some other way so conducted itself as to produce a glaring miscarriage of justice, or has been tricked by the defence so as to produce a similar result.
>
> Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should, 'be placed, upon that power, unless, it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by

a Judge who had the advantage of seeing the witnesses. To state this however is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice.

(page 229 of the report)"

15. The principles of law laid down by the Privy Council in *Sheo Swarup* (supra) has been consistently followed by this Court in a series of subsequent pronouncements of which reference may be illustratively made to the following:

Tulsiram Kanu v. State[2]*, Balbir Singh v. State of Punjab*[3]*, M.G. Agarwal v. State of Maharashtra*[4]*, Khedu Mohton v. State of Bihar*[5]*, Sambasivan v. State of Kerala*[6]*, Bhagwan Singh v. State of M.P.*[7] and *State of Goa v. Sanjay Thakran*[8]*.*

16. A concise statement of the law on the issue that had emerged after over half a century of evolution since *Sheo Swarup* (supra) is to be found in para 42 of the report in *Chandrappa & Ors. v. State of Karnataka*[9]*.* The same may, therefore, be usefully noticed below:

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, re-

2. AIR 1954 SC 1
3. AIR 1957 SC 216.
4. AIR 1963 SC 200.
5. (1970) 2 SCC 450.
6. (1998) 5 SCC 412.
7. (2002) 4 SCC 85.
8. (2007) 3 SCC 755.
9. 2007 (4) SCC 415.

appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) <u>If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court</u>."

(*emphasis is ours*)

17. Another significant aspect of the law in this regard which has to be noticed is that an appeal to this Court against an order of the High Court affirming or reversing the order of conviction recorded by the trial court is contingent on grant of leave by this Court under Article 136 of the Constitution. However, if an order of acquittal passed by the trial court is to be altered by the High Court to an order of conviction and the accused is to be sentenced to death or to undergo life imprisonment or imprisonment for more than 10 years, leave to appeal to this Court has been dispensed with and Section 379 of the Code of Criminal Procedure, 1973, provides a statutory right of appeal to the accused in such a case. The aforesaid distinction, therefore, has to be kept in mind and due notice must be had of the legislative intent to confer a special status to an appeal before this court against an order of the High Court altering the acquittal made by the trial court. The issue had been dealt with by this Court in *State of Rajasthan v. Abdul Mannan*[10] in the following terms, though in a different context:

> "12. As is evident from the above recorded findings, the judgment of conviction was converted to a judgment of acquittal by the High Court. Thus, the first and foremost question that we need to consider is, in what circumstances this Court should interfere with the judgment of acquittal. Against an order of acquittal, an appeal by the State is maintainable to this Court only with the leave of the Court. On the contrary, if the judgment of acquittal passed by the trial court is set aside by the High Court, and the accused is sentenced to death, or life imprisonment or imprisonment for more than 10 years, then the right of appeal of the accused is treated as an absolute right subject to the provisions of Articles 134(1)(a) and 134(1)(b) of the Constitution of India and Section 379 of the Code of Criminal Procedure, 1973. In light of this, it is obvious that an appeal against acquittal is considered on

10. 2011 (8) SCC 65.

> slightly different parameters compared to an ordinary appeal preferred to this Court."

18. Having dealt with the principles of law that ought to be kept in mind while considering an appeal against an order of acquittal passed by the trial court, we may now proceed to examine the reasons recorded by the trial court for acquitting the accused in the present case and those that prevailed with the High Court in reversing the said conclusion and in convicting and sentencing the accused appellants.

19. Insofar as the charge of criminal conspiracy under Section 120B IPC is concerned, there is no doubt and dispute that to prove the said charge the prosecution had examined PWs 15,16 and 17 who did not support the prosecution case in any manner at all. In fact, each of the aforesaid three witnesses categorically denied that they had made any statement before the Investigating Officer with regard to any agreement amongst the accused on 21.09.1991 to commit the murder of D-1 and D-2 on the next day when they were to be brought to the court. In fact it was noted by the learned trial court that the public prosecutor has virtually conceded that the evidence on record did not establish the charge of criminal conspiracy against any of the accused. The learned trial Judge, therefore, acquitted all the accused of the said charge. The view taken by the learned trial Judge was definitely a possible view. As against the same, the High Court came to the conclusion that, notwithstanding the evidence of PWs 15,16 and 17, the charge of criminal conspiracy has been established as the prosecution had succeeded in proving that the accused persons (except A-14, A-15 and A-16) had come to the place of occurrence armed with dangerous weapons and at the mere call of the said accused, they had attacked D-1, D-2 and D-3 with the weapons that they had brought. In this regard, the High Court relied on the fact that it is an established proposition of law that direct evidence of criminal conspiracy would rarely be forthcoming and a conclusion in this regard has to be, largely, inferential.

20. On a careful consideration of this aspect of the case, we find ourselves unable to agree with the conclusion of the High Court. Firstly, if the conclusion recorded by the learned trial court was a possible conclusion, the High Court ought not to have ventured further in the matter. Secondly, the aforesaid exercise, in our considered view, did not also occasion a correct conclusion inasmuch as the presence of the accused at the spot armed with weapons and responding to the call of A-14, A-15 and A-16 to attack the deceased, even if assumed, in the absence of any further evidence, cannot establish a prior arrangement/agreement or a meeting of minds amongst the accused to commit the offence of murder so as to sustain a charge of criminal conspiracy under Section 120B IPC.

21. Before going into the main issue in the case, namely, the culpability of any or all the accused under Section 302 IPC either on the basis of constructive liability under Section 34/149 IPC or on the basis of the individual acts of the accused, an incidental aspect of the case with regard to the plea of alibi set up by A-4 and A-12 can be conveniently dealt with at this stage. The plea of alibi set up on behalf of the aforesaid two accused on the basis of the evidence of DWs - 1, 2 and 3 was accepted by the learned trial court by holding that the defence evidence tendered in the case had established that at the time of the occurrence A-12 was in the ITI, Tuticorin whereas A-4 was in the office of the Sub-Registrar, Tuticorin. Reading the evidence of DWs - 1, 2 and 3 and the documents exhibited in this regard (Ex. D-4, D-5, D-8, D-9, D-10) it is possible to take a view that aforesaid two accused were not present at the place of occurrence at the relevant time. The High Court answered the aforesaid issue by stating that as it was admitted by DW-1 in cross-examination that a student could leave the college after being marked present in the attendance register and as the sale deed (Ex.D-5) claimed to have been executed by A-4 in Tuticorin at the time of the incident did not specify the time of execution, the plea of alibi set up by A-4 and A-12 was not satisfactorily proved.

The exercise undertaken by the High Court, once again, overlooks the basic principle of law that this Court has repeatedly emphasized in the matter of exercise of jurisdiction while hearing an appeal against an order of acquittal passed by the trial court. We are, therefore, unable to accord our approval to the manner in which the High Court had dealt with this aspect of the case.

22. This would now require us to consider the main issue in the case, namely, the liability of the accused appellants under the provisions of IPC other than those dealt with in the discussions that have preceded.

The trial court considered it prudent to view the testimony of PW-1 with great care and circumspection as the said witness is the younger brother of one of the deceased. The learned trial court also took into account the fact that PW-1, though examined as an eye witness, could not specifically say as to which accused had assaulted which particular deceased and the weapon(s) used. That apart, the learned trial court took into account the fact that PW-1 had sought to implicate the acquitted A-20 to A-23 who, admittedly, were not present at the place of occurrence as stated by the investigating officer of the case examined as PW-30.

The learned trial court while considering the evidence of PW-2, PW-3, and PW-4, took into account the fact that all the said witnesses are closely related to the deceased and that they were declared hostile by the prosecution. Specifically, it was noticed by the learned trial court that PW-2 had stated that immediately after incident had occurred he had run away from the place and had mingled with the crowd. PW-2 had further stated that he had not seen who had hacked whom. PW-3, it was noticed by the learned trial, had stated that he had returned to the place of the incident after taking lunch and, therefore, he did not see the occurrence. On the other hand, PW-4 had stated that the assault was committed by a group of men and had not named any particular accused. In such circumstances

the learned trial court came to the conclusion that the conviction of any of the accused under Section 302 IPC either for their individual acts or on the principle of constructive liability under Section 34/149 IPC would not be warranted on the basis of the evidence of PWs 1 to 4.

23. The learned trial court, thereafter, proceeded to examine the evidence of PW-5 and PW-7, the police constables who had escorted D-1 and D-2 to the court complex. On such consideration, the learned trial court came to the finding that the evidence of PW-5 regarding pelting of stones on him and PW-7 by some of the accused was unacceptable as no resultant injuries are recorded in the wound certificates (Ex. P-15 and P-16). In this regard, the learned trial court also noticed that the injuries mentioned in the aforesaid wound certificates were caused by aruval and knife and ,further, that neither PW-5 nor PW-7 had informed the doctor about any injuries being caused by pelting of stones. The apparently false involvement of A-20 to A-23 in the incident made by PWs - 5 and 7; the wrong identification of several of the accused made in court by PW-5 and PW-7; the absence of any test identification parade are the other circumstances that was taken note of by the learned trial court to arrive at the conclusion that the evidence of PW-5 and PW-7 is not reliable. The injuries on PW-5 claimed to have been caused by an aruval was also found by the learned trial court not to be free from doubt or ambiguity. This is because, according to PW-5, he had tried to prevent the blow dealt with the aruval by A-17, which fell on the 'rifle but' carried by him and had also injured him on the left hand. The rifle carried by PW-5, however, was not exhibited in the trial. Moreover, according to the prosecution, D-1 was examined at about 3.25 p.m and PW-5 and PW-7 were examined between 4.05 and 4.15 p.m. PW-5 in his deposition had, however, stated that he along with PW-7 was treated around 5.45 – 6.00 p.m. and at that time D-1 was also in the hospital undergoing treatment. All these facts were duly taken note of along with the oral and documentary evidence adduced

by the prosecution to show that D-1 had died at 4.07 PM.

24. Apart from the above inconsistencies which were considered by the learned trial court to be grave and severe, the fact that the FIR registered at 3.15 p.m. was so registered, inter alia, under Section 302 IPC though, admittedly, the deceased persons were alive at that time was also taken note of by the learned trial court as being a significant aspect of the case which required an explanation from the prosecution which was not forthcoming. The discrepancies between Ex. P-1 wherein 11 accused were named and Ex. P-2 where none of the accused were named and the contents of Ex. P-4 where only three accused were named were duly taken note of by the learned trial court apart from the fact that in Ex. P-2 it had been stated that 4-5 persons from outside had come and committed the assault. The prosecution had alleged that A-5 had received cut injuries on his forehand and 4 of his fingers had been severed due to an aruval blow aimed by A-1 on D-1 which fell on A-5. The fact that the FIR filed with regard to injuries caused to A-5 by A-1 had ended in a closure report had also been considered by the leaned trial court. The non-examination of any disinterested witnesses though several such persons had witnessed the incident is an additional circumstance that was relied upon by the learned trial court to come to the conclusion that the accused appellants should be exonerated of the charges levelled against them.

25. In the above facts can it be said that the view taken by the trial court is not a possible view? If the answer is in the affirmative, the jurisdiction of the High Court to interfere with the acquittal of the accused appellants, on the principles of law referred to earlier, ought not to have been exercised. In other words, the reversal the acquittal could have been made by the High Court only if the conclusions recorded by the learned trial court did not reflect a possible view. It must be emphasized that the inhibition to interfere must be perceived only in a situation where the view taken by the trial court is not a possible view. The use of the expression "possible view" is conscious and not

without good reasons. The said expression is in contradistinction to expressions such as "erroneous view" or "wrong view" which, at first blush, may seem to convey a similar meaning though a fine and subtle difference would be clearly discernible.

26. The expressions "erroneous", "wrong" and "possible" are defined in the Oxford English dictionary in the following terms:

"**erroneous** : wrong;incorrect.

wrong : 1. not correct or true, mistaken
2. unjust,dishonest or immoral

possible : 1. capable of existing, happening, or being achieved.
2. that may exist or happen, but that is not certain or probable."

27. It will be necessary for us to emphasize that a possible view denotes an opinion which can exist or be formed irrespective of the correctness or otherwise of such an opinion. A view taken by a court lower in the hierarchical structure may be termed as erroneous or wrong by a superior court upon a mere disagreement. But such a conclusion of the higher court would not take the view rendered by the subordinate court outside the arena of a possible view. The correctness or otherwise of any conclusion reached by a court has to be tested on the basis of what the superior judicial authority perceives to be the correct conclusion. A possible view, on the other hand, denotes a conclusion which can reasonably be arrived at regardless of the fact where it is agreed upon or not by the higher court. The fundamental distinction between the two situations have to be kept in mind. So long as the view taken by the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, the view taken by the trial court cannot be interdicted and that of the High

Court supplanted over and above the view of the trial court.

28. A consideration on the basis on which the learned trial court had founded its order of acquittal in the present case clearly reflects a possible view. There may, however, be disagreement on the correctness of the same. But that is not the test. So long as the view taken is not impossible to be arrived at and reasons therefor, relatable to the evidence and materials on record, are disclosed any further scrutiny in exercise of the power under Section 378 Cr.P.C. was not called for.

29. However, as the High Court had embarked upon an in-depth consideration of the entire evidence on record and had arrived at conclusions contrary to those of the trial court, the discussions now will have to centre around the basis disclosed by the order of the High Court for reversing the acquittal of the accused appellants. The grounds that had prevailed upon the High Court to hold that the commission of the offence of criminal conspiracy under Section 120 B IPC have been proved by the prosecution in the present case have already been noticed. Our reasons for disagreeing with the said view of the High Court have also been indicated hereinabove. Similarly, the reasons for our disagreement with the conclusion of the High Court that the defence evidence adduced in the case did not satisfactorily establish the plea of alibi put forward by A-4 and A-12 have also been indicated. The aforesaid aspects of the case, therefore, would not need any further dilation and it is the reasons for the conviction of the accused appellants under Section 302 and the other provisions of the IPC will be required to be noticed by us.

30. The High Court has concluded that the evidence of PW-1, PW-2, PW-3 and PW-4 have supported the prosecution case to a certain extent and the said fact could not have been ignored only because PW-2, PW-3 and PW-4 were declared hostile. Even if the aforesaid reasoning of the High Court is to be accepted what would logically follow there from is that the

evidence of PW-1, PW-2, PW-3 and PW-4, at best, shows the presence of the convicted accused and the deceased at the place of occurrence on the day of the incident. In so far as the evidence of PW-5 and PW-7 is concerned, the High Court was of the view that the failure to mention the names of any of the convicted accused in Ex. P-2 can be explained by the fact that PW-5 and PW-7 must have been in a state of shock and, furthermore, Ex. P-2 was a report to the Magistrate, not of the incident as such, but a report of what had happened to the prisoners who were brought by PW-5 and PW-7 from the jail for production in the court. The errors on the part of PW-5 and PW-7 in identifying some of the accused in Court have been understood by the High Court to be on account of the long lapse of time between the incident and date of their examination in Court (5 years). The absence of any Test Identification Parade, according to the High Court, did not materially affect the prosecution case, as PW-5 and PW-7 had stated in their evidence that the accused used to frequently come to police station in connection with other cases in which they were involved.

31. We find it difficult to agree with the view taken by the High Court on the above aspects of the case. Not mentioning the name of any of the accused in the report submitted to the court i.e. Ex. P-2, particularly, when according to PW-5 and PW-7, the accused persons were known to them is a vital lacuna which cannot be explained by confining the scope of the said report as has been done by the High Court. At the same time, the narration of the names of several of the accused in the examination of PW-5 and PW-7 in court, in our view, would cease to be a mere discrepancy with reference to the earlier version of the witnesses as mentioned in Ex. P-2. The same would amount to an improvement or an exaggeration on the part of the prime witnesses of the prosecution thereby casting a serious doubt on their reliability. PW-5 and PW-7 are supposed to be members of a disciplined force. The lacuna in Ex. P-2 (absence of any names) cannot be reasonably understood to

be on account of any shock suffered by the witnesses due to the incident. The failure on the part of PW-5 and PW-7 to use the fire arms issued to them despite an assault committed by as many as 23 persons resulting to the death of three, as the prosecution has alleged, is both mysterious and inexplicable. So is the registration of the FIR under Section 302 IPC at 3.15 p.m. when the deceased persons were still alive. The efficacy of the dying declaration (Ex. P-4) when the maker thereof had slipped into a coma even before completing the statement would have a serious effect on the capacity of D-1 to make such a statement. The certification made by PW-21 with regard to the condition of the deceased is definitely not the last word. Though ordinarily and in the normal course such an opinion should be accepted and acted upon by the court, in cases, where the circumstances so demand such opinions must be carefully balanced with all other surrounding facts and circumstances. All the above, in our view, demonstrates the fragile nature of the conclusions reached by the High Court in the present case.

32. For the above reasons, we hold that conviction of the accused appellants recorded by the High Court under the different provisions of the IPC and the sentences imposed cannot be sustained. We accordingly allow this appeal, set aside the judgment and order dated 04.09.2008/19.09.2008 passed by the High Court of Madras and confirm the order of acquittal dated 16.04.1998 passed by the learned trial court. The accused appellants, if in custody, be released forthwith unless required in any other case.

K.K.T. Appeal allowed.

TUKARAM KANA JOSHI & ORS. THR. POWER OF ATTORNEY HOLDER
v.
M.I.D.C. & ORS.
*(*Civil Appeal No. 7780 of 2012)

NOVEMBER 2, 2012

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

Constitution of India, 1950:

Articles 21 and 300-A – Initiation of land acquisition proceedings notifying the land for acquisition – Acquisition proceedings lapsed – Still possession of the land taken by the Authority – No compensation granted to land-owner – Writ petition – Dismissed by High Court on the ground of delay and non-availability of certain documents – On appeal, held: Acquisition of property tantamounts to deprivation and such deprivation can take place only in accordance with law and cannot be done by way of executive fiat or order or administrative caprice – Right to property is not only a constitutional right, or fundamental right or a statutory right, but also a human right – Depriving the land-owners of their immovable properties, was a clear violation of Article 21 – Land Acquisition Act, 1894.

Article 14 – Acquisition of land – Benefit of acquisition given to some land-owners while refused to some – Held: Refusal to some land-owners to acquisition benefits is discriminatory – Land Acquisition.

Delay/Laches – Acquisition of Land, without granting any compensation therefor – Writ petition – Dismissed on the ground of delay/laches by High Court – On appeal, held: High Court committed an error in dismissing the petition on the

ground of delay – Delay and laches is one of the facets to deny exercise of discretion and not an absolute impediment – The court should exercise the discretion, when there is continuity of cause of action, or the situation shocks the judicial conscience and when no third party interest is involved – The present case is not hit by the doctrine of delay and laches as it is not a constitutional limitation, the cause of action was continuous and the situation shocks the judicial conscience.

The land of the predecessor-in-interest of the appellants was notified u/s. 4 of Land Acquisition Act in the year 1964 by the respondent-Authority, for a project for industrial development. The acquisition proceedings lapsed as no subsequent proceedings were taken up thereafter. However, the possession of the land was taken by the State authorities and the land was handed over to Industrial Development Corporation. The predecessor-in-interest were not granted any compensation, while similarly situated persons were granted compensation. The appellants had been pursuing the authorities for compensation. They were unable to get any compensation or any land in lieu of the acquired lands as per the beneficial schemes floated by the State Authorities. Therefore, the appellants filed writ petition. The High Court dismissed the petition on the ground of delay, and the non-availability of certain documents. Hence the present appeal.

Allowing the appeal, the Court.

HELD: 1.1 The appellants were deprived of their immovable property in 1964, when Article 31 of the Constitution was still intact and the right to property was a part of fundamental rights under Article 19 of the Constitution. Even after the Right to Property seized to be a Fundamental Right, taking possession of or acquiring the property of a citizen most certainly

tantamounts to deprivation and such deprivation can take place only in accordance with the "law", as the said word has specifically been used in Article 300-A of the Constitution. Such deprivation can be only by resorting to a procedure prescribed by a statute. The same cannot be done by way of executive fiat or order or administration caprice. [Para 6] [40-A-C]

Jilubhai Nanbhai Khachar, etc. etc. v. State of Gujarat and Anr. **AIR 1995 SC 142 : 1994 (1) Suppl. SCR 807 – relied on.**

1.2 The right to property is now considered to be not only a constitutional or a statutory right, but also a human right. Though, it is not a basic feature of the Constitution or a fundamental right. Human rights are considered to be in realm of individual rights, such as the right to health, the right to livelihood, the right to shelter and employment etc. Now however, human rights are gaining an even greater multi faceted dimension. The right to property is considered, very much to be a part of such new dimension. [Para 7] [40-F-G]

Lachhman Dass v. Jagat Ram and Ors. **(2007) 10 SCC 448: 2007(2) SCR 980***;* *Amarjit Singh and Ors. v. State of Punjab and Ors*. **(2010) 10 SCC 43: 2010 (12) SCR 163***;* *Narmada Bachao Andolan v. State of Madhya Pradesh and Anr.* **AIR 2011 SC 1989: 2011 (6) SCR 443***;* *State of Haryana v. Mukesh Kumar and Ors*. **AIR 2012 SC 559 : 2011 (14) SCR 21; and** *Delhi Airtech Services Pvt. Ltd. v. State of U.P and Anr.* **AIR 2012 SC 573: 2012 (12) SCR 191 – relied on.**

1.3 In the present case, the functionaries of the State took over possession of the land belonging to the appellants without any sanction of law. The appellants had repeatedly asked for grant of the benefit of compensation. The State must either comply with the

procedure laid down for acquisition, or requisition, or any other permissible statutory mode. There is a distinction, a true and concrete distinction, between the principle of "eminent domain" and "police power" of the State. Under certain circumstances, the police power of the State may be used temporarily, to take possession of property but the present case clearly shows that neither of the said powers have been exercised. It is evident that the act of the State amounts to encroachment, in exercise of "absolute power" which in common parlance is also called abuse of power or use of muscle power. The authorities have treated the land owner as a 'subject' of medieval India, but not as a 'citizen' under the Constitution. [Para 9] [41-E-H; 42-A-B]

1.4. Depriving the appellants of their immovable properties, was a clear violation of Article 21 of the Constitution. In a welfare State, statutory authorities are bound, not only to pay adequate compensation, but there is also a legal obligation upon them to rehabilitate such persons. The non-fulfillment of their obligations would tantamount to forcing the said uprooted persons to become vagabonds or to indulge in anti-national activities as such sentiments would be born in them on account of such ill-treatment. Therefore, it is not permissible for any welfare State to uproot a person and deprive him of his fundamental/constitutional/human rights, under the garb of industrial development. [Para 15] [44-C-F]

2.1 The High Court committed an error in holding the appellants non-suited on the ground of delay and non-availability of records, as the court failed to appreciate that the appellants had been pursing their case persistently. Accepting their claim, the Statutory Authorities had even initiated the acquisition proceedings in 1981, which subsequently lapsed for want of further

action on the part of those authorities. The claimants are illiterate and inarticulate persons, who have been deprived of their fundamental rights by the State, without it resorting to any procedure prescribed by law, without the court realising that the enrichment of a welfare State, or of its instrumentalities, at the cost of poor farmers is not permissible, particularly when done at the behest of the State itself. [Para 14] [43-H; 44-A-B]

2.2 The State, especially a welfare State which is governed by the Rule of Law, cannot arrogate itself to a status beyond one that is provided by the Constitution. The Constitution of India is an organic and flexible one. Delay and laches is adopted as a mode of discretion to decline exercise of jurisdiction to grant relief. The Court is required to exercise judicial discretion. The said discretion is dependent on facts and circumstances of the cases. Delay and laches is one of the facets to deny exercise of discretion. It is not an absolute impediment. There can be mitigating factors, continuity of cause of action, etc. That apart, if whole thing shocks the judicial conscience, then the Court should exercise the discretion more so, when no third party interest is involved. Thus analysed, the petition is not hit by the doctrine of delay and laches as the same is not a constitutional limitation, the cause of action is continuous and further the situation certainly shocks judicial conscience. [Para 10] [42-B-E]

H.D Vora v. State of Maharashtra and Ors. **AIR 1984 SC 866: 1984 (2) SCR 693 – relied on.**

2.3 The question of condonation of delay is one of discretion and has to be decided on the basis of the facts of the case at hand, as the same vary from case to case. It will depend upon what the breach of fundamental right and the remedy claimed are and when and how the delay arose. It is not that there is any period of limitation for the

Courts to exercise their powers under Article 226, nor is it that there can never be a case where the Courts cannot interfere in a matter, after the passage of a certain length of time. There may be a case where the demand for justice is so compelling, that the High Court would be inclined to interfere in spite of delay. Ultimately, it would be a matter within the discretion of the Court and such discretion, must be exercised fairly and justly so as to promote justice and not to defeat it. The validity of the party's defence must be tried upon principles substantially equitable. [Para 11] [42-E-H; 43-A]

P.S. Sadasivaswamy v. State of T.N. **AIR 1974 SC 2271: 1975 (2) SCR 356***;* *State of M.P. and Ors. v. Nandlal Jaiswal and Ors.* **AIR 1987 SC 251: 1987 (1) SCR 1***;* **and** *Tridip Kumar Dingal and Ors. v. State of West Bengal and Ors.* **(2009) 1 SCC 768: 2008 (15) SCR 194 – relied on.**

2.4 No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. Discretion must be exercised judiciously and reasonably. In the event that the claim made by the applicant is legally sustainable, delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest, cannot be sustained on the sole ground of laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in the injustice being done, because of a non-deliberate delay. The court should not harm innocent parties if their rights have infact emerged, by delay on the part of the Petitioners. [Para 12] [43-B-E]

Durga Prasad v. Chief Controller of Imports and Exports

and Ors. **AIR 1970 SC 769: 1969 (2) SCR 596*;*** *Collector, Land Acquisition, Anantnag and Anr. v. Mst. Katiji and Ors*. **AIR 1987 SC 1353: 1987 (2) SCR 387*;*** *Dehri Rohtas Light Railway Company Ltd. v. District Board, Bhojpur and Ors.* **AIR 1993 SC 802: 1992 (2) SCR 155*;*** *Dayal Singh and Ors. v. Union of India and Ors.* **AIR 2003 SC 1140: 2003 (1) SCR 714*;* and** *Shankara Co-op Housing Society Ltd. v. M. Prabhakar and Ors.* **AIR 2011 SC 2161: 2011 (7) SCR 468 – relied on.**

3. The appellants have been seriously discriminated against *qua* other persons, whose land was also acquired. Some of them were given the benefits of acquisition, including compensation in the year 1966. This kind of discrimination not only breeds corruption, but also dis-respect for governance, as it leads to frustration and to a certain extent, forces persons to take the law into their own hands. The findings of the High Court, that requisite records were not available, or that the appellants approached the authorities at a belated stage are contrary to the evidence available on record and thus, cannot be accepted and excused as it remains a slur on the system of governance and justice alike, and an anathema to the doctrine of equality, which is the soul of the Constitution. Even under valid acquisition proceedings, there is a legal obligation on the part of the authorities to complete such acquisition proceedings at the earliest, and to make payment of requisite compensation. The appeals etc. are required to be decided expeditiously, for the sole reason that, if a person is not paid compensation in time, he will be unable to purchase any land or other immovable property, for the amount of compensation that is likely to be paid to him at a belated stage. [Para 17] [44-H; 45-A-D]

K. Krishna Reddy and Ors. v. The Special Dy. Collector,

Land Acquisition Unit II, LMD Karimnagar, Andhra Pradesh, **AIR 1988 SC 2123: 1988 (2) Suppl. SCR 853 – relied on.**

4. In order to redress the grievances of the appellants, the respondent-authorities would notify the land in dispute under Section 4 of the Act within a period of 4 weeks from the date of this judgment. Section 6 declaration will be issued within a period of one week thereafter. As the appellants have full notice and information with respect to the proceedings, publication in the newspapers either of the notification or of the declaration under the Act are dispensed with. Notice under Section 9 of the Act will be served within a period of 4 weeks after the publication of Section 6 declaration and award will be made within a period of three months thereafter. The deemed acquisition proceedings would thus, be concluded most expeditiously. The market value of the land in dispute be assessed as it prevails on the date on which the Section 4 notification is published in the Official Gazette. Payment of compensation/award amount will be made to the claimants/persons-interested immediately thereafter, alongwith all statutory benefits. The appellants shall be entitled to pursue the statutory remedies available to them for further enhancement of compensation, if so desired. [Para 20] [46-B-F]

Case Law Reference:

1994 (1) Suppl. SCR 807	**Relied on**	**Para 1**
2007(2) SCR 980	**Relied on**	**Para 2**
2010 (12) SCR 163	**Relied on**	**Para 2**
2011 (6) SCR 443	**Relied on**	**Para 2**
2011 (14) SCR 211	**Relied on**	**Para 2**
2012 (12) SCR 191	**Relied on**	**Para 2**

1984 (2) SCR 693	**Relied on**	**Para 4**
1975 (2) SCR 356	**Relied on**	**Para 5**
1987 (1) SCR 1	**Relied on**	**Para 5**
2008 (15) SCR 194	**Relied on**	**Para 5**
1969 (2) SCR 596	**Relied on**	**Para 6**
1987 (2) SCR 387	**Relied on**	**Para 6**
1992 (2) SCR 155	**Relied on**	**Para 6**
2003 (1) SCR 714	**Relied on**	**Para 6**
2011 (7) SCR 468	**Relied on**	**Para 6**
1988 (2) Suppl. SCR 853	**Relied on**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7780 of 2012.

From the Judgment & Order dated 14.11.2011 of the High Court of Judicature at Bombay in Writ Petition No. 9513 of 2009.

V.C. Daga, Dilip Annasaheb Taur, Sujay N. Gowde, Retu Rastogi, Anil Kumar for the Appellant.

Guru Prasad Pal, Ramni Taneja, Anil Shrivastav, Pankaj Bhasme, A.S. Bhasme, B.H. Marlapalle, Shankar Chillarge, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Leave granted.

2. This appeal has arisen from the impugned judgment and order dated 14.11.2011, passed by the High Court of Bombay in Writ Petition No.9513 of 2009, by way of which the High Court has rejected the claim of the appellants for any compensation

due to them for the land taken by the respondent authorities, without resorting to any procedure prescribed by law.

3. The facts and circumstances giving rise to this appeal are as under:

A. The land in dispute admeasuring 0-2-3 and 0-7-1 (9500 sq.mtrs.) in Survey nos. 2 and 3 respectively, situate in the revenue estate of village Shirwame Taluka and District Thane, was owned by the predecessors-in-interest of the appellants, namely, Kana Ganpat Joshi, Maruti Kana Joshi, Dinanath Ganpat Joshi and Gopinath Ganpat Joshi. A very large chunk of land including the said land stood notified under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the 'Act') on 6.6.1964 for the establishment of the Ulhas Khore Project i.e. a project for industrial development. However, no subsequent proceedings were taken up thereafter, and the acquisition proceedings lapsed. The predecessors-in-interest of the appellants were not merely illiterate farmers, but were also absolutely unaware of their rights and hence too inarticulate to claim them. Thus, they could be persuaded by the officers of the respondent authorities to hand over possession of the said land. Actual physical possession of the said land was taken by the State authorities and handed over to the Maharashtra Industrial Development Corporation (hereinafter called as the 'Development Corporation') in the year 1964 itself.

B. Similarly situated persons who were also deprived of their rights in a similar manner were granted compensation vide order dated 17.6.1966.

C. The respondent-authorities realised in 1981 that grave injustice had been done to the appellants. Thus, in respect of the land in dispute, a fresh notification under Section 4 of the Act dated 14.5.1981 was issued. However, no further proceedings under the Act were initiated. The appellants had been pursuing the authorities persuading them to complete the

deemed acquisition proceedings, but despite their efforts, even a declaration under Section 6 of the Act was not issued and therefore, such proceedings also died a natural death.

D. On 30.4.1988, the Development Corporation, under the instructions of the Government of Maharashtra handed over the possession of the said land to the City Industrial Development Corporation of Maharashtra (hereinafter referred to as 'CIDCO'). The appellants were unable to get any compensation for the said land or even for that matter, any land in lieu of the lands so taken, in spite of their best efforts made in this regard. Various beneficial schemes were floated by the State authorities in favour of persons who had been deprived of their livelihood and those, whose land had been acquired for the same purpose and under such schemes, such uprooted persons were granted a particular piece of developed land, proportionate to their area acquired. But, appellants' efforts in this regard also could not be fruitful.

E. As the appellants were unable to get any relief from any authority, though they were continuously pursuing their remedies by approaching the Special Land Acquisition Officer, as well as the Revenue Authorities of the State, without any success whatsoever, they then, feeling totally distraught/ frustrated, approached the High Court of Bombay as a last resort, by filing Writ Petition No. 9513 of 2009. The same was dismissed by the High Court only on the grounds of delay, and the non-availability of certain documents.

Hence, this appeal.

4. We have heard the learned counsel for the parties and perused the record.

5. This Court has dealt with this case on several occasions in the past and has repeatedly asked the State authorities to be sensitive, sympathetic and requested them to put forward suggestions before the court, to enable it to redress the

grievances of the appellants. The respondents herein have placed various affidavits on record and the facts of the case have fairly been admitted.

6. The appellants were deprived of their immovable property in 1964, when Article 31 of the Constitution was still intact and the right to property was a part of fundamental rights under Article 19 of the Constitution. It is pertinent to note that even after the Right to Property seized to be a Fundamental Right, taking possession of or acquiring the property of a citizen most certainly tantamounts to deprivation and such deprivation can take place only in accordance with the "law", as the said word has specifically been used in Article 300-A of the Constitution. Such deprivation can be only by resorting to a procedure prescribed by a statute. The same cannot be done by way of executive fiat or order or administration caprice. In *Jilubhai Nanbhai Khachar, etc. etc. v. State of Gujarat & Anr.,* AIR 1995 SC 142, it has been held as follows:-

> *"In other words, Article 300-A only limits the power of the State that no person shall be deprived of his property save by authority of law. There is no deprivation without due sanction of law. Deprivation by any other mode is not acquisition or taking possession under Article 300-A. In other words, if there is no law, there is no deprivation."*

7. The right to property is now considered to be, not only a constitutional or a statutory right, but also a human right. Though, it is not a basic feature of the Constitution or a fundamental right. Human rights are considered to be in realm of individual rights, such as the right to health, the right to livelihood, the right to shelter and employment etc. Now however, human rights are gaining an even greater multi faceted dimension. The right to property is considered, very much to be a part of such new dimension.

(Vide: *Lachhman Dass v. Jagat Ram & Ors.* (2007) 10 SCC 448; *Amarjit Singh & Ors. v. State of Punjab & Ors.*

(2010) 10 SCC 43; *Narmada Bachao Andolan v. State of Madhya Pradesh & Anr.* AIR 2011 SC 1989; *State of Haryana v. Mukesh Kumar & Ors.* AIR 2012 SC 559 and *Delhi Airtech Services Pvt. Ltd. v. State of U.P & Anr.* AIR 2012 SC 573)

8. In the case at hand, there has been no acquisition. The question that emerges for consideration is whether, in a democratic body polity, which is supposedly governed by the Rule of Law, the State should be allowed to deprive a citizen of his property, without adhering to the law. The matter would have been different had the State pleaded that it has right, title and interest over the said land. It however, concedes to the right, title and interest of the appellants over such land and pleads the doctrine of delay and laches as grounds for the dismissal of the petition/appeal.

9. There are authorities which state that delay and laches extinguish the right to put forth a claim. Most of these authorities pertain to service jurisprudence, grant of compensation for a wrong done to them decades ago, recovery of statutory dues, claim for educational facilities and other categories of similar cases, etc. Though, it is true that there are a few authorities that lay down that delay and laches debar a citizen from seeking remedy, even if his fundamental right has been violated, under Article 32 or 226 of the Constitution, the case at hand deals with a different scenario altogether. Functionaries of the State took over possession of the land belonging to the appellants without any sanction of law. The appellants had asked repeatedly for grant of the benefit of compensation. The State must either comply with the procedure laid down for acquisition, or requisition, or any other permissible statutory mode. There is a distinction, a ?true and concrete distinction, between the principle of "eminent domain" and "police power" of the State. Under certain circumstances, the police power of the State may be used temporarily, to take possession of property but the present case clearly shows that neither of the said powers have been exercised. A question then arises with respect to the authority or power under which the State entered upon the land.

It is evident that the act of the State amounts to encroachment, in exercise of "absolute power" which in common parlance is also called abuse of power or use of muscle power. To further clarify this position, it must be noted that the authorities have treated the land owner as a 'subject' of medieval India, but not as a 'citizen' under our constitution.

10. The State, especially a welfare State which is governed by the Rule of Law, cannot arrogate itself to a status beyond one that is provided by the Constitution. Our Constitution is an organic and flexible one. Delay and laches is adopted as a mode of discretion to decline exercise of jurisdiction to grant relief. There is another facet. The Court is required to exercise judicial discretion. The said discretion is dependent on facts and circumstances of the cases. Delay and laches is one of the facets to deny exercise of discretion. It is not an absolute impediment. There can be mitigating factors, continuity of cause action, etc. That apart, if whole thing shocks the judicial conscience, then the Court should exercise the discretion more so, when no third party interest is involved. Thus analysed, the petition is not hit by the doctrine of delay and laches as the same is not a constitutional limitation, the cause of action is continuous and further the situation certainly shocks judicial conscience.

11. The question of condonation of delay is one of discretion and has to be decided on the basis of the facts of the case at hand, as the same vary from case to case. It will depend upon what the breach of fundamental right and the remedy claimed are and when and how the delay arose. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226, nor is it that there can never be a case where the Courts cannot interfere in a matter, after the passage of a certain length of time. There may be a case where the demand for justice is so compelling, that the High Court would be inclined to interfere in spite of delay. Ultimately, it would be a matter within the discretion of the Court and such discretion, must be exercised fairly and justly so as

to promote justice and not to defeat it. The validity of the party's defence must be tried upon principles substantially equitable. (Vide: *P.S. Sadasivaswamy v. State of T.N.* AIR 1974 SC 2271; *State of M.P. & Ors. v. Nandlal Jaiswal & Ors.,* AIR 1987 SC 251; and *Tridip Kumar Dingal & Ors. v. State of West Bengal & Ors.,* (2009) 1 SCC 768;)

12. No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. Discretion must be exercised judiciously and reasonably. In the event that the claim made by the applicant is legally sustainable, delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest, cannot be sustained on the sole ground of laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in the injustice being done, because of a non-deliberate delay. The court should not harm innocent parties if their rights have infact emerged, by delay on the part of the Petitioners. (Vide: *Durga Prasad v. Chief Controller of Imports and Exports & Ors.,* AIR 1970 SC 769; *Collector, Land Acquisition, Anantnag & Anr. v. Mst. Katiji & Ors.,* AIR 1987 SC 1353; *Dehri Rohtas Light Railway Company Ltd. v. District Board, Bhojpur & Ors.,* AIR 1993 SC 802; *Dayal Singh & Ors. v. Union of India & Ors.,* AIR 2003 SC 1140; and *Shankara Co-op Housing Society Ltd. v. M. Prabhakar & Ors.,* AIR 2011 SC 2161)

13. In the case of *H.D Vora v. State of Maharashtra & Ors.,* AIR 1984 SC 866, this Court condoned a 30 year delay in approaching the court where it found violation of substantive legal rights of the applicant. In that case, the requisition of premises made by the State was assailed.

14. The High Court committed an error in holding the appellants non-suited on the ground of delay and non-availability

of records, as the court failed to appreciate that the appellants had been pursing their case persistently. Accepting their claim, the Statutory authorities had even initiated the acquisition proceedings in 1981, which subsequently lapsed for want of further action on the part of those authorities. The claimants are illiterate and inarticulate persons, who have been deprived of their fundamental rights by the State, without it resorting to any procedure prescribed by law, without the court realising that the enrichment of a welfare State, or of its instrumentalities, at the cost of poor farmers is not permissible, particularly when done at the behest of the State itself. The appellants belonged to a class which did not have any other vocation or any business/ calling to fall back upon, for the purpose of earning their livelihood.

15. Depriving the appellants of their immovable properties, was a clear violation of Article 21 of the Constitution. In a welfare State, statutory authorities are bound, not only to pay adequate compensation, but there is also a legal obligation upon them to rehabilitate such persons. The non-fulfillment of their obligations would tantamount to forcing the said uprooted persons to become vagabonds or to indulge in anti-national activities as such sentiments would be born in them on account of such ill-treatment. Therefore, it is not permissible for any welfare State to uproot a person and deprive him of his fundamental/constitutional/human rights, under the garb of industrial development.

16. The appellants have been deprived of their legitimate dues for about half a century. In such a fact-situation, we fail to understand for which class of citizens, the Constitution provides guarantees and rights in this regard and what is the exact percentage of the citizens of this country, to whom Constitutional/statutory benefits are accorded, in accordance with the law.

17. The appellants have been seriously discriminated against qua other persons, whose land was also acquired.

Some of them were given the benefits of acquisition, including compensation in the year 1966. This kind of discrimination not only breeds corruption, but also dis-respect for governance, as it leads to frustration and to a certain extent, forces persons to take the law into their own hands. The findings of the High Court, that requisite records were not available, or that the appellants approached the authorities at a belated stage are contrary to the evidence available on record and thus, cannot be accepted and excused as it remains a slur on the system of governance and justice alike, and an anathema to the doctrine of equality, which is the soul of our Constitution. Even under valid acquisition proceedings, there is a legal obligation on the part of the authorities to complete such acquisition proceedings at the earliest, and to make payment of requisite compensation. The appeals etc. are required to be decided expeditiously, for the sole reason that, if a person is not paid compensation in time, he will be unable to purchase any land or other immovable property, for the amount of compensation that is likely to be paid to him at a belated stage.

18. While dealing with the similar issue, this Court in *K. Krishna Reddy & Ors. v. The Special Dy. Collector, Land Acquisition Unit II, LMD Karimnagar, Andhra Pradesh,* AIR 1988 SC 2123, held as under:

> "….After all money is what money buys. What the claimants could have bought with the compensation in 1977 cannot do in 1988. Perhaps, not even one half of it. It is a common experience that the purchasing power of rupee is dwindling. With rising inflation, the delayed payment may lose all charm and utility of the compensation. In some cases, the delay may be detrimental to the interests of claimants. The Indian agriculturists generally have no avocation. They totally depend upon land. If uprooted, they will find themselves nowhere. They are left high and dry. They have no savings to draw. They have nothing to fall back upon. They know no other work. They may even face starvation unless rehabilitated. In all such cases, it is of utmost importance that the award should be made without delay. The enhanced compensation must be determined without loss of time…."

19. In view of the above, the instant case represents a highly unsatisfactory and disturbing situation prevailing in one of the most developed States of our country.

20. Be that as it may, ultimately, good sense prevailed, and learned senior counsel appearing for the State came forward with a welcome suggestion stating that in order to redress the grievances of the appellants, the respondent-authorities would notify the land in dispute under Section 4 of the Act within a period of 4 weeks from today. Section 6 declaration will be issued within a period of one week thereafter. As the appellants have full notice and information with respect to the proceedings, publication in the newspapers either of the notification or of the declaration under the Act are dispensed with. Notice under Section 9 of the Act will be served within a period of 4 weeks after the publication of Section 6 declaration and award will be made within a period of three months thereafter. The deemed acquisition proceedings would thus, be concluded most expeditiously. Needless to say, the market value of the land in dispute will be assessed as it prevails on the date on which the Section 4 notification is published in the Official Gazette. Payment of compensation/award amount will be made to the claimants/persons-interested immediately thereafter, alongwith all statutory benefits. The appellants shall be entitled to pursue the statutory remedies available to them for further enhancement of compensation, if so desired.

21. Before parting with the case, we appreciate the gesture shown by the State Government for coming forward with a most appropriate suggestion to enable us to resolve the controversy involved herein, in a manner so cordial and sympathetic.

22. With these observations, the appeal stands disposed of.

K.K.T. Appeal allowed.

ROHITASH KUMAR & ORS.
v.
OM PRAKASH SHARMA & ORS.
(Civil Appeal Nos. 2133-2134 of 2004)

NOVEMBER 6, 2012

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

Service Law – Seniority – Inter-se seniority – Among officers holding the same rank – Selection of direct recruits in one selection process – However, given training in two separate batches (Batch Nos. 16 and 17) commencing on 1.2.1993 and 2.7.1993 respectively – Promotee joining the post on 15.3.1993 – Promotee placed in seniority list below the officers of Batch No. 17 – On challenging the seniority list, Courts below directed to place the promotee below officers of Batch No. 16 and above the officers of batch No. 17 as per proviso to rule 3 of the Rules – In appeal, direct recruits in Batch No. 17 taking the plea that officers selected through single selection process cannot be accorded seniority by bifurcating in different batches – Held: Fixing the seniority of the officers of 17th Batch from 1.2.1993 would amount to fixing their seniority from a date prior to their birth in the cadre as their training started on 2.7.1993 – Such a course is not permissible in law – Border Security Force (Seniority Promotion and Superannuation of Officers) Rules, 1978 – r. 3.

Interpretation of Statute:

Rule of Contemporanea exposition – Administrative interpretation/Executive Construction-Applicability – Held: The rule can be invoked, but it will not always be decisive with respect to question of construction – The Court may refuse to follow such a construction in a clear case of error, on the ground that wrong practice does not make the law.

Interpretation of proviso – The normal function of a proviso is to provide an exception – Usually, proviso cannot be interpreted as a general rule that has been provided for, nor can be interpreted in a manner that would nullify the enactment or take away a right conferred by the statute – If, upon plain and fair construction, the main provision is clear, a proviso cannot expand or limit its ambit or scope.

Rule of interpretation – If the language of a statute is plain and allows only one meaning, it has to be given effect to, even if it causes hardship or possible injustice – If there is any hardship, it is for the legislature to amend the law – Court cannot be called upon to discard the cardinal rule of interpretation for the purpose of mitigating such hardship.

Rule of interpretation – While interpreting provision of a statute, court can neither add nor subtract even a single word – It would not amount to interpretation, but legislation – Court cannot proceed with the assumption that legislature committed a mistake – Even if there is some defect in the phraseology used by legislature in framing the statute, it is not open to the court to add and amend, or by construction, make up for the deficiencies – The statute not to be construed in light of certain notions that the legislature might have had in mind or what the legislature is expected to have said.

Maxims:

'Dura Lex Sed Lex' – Applicability.

'A Verbis Legis Non Est Recedendum' – Meaning and applicability.

154 persons were selected to be appointed as Asstt. Commandant (Direct Entry) in Border Security Force. They were sent for training in two separate batches. Batch No. 16 joined the training on 1.2.1993 while Batch

No. 17 joined the training on 2.7.1993. Respondent No. 1, who was promoted from the feeding cadre, joined the post as Asstt. Commandant on 15.3.1993. In the seniority list, respondent No. 1 was placed below all the officers of Batch No. 17.

Respondent No. 1 challened the seniority list in a writ petition. Single Judge of High Court allowed the petition holding that he was entitled to be ranked in seniority above the officers of Batch No.17 and below the officers in Batch No. 16. The writ appeal, thereagainst was dismissed by Division Bench of the High Court.

The appellants, who were the officers in the Batch No. 17 approached this Court with the permission of the Court as they were not the parties before the High Court. They *interalia* contended that the officers selected through single selection process, if have been given training in different batches cannot be accorded different seniority by bifurcating them; and that statutory authorities have previously always fixed seniority without taking note of the fact that training was conducted in different batches.

Dismissing the appeals, the Court

HELD: 1.1 *Contemporanea expositio* as expounded by administrative authorities, is a very useful and relevant guide to the interpretation of the expressions used in a statutory instrument. The words used in a statutory provision must be understood in the same way, in which they are usually understood, in ordinary common parlance with respect to the area in which, the said law is in force or, by the people who ordinarily deal with them. [Para 7] [62-H; 63-A]

K.P. Varghese v. Income-tax Officer, Ernakulam and Anr. **AIR 1981 SC 1922: 1982 (1) SCR 629 ;** *Indian Metals and Ferro Alloys Ltd., Cuttack v. Collector of Central Excise, Bhubaneshwar* **AIR 1991 SC 1028**: **1990 (3) Suppl. SCR 329 ;** *Y.P. Chawla and Ors. v. M.P. Tiwari and Anr.* **AIR 1992 SC 1360: 1992 (2) SCR 440 – relied on.**

1.2 A construction, which is in consonance with long-standing practice prevailing in the concerned department in relation to which the law has been made, should be preferred. [Para 8] [63-C-D]

N. Suresh Nathan and Anr. v. Union of India and Ors. **1992 Supp (1) SCC 584: 1991 (2) Suppl. SCR 423;** *M.B. Joshi and Ors. v. Satish Kumar Pandey and Ors.* **1993 Supp (2) SCC 419: 1992 (2) Suppl. SCR 1 – relied on.**

1.3 While a maxim was applicable with respect to construing an ancient statute, the same could not be used to interpret Acts which are comparatively modern, and in relation to such Acts, interpretation should be given to the words used therein, in the context of new facts and the present situation, if the said words are in fact, capable of comprehending them. [Para 9] [63-D-F]

Senior Electric Inspector and Ors. v. Laxminarayan Chopra and Anr. **AIR 1962 SC 159**: **1962 SCR 146 ;** *M/s. J.K. Cotton Spinning and Weaving Mills Ltd. and Anr. v. Union of India and Ors.* **AIR 1988 SC 191: 1988 SCR 700 – relied on.**

1.4 The principle of contemporenea expositio, i.e. interpreting a document with reference to the exposition that it has received from the Competent Authority, can be invoked though the same will not always be decisive with respect to questions of construction. Administrative construction, i.e., contemporaneous construction that is provided by administrative or executive officers who are responsible for the execution of the Act/Rules etc., should generally be clearly erroneous, before the same is over-turned. Such a construction, commonly referred to as practical construction although not controlling, is nevertheless entitled to be given considerable weightage

and is also, highly persuasive. It may, however, be disregarded for certain cogent reasons. In a clear case of error, the Court should, without hesitation, refuse to follow such a construction for the reason that, "wrong practice does not make the law." "Past practice should not be upset provided such practice conforms to the rules" but must be ignored if it is found to be *de hors* the rules. [Para 10] [63-F-H; 64-A-B-C-D]

Desh Bandhu Gupta and Co. and Ors. v. Delhi Stock Exchange Association Ltd. **AIR 1979 SC 1049: 1979 (3) SCR 373;** *Municipal Corporation for City of Pune and Anr. v. Bharat Forge Co. Ltd. and Ors.* **AIR 1996 SCR 2856: 1995 (2) SCR 716;** *State of Rajasthan and Ors. v. Dev Ganga Enterprises* **(2010) 1 SCC 505: 2009 (16) SCR 269;** *Shiba Shankar Mohapatra v. State of Orissa and Ors.* **(2010) 12 SCC 471: 2009 (15) SCR 866;** *D. Stephen Joseph v. Union of India and Ors.* **(1997) 4 SCC 753: 1997 (3) SCR 1040 – relied on.**

1.5 "The manner in which a statutory authority understands the application of a statute, would not confer any legal right upon a party unless the same finds favour with the Court of law, dealing with the matter". This principle has also been applied in judicial decisions, as it has been held consistently, that long standing settled practice of the Competent Authority should not normally be disturbed, unless the same is found to be manifestly wrong, 'unfair'. [Paras 11 and 12] [64-D-F]

Laxminarayan R. Bhattad and Ors. v. State of Maharashtra and Anr. **AIR 2003 SC 3502: 2003 (3) SCR 409;** *Thamma Venkata Subbamma (dead) by LR. v. Thamma Rattamma and Ors.* **AIR 1987 SC 1775: 1987 (3) SCR 236 ;** *Assistant District Registrar, Co-operative Housing Society Ltd. v. Vikrambhai Ratilal Dalal and Ors.* **1987 (Supp) SCC 27;** *Ajitsinh C. Gaekwad and Ors. v. Dileepsinh D. Gaekwad and Ors.* **1987 (Supp) SCC 439;** *Collector of Central Excise, Madras v. M/s. Standard Motor Products etc.* **AIR 1989 SC 1**

298: 1989 (1) SCR 824; *Kattite Valappil Pathumma and Ors. v. Taluk Land Board and Ors.* **AIR 1997 SC 1115: 1997 (2) SCR 175;** *Hemalatha Gargya v. Commissioner of Income-tax, A.P. and Anr.* **(2003) 9 SCC 510: 2002 (4) Suppl. SCR 382 – relied on.**

1.6 The rules of administrative interpretation/ executive construction, may be applied, either where a representation is made by the maker of a legislation, at the time of the introduction of the Bill itself, or if construction thereupon, is provided for by the executive, upon its coming into force, then also, the same carries great weightage. [Para 13] [65-A-B]

*Mahalakshmi Sugar Mills Co. Ltd. and Anr. v. Union of India and **Ors.*** **AIR 2009 SC 792: 2008 (5) SCR 793 – relied on.**

1.7 Administrative interpretation may often provide the guidelines for interpreting a particular Rule or executive instruction, and the same may be accepted unless, of course, it is found to be in violation of the Rule itself. [Para 14] [65-C]

2.1 The normal function of a proviso is generally, to provide for an exception i.e. exception of something that is outside the ambit of the usual intention of the enactment, or to qualify something enacted therein, which, but for the proviso would be within the purview of such enactment. Thus, its purpose is to exclude something which would otherwise fall squarely within the general language of the main enactment. Usually, a proviso cannot be interpreted as a general rule that has been provided for. Nor it can be interpreted in a manner that would nullify the enactment, or take away in entirety, a right that has been conferred by the statute. In case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on

the interpretation of the main enactment, so as to exclude by implication, what clearly falls within its expressed terms. If, upon plain and fair construction, the main provision is clear, a proviso cannot expand or limit its ambit and scope. [Para 15] [65-D-G]

CIT, Mysore etc. v. Indo Mercantile Bank Ltd. **AIR 1959 SC 713: 1959 Suppl. SCR 256;** *Kush Sahgal and Ors. v. M.C. Mitter and Ors.* **AIR 2000 SC 1390: 2000 (2) SCR 648;** *Haryana State Cooperative Land Development Bank Ltd. v. Haryana State Cooperative Land Development Bank Employees Union and Anr.* **(2004) 1 SCC 574: 2003 (6) Suppl. SCR 1039**; *Nagar Palika Nigam v. Krishi Upaj Mandi Samiti and Ors.* **AIR 2009 SC 187: 2008 (14) SCR 419;** *State of Kerala and Anr. v. B. Six Holiday Resorts Private Limited and Ors.* **(2010) 5 SCC 186: 2010 (3) SCR 1 – relied on.**

2.2 The proviso to a particular provision of a statute, only embraces the field which is covered by the main provision, by carving out an exception to the said main provision. [Para 16] [66-B]

Ram Narain Sons Ltd. and Ors. v. Assistant Commissioner of Sales Tax and Ors. **AIR 1955 SC 765: 1955 SCR 483;** *A.N. Sehgal and Ors. v. Rajeram Sheoram and Ors.* **AIR 1991 SC 1406: 1991 (2) SCR 198 – relied on.**

2.3 In a normal course, proviso can be extinguished from an exception for the reason that exception is intended to restrain the enacting clause to a particular class of cases while the proviso is used to remove special cases from the general enactment provided for them specially. [Para 17] [66-C-D]

3.1 It is a well settled principle of interpretation that hardship or inconvenience caused, cannot be used as a basis to alter the meaning of the language employed by the legislature, if such meaning is clear upon a bare

perusal of the Statute. If the language is plain and hence allows only one meaning, the same has to be given effect to, even if it causes hardship or possible injustice. [Para 18] [66-E-F]

Commissioner of Agricultural Income Tax, West Bengal v. Keshab Chandra Mandal **AIR 1950 SC 265: 1950 SCR 435 ;** *D. D. Joshi and Ors. v. Union of India and Ors.* **AIR 1983 SC 420: 1983 (2) SCR 448 - relied on.**

Bengal Immunity Co. Ltd. v. State of Bihar and Ors. **AIR 1955 SC 661: 1955 SCR 603 – followed.**

3.2 If there is any hardship, it is for the legislature to amend the law, and that the Court cannot be called upon, to discard the cardinal rule of interpretation for the purpose of mitigating such hardship. If the language of an Act is sufficiently clear, the Court has to give effect to it, however, inequitable or unjust the result may be. The words, '*dura lex sed lex*' which mean "the law is hard but it is the law" may be used to sum up the situation. Therefore, even if a statutory provision causes hardship to some people, it is not for the Court to amend the law. A legal enactment must be interpreted in its plain and literal sense, as that is the first principle of interpretation. "Inconvenience is not" a decisive factor to be considered while interpreting a statute. Therefore, it is evident that the hardship caused to an individual, cannot be a ground for not giving effective and grammatical meaning to every word of the provision, if the language used therein, is unequivocal. [Paras 19 and 21] [66-H; 67-A-B-F-G]

Mysore State Electricity Board v. Bangalore Woolen, Cotton and Silk Mills Ltd. and Ors. **AIR 1963 SC 1128: 1963 Suppl. SCR 127 – followed.**

Martin Burn Ltd. v. The Corporation of Calcutta **AIR 1966 SC 529: 1966 SCR 543;** *The Commissioner of Income Tax,*

West Bengal I, Calcutta v. M/s Vegetables Products Ltd. **AIR 1973 SC 927: 1973 (3) SCR 448 ;** *Tata Power Company Ltd. v. Reliance Energy Limited and Ors.* **(2009) 16 SCC 659: 2009 (9) SCR 625 – relied on.**

4.1 While interpreting the provisions of a statute, it can neither add, nor subtract even a single word. The legal maxim "*A Verbis Legis Non Est Recedendum*" means, "From the words of law, there must be no departure". A section is to be interpreted by reading all of its parts together, and it is not permissible, to omit any part thereof. The Court cannot proceed with the assumption that the legislature, while enacting the statute has committed a mistake; it must proceed on the footing that the legislature intended what it has said; even if there is some defect in the phraseology used by it in framing the statute, and it is not open to the court to add and amend, or by construction, make up for the deficiencies, which have been left in the Act. The Court can only iron out the creases but while doing so, it must not alter the fabric, of which an Act is woven. The Court, while interpreting statutory provisions, cannot add words to a Statute, or read words into it which are not part of it, especially when a literal reading of the same, produces an intelligible result. [Para 22] [67-G-H; 68-A-C]

Nalinakhya Bysack v. Shyam Sunder Haldar and Ors. **AIR 1953 SC 148: 1953 SCR 533 ;** *Sri Ram Ram Narain Medhi v. State of Bombay* **AIR 1959 SC 459: 1959 Suppl. SCR 489 ;** *M. Pentiah and Ors. v. Muddala Veeramallappa and Ors.* **AIR 1961 SC 1107: 1961 SCR 295 ;** *The Balasinor Nagrik Co-operative Bank Ltd. v. Babubhai Shankerlal Pandya and Ors.* **AIR 1987 SC 849;** *Dadi Jagannadham v. Jammulu Ramulu and Ors.* **(2001) 7 SCC 71: 2001 (2) Suppl. SCR 60 – relied on.**

4.2 The statute is not to be construed in the light of certain notions that the legislature might have had in mind, or what the legislature is expected to have said, or what the legislature might have done, or what the duty of the legislature to have said or done was. The Courts have to administer the law as they find it, and it is not permissible for the Court to twist the clear language of the enactment, in order to avoid any real, or imaginary hardship which such literal interpretation may cause. Under the garb of interpreting the provision, the Court does not have the power to add or subtract even a single word, as it would not amount to interpretation, but legislation. [Paras 23 and 24] [68-E-G]

5.1 The Service Selection Board selected 154 persons to be appointed as Assistant Commandant (Direct Entry), and they were then sent for training in two separate batches. Batch No.16 consisted of 67 officers who joined the training on 1.2.1993, while Batch No.17 consisted of 87 officers who joined the training on 2.7.1993. They could not be sent for training in one batch, even though they had been selected through the same competitive examination, due to administrative reasons i.e., character verification etc. Respondent No.1, who was promoted from the feeding cadre, joined his post on 15.3.1993. Thus, it is evident that he was placed in the promotional cadre, prior to the commencement of the training of Batch No.17 on 2.7.1993. [Para 25] [69-A-C]

5.2 The language of rule 3 is crystal clear. There is no ambiguity with respect to it. The validity of the rule is not under challenge. In such a fact-situation, it is not permissible for the court to interpret the rule otherwise. The said proviso will have application only in a case where officers who have been selected in pursuance of the same selection process are split into separate batches. Interpreting the rule otherwise, would amount to adding words to the proviso, which the law does not permit. [Para 27] [69-G-H; 70-A-B]

5.3 If the contention of the appellants is accepted, it would amount to fixing their seniority from a date prior, to their birth in the cadre. Admittedly, the appellants (17th batch), joined training on 2.7.1993 and their claim is to fix their seniority from the Ist of February, 1993 i.e. the date on which, the 16th batch joined training. Such a course is not permissible in law. The facts and circumstances of the case neither require any interpretation, nor reading down of the rule. [Para 28] [70-B-C]

Case Law Reference:

1982 (1) SCR 629	Relied on	Para 7
1990 (3) Suppl. SCR 329	Relied on	Para 7
1992 (2) SCR 440	Relied on	Para 7
1991 (2) Suppl. SCR 423	Relied on	Para 8
1992 (2) Suppl. SCR 1	Relied on	Para 8
1962 SCR 146	Relied on	Para 9
1988 SCR 700	Relied on	Para 9
1979 (3) SCR 373	Relied on	Para 10
1995 (2) SCR 716	Relied on	Para 10
2009 (16) SCR 269	Relied on	Para 10
2009 (15) SCR 866	Relied on	Para 10
1997 (3) SCR 1040	Relied on	Para 10
2003 (3) SCR 409	Relied on	Para 11
1987 (3) SCR 236	Relied on	Para 12
1987 (Supp) SCC 27	Relied on	Para 12
1987 (Supp) SCC 439	Relied on	Para 12
1989 (1) SCR 824	Relied on	Para 12
1997 (2) SCR 175	Relied on	Para 12
2002 (4) Suppl. SCR 382	Relied on	Para 12
2008 (5) SCR 793	Relied on	Para 13
1959 Suppl. SCR 256	Relied on	Para 15
2000 (2) SCR 648	Relied on	Para 15
2003 (6) Suppl. SCR 1039	Relied on	Para 15
2008 (14) SCR 419	Relied on	Para 15
2010 (3) SCR 1	Relied on	Para 15
1955 SCR 483	Relied on	Para 16
1991 (2) SCR 198	Relied on	Para 16
1950 SCR 435	Relied on	Para 18
1983 (2) SCR 448	Relied on	Para 18
1955 SCR 603	Followed	Para 19
1963 Suppl. SCR 127	Followed	Para 20
1966 SCR 543	Relied on	Para 21
1973 (3) SCR 448	Relied on	Para 21
2009 (9) SCR 625	Relied on	Para 21
1953 SCR 533	Relied on	Para 22
1959 Suppl. SCR 489	Relied on	Para 22
1961 SCR 295	Relied on	Para 22
AIR 1987 SC 849	Relied on	Para 22
2001 (2) Suppl. SCR 60	Relied on	Para 22

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2133-2134 of 2004.

From the Judgment & Order of the High Court of Jammu and Kashmir at Jammu dated 27.07.2001 in SWP No. 1393 of 1999 and dated 01.08.2002 in LPA No. 275 of 2002.

R. Venkataramani, Kumar Parimal, Aljo K. Joseph, P.V. Yogeswaran, Supriya Garg, Neelam Singh, Shodham Babu for the Appellants.

P.P. Malhotra, ASG, Dr. Rajeev Dhavan, Gaurav Sharma, Shailendra Saini, B.K. Prasad, Sushma Suri, Jaya Goyal, Nikhil Nayyar, T.V.S. Raghavendra Sreyas, Naveen R. Nath for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These appeals have been preferred against the impugned judgment and order dated 22.7.2001, passed by the High Court of Jammu & Kashmir at Jammu in SWP No. 1393 of 1999, and judgment and order dated 1.8.2002 passed in LPA No. 275 of 2002.

2. The facts and circumstances giving rise to these appeals are mentioned as under:

A. The appellants and contestant respondents are Assistant Commandants in the Border Security Force (hereinafter referred to as, `BSF'). The appellants and respondent nos. 4 and 5 are direct recruits, while respondent no.1 has been promoted against the quota of 10 per cent posts, that are reserved for Ministerial Cadre posts.

B. The Union of India – respondent no.2, issued a seniority list dated 18.7.1995, placing respondent no. 1 at Serial No. 1863, below all the officers of Batch No.17 and thereafter, a final seniority list of Assistant Commandants was published on 5.7.1996.

C. Respondent no.1 challenged the said seniority list in which he was ranked below the officers of Batch No. 17, by filing Writ Petition No. 1393 of 1999, on the ground that with effect from 15.3.1993, he stood promoted as Assistant Commandant, and that he had also completed all requisite training for the same at the B.S.F. Academy, Tekanpur, which had commenced on 1.2.1993. There was another batch that undertook training on 2.7.1993. However, the said officers of the second batch, who had joined such training on 2.7.1993, could not be ranked higher than him, in the seniority list.

D. The said writ petition filed by respondent no.1, was contested by the Union of India. The learned single judge allowed the writ petition vide impugned judgment and order dated 27.7.2001, wherein it was held that respondent no.1/ petitioner therein, was, in fact, entitled to be ranked in seniority above the officers of Batch No.17, and below the officers of Batch No.16.

E. The Union of India challenged the aforementioned impugned judgment and order dated 27.7.2001, by filing a Letters Patent Appeal which was dismissed vide impugned judgment and order dated 1.8.2002.

F. The appellants, though had not been impleaded as parties before the High Court, sought permission to file special leave petitions with respect to the said matter, and the same was granted by this Court. Hence, these appeals.

3. Shri R. Venkataramani, learned senior counsel appearing on behalf of the appellants, has submitted that officers that are selected in response to a single advertisement, and through the same selection process, if have been given training in two separate batches, for administrative reasons i.e. police verification, medical examination etc., cannot be accorded different seniority by bifurcating them into two or more separate batches. The High Court therefore, committed an error by allowing the claim of respondent no.1, which opposed the

seniority of the officers, for the reason that, if Batch Nos. 16 and 17 are taken together, the officers who, in terms of seniority, were placed at Serial No.5, would be moved to Serial No. 60, if treated separately. For instance, the person placed at Serial No. 8 had moved to Serial No. 62, and the one placed at Serial No. 11 had moved to Serial No. 64. Thus, such an act has materially adversely affected the seniority of officers even though they were duly selected in the same batch. The provisions of Rule 3 of the Border Security Force (Seniority, Promotion and Superannuation of Officers) Rules, 1978 (hereinafter referred to as the, `Rules 1978'), have been wrongly interpreted. The Statutory authorities have previously, always fixed seniority without taking note of the fact that training of officers was conducted in different batches. Thus, appeals deserve to be allowed.

4. Per contra, Shri P.P. Malhotra, learned ASG and Dr. Rajeev Dhavan, learned senior counsel appearing on behalf of respondent nos. 4 and 5, have vehemently opposed the appeals, contending that the said Rule is not ambiguous in any manner and thus, the same must be given a literal interpretation and that if, as a result of this, any hardship is caused to anyone, the same cannot be a valid ground for interpreting the statutory rule in a different manner. The said rules are not under challenge. The rule of contemporanea expositio does not apply in contravention of statutory provisions. The proviso to Rule 3 provides for the bifurcation of officers of the same batch in the event of a contingency which is exactly what has taken place in the instant case. The High Court has only applied the said provisions. Thus, no interference is called for and the present appeals are liable to be rejected.

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

6. The relevant Rule 3 of the Rules, 1978, reads as under:

"(3) Subject to the provisions of Sub-Rule (2) inter - se

seniority amongst officers holding the same rank shall be as follows namely:

(i) Seniority of Officers promoted on the same day shall be determined in the order in which they are selected for promotion to that rank.

(ii) Seniority of direct entrants shall be determined in accordance with the aggregate marks obtained by them before the Selection Board and at the passing out examination conducted at the Border Security Force Academy.

(iii) Seniority of temporary officers subject to the provisions of clauses (i) and (ii) shall be determined on the basis of the order of merit at the time of their selection and officers selected on an earlier batch will be senior to officers selected in subsequent batches.

(iv) Seniority of officers subject to the provisions of clauses (i) (ii) and (iii) shall be determined according to the date of their continuous appointment in that rank.

Provided that in case of direct entrants the date of **appointment shall be the date of commencement of their training course** at the Border Security Force Academy." (Emphasis added)

Rule of Contemporanea Expositio:

7. This Court applied the rule of contemporanea expositio, as the Court found that the same is a well established rule of the interpretation of a statute, with reference to the exposition that it has received from contemporary authorities. However, while doing so, the Court added words of caution to the effect that such a rule must give way, where the language of the statute is plain and unambiguous., This Court applied the said rule of interpretation by holding that contemporanea expositio as expounded by administrative authorities, is a very useful and

relevant guide to the interpretation of the expressions used in a statutory instrument. The words used in a statutory provision must be understood in the same way, in which they are usually understood, in ordinary common parlance with respect to the area in which, the said law is in force or, by the people who ordinarily deal with them. (Vide: *K.P. Varghese v. Income-tax Officer, Ernakulam & Anr.,* AIR 1981 SC 1922; *Indian Metals and Ferro Alloys Ltd., Cuttack v. Collector of Central Excise, Bhubaneshwar,* AIR 1991 SC 1028; and *Y.P. Chawla & Ors. v. M.P. Tiwari & Anr.,* AIR 1992 SC 1360).

8. In *N. Suresh Nathan & Anr. v. Union of India & Ors.,* 1992 Supp (1) SCC 584; and *M.B. Joshi & Ors. v. Satish Kumar Pandey & Ors.,* 1993 Supp (2) SCC 419, this Court observed that such construction, which is in consonance with long-standing practice prevailing in the concerned department in relation to which the law has been made, should be preferred.

9. In *Senior Electric Inspector & Ors. v. Laxminarayan Chopra & Anr.,* AIR 1962 SC 159; and *M/s. J.K. Cotton Spinning & Weaving Mills Ltd. & Anr. v. Union of India & Ors.,* AIR 1988 SC 191, it was held that while a maxim was applicable with respect to construing an ancient statute, the same could not be used to interpret Acts which are comparatively modern, and in relation to such Acts, interpretation should be given to the words used therein, in the context of new facts and the present situation, if the said words are in fact, capable of comprehending them.

10. In *Desh Bandhu Gupta and Co. & Ors. v. Delhi Stock Exchange Association Ltd.,* AIR 1979 SC 1049, this Court observed that the principle of contemporenea expositio, i.e. interpreting a document with reference to the exposition that it has received from the Competent Authority, can be invoked though the same will not always be decisive with respect to questions of construction. Administrative construction, i.e., contemporaneous construction that is provided by administrative or executive officers who are responsible for the

execution of the Act/Rules etc., should generally be clearly erroneous, before the same is over-turned. Such a construction, commonly referred to as practical construction although not controlling, is nevertheless entitled to be given considerable weightage and is also, highly persuasive. It may however, be disregarded for certain cogent reasons. In a clear case of error, the Court should, without hesitation, refuse to follow such a construction for the reason that, "wrong practice does not make the law." (Vide : *Municipal Corporation for City of Pune & Anr. v. Bharat Forge Co. Ltd. & Ors.,* AIR 1996 SC 2856). (See also: *State of Rajasthan & Ors. v. Dev Ganga Enterprises,* (2010) 1 SCC 505; and *Shiba Shankar Mohapatra v. State of Orissa & Ors.,* (2010) 12 SCC 471).

In *D. Stephen Joseph v. Union of India & Ors.,* (1997) 4 SCC 753, the Court held that, "past practice should not be upset provided such practice conforms to the rules" but must be ignored if it is found to be de hors the rules.

11. However, in *Laxminarayan R. Bhattad & Ors. v. State of Maharashtra & Anr.,* AIR 2003 SC 3502, this Court held that, "the manner in which a statutory authority understands the application of a statute, would not confer any legal right upon a party unless the same finds favour with the Court of law, dealing with the matter".

12. This principle has also been applied in judicial decisions, as it has been held consistently, that long standing settled practice of the Competent Authority should not normally be disturbed, unless the same is found to be manifestly wrong, 'unfair'. (Vide: *Thamma Venkata Subbamma (dead) by LR. v. Thamma Rattamma & Ors.,* AIR 1987 SC 1775; *Assistant District Registrar, Co-operative Housing Society Ltd. v. Vikrambhai Ratilal Dalal & Ors.,* 1987 (Supp) SCC 27; *Ajitsinh C. Gaekwad & Ors. v. Dileepsinh D. Gaekwad & Ors.,* 1987 (Supp) SCC 439; *Collector of Central Excise, Madras v. M/s. Standard Motor Products etc.,* AIR 1989 SC 1298; *Kattite Valappil Pathumma & Ors. v. Taluk Land Board & Ors.,* AIR

1997 SC 1115; and *Hemalatha Gargya v. Commissioner of Income-tax, A.P. & Anr.,* (2003) 9 SCC 510).

13. The rules of administrative interpretation/executive construction, may be applied, either where a representation is made by the maker of a legislation, at the time of the introduction of the Bill itself, or if construction thereupon, is provided for by the executive, upon its coming into force, then also, the same carries great weightage. (Vide : *Mahalakshmi Sugar Mills Co. Ltd. & Anr. v. Union of India & Ors.,* AIR 2009 SC 792).

14. In view of the above, one may reach the conclusion that administrative interpretation may often provide the guidelines for interpreting a particular Rule or executive instruction, and the same may be accepted unless, of course, it is found to be in violation of the Rule itself.

Interpretation of the proviso:

15. The normal function of a proviso is generally, to provide for an exception i.e. exception of something that is outside the ambit of the usual intention of the enactment, or to qualify something enacted therein, which, but for the proviso would be within the purview of such enactment. Thus, its purpose is to exclude something which would otherwise fall squarely within the general language of the main enactment. Usually, a proviso cannot be interpreted as a general rule that has been provided for. Nor it can be interpreted in a manner that would nullify the enactment, or take away in entirety, a right that has been conferred by the statute. In case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude by implication, what clearly falls within its expressed terms. If, upon plain and fair construction, the main provision is clear, a proviso cannot expand or limit its ambit and scope. (Vide: *CIT, Mysore etc. v. Indo Mercantile Bank Ltd.,* AIR 1959 SC 713; *Kush Sahgal & Ors. v. M.C. Mitter & Ors.,* AIR 2000 SC 1390; *Haryana State Cooperative Land*

Development Bank Ltd. v. Haryana State Cooperative Land Development Bank Employees Union & Anr., (2004) 1 SCC 574; *Nagar Palika Nigam v. Krishi Upaj Mandi Samiti & Ors.,* AIR 2009 SC 187; and *State of Kerala & Anr. v B. Six Holiday Resorts Private Limited & Ors.,* (2010) 5 SCC 186).

16. The proviso to a particular provision of a statute, only embraces the field which is covered by the main provision, by carving out an exception to the said main provision. (Vide: *Ram Narain Sons Ltd. & Ors. v. Assistant Commissioner of Sales Tax & Ors.,* AIR 1955 SC 765; and *A.N. Sehgal & Ors. v. Rajeram Sheoram & Ors.,* AIR 1991 SC 1406).

17. In a normal course, proviso can be extinguished from an exception for the reason that exception is intended to restrain the enacting clause to a particular class of cases while the proviso is used to remove special cases from the general enactment provided for them specially.

Hardship of an individual:

18. There may be a statutory provision, which causes great hardship or inconvenience to either the party concerned, or to an individual, but the Court has no choice but to enforce it in full rigor.

It is a well settled principle of interpretation that hardship or inconvenience caused, cannot be used as a basis to alter the meaning of the language employed by the legislature, if such meaning is clear upon a bare perusal of the Statute. If the language is plain and hence allows only one meaning, the same has to be given effect to, even if it causes hardship or possible injustice. (Vide: *Commissioner of Agricultural Income Tax, West Bengal v. Keshab Chandra Mandal,* AIR 1950 SC 265; and *D. D. Joshi & Ors. v. Union of India & Ors.,* AIR 1983 SC 420).

19. In *Bengal Immunity Co. Ltd. v. State of Bihar & Ors.,* AIR 1955 SC 661 it was observed by a Constitution Bench of this Court that, if there is any hardship, it is for the legislature

to amend the law, and that the Court cannot be called upon, to discard the cardinal rule of interpretation for the purpose of mitigating such hardship. If the language of an Act is sufficiently clear, the Court has to give effect to it, however, inequitable or unjust the result may be. The words, 'dura lex sed lex' which mean "the law is hard but it is the law." may be used to sum up the situation. Therefore, even if a statutory provision causes hardship to some people, it is not for the Court to amend the law. A legal enactment must be interpreted in its plain and literal sense, as that is the first principle of interpretation.

20. In *Mysore State Electricity Board v. Bangalore Woolen, Cotton & Silk Mills Ltd. & Ors.,* AIR 1963 SC 1128 a Constitution Bench of this Court held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute.

21. In *Martin Burn Ltd. v. The Corporation of Calcutta,* AIR 1966 SC 529, this Court, while dealing with the same issue observed as under:–

> "A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a Court likes the result or not."

(See also: *The Commissioner of Income Tax, West Bengal I, Calcutta v. M/s Vegetables Products Ltd.,* AIR 1973 SC 927; and *Tata Power Company Ltd. v. Reliance Energy Limited & Ors.,* (2009) 16 SCC 659).

Therefore, it is evident that the hardship caused to an individual, cannot be a ground for not giving effective and grammatical meaning to every word of the provision, if the language used therein, is unequivocal.

Addition and Subtraction of words:

22. The Court has to keep in mind the fact that, while interpreting the provisions of a Statute, it can neither add, nor subtract even a single word. The legal maxim "A Verbis Legis

Non Est Recedendum" means, "From the words of law, there must be no departure". A section is to be interpreted by reading all of its parts together, and it is not permissible, to omit any part thereof. The Court cannot proceed with the assumption that the legislature, while enacting the Statute has committed a mistake; it must proceed on the footing that the legislature intended what it has said; even if there is some defect in the phraseology used by it in framing the statute, and it is not open to the court to add and amend, or by construction, make up for the deficiencies, which have been left in the Act. The Court can only iron out the creases but while doing so, it must not alter the fabric, of which an Act is woven. The Court, while interpreting statutory provisions, cannot add words to a Statute, or read words into it which are not part of it, especially when a literal reading of the same, produces an intelligible result. (Vide: *Nalinakhya Bysack v. Shyam Sunder Haldar & Ors.,* AIR 1953 SC 148; *Sri Ram Ram Narain Medhi v. State of Bombay,* AIR 1959 SC 459; *M. Pentiah & Ors. v. Muddala Veeramallappa & Ors.,* AIR 1961 SC 1107; *The Balasinor Nagrik Co-operative Bank Ltd. v. Babubhai Shankerlal Pandya & Ors.,* AIR 1987 SC 849; and *Dadi Jagannadham v. Jammulu Ramulu & Ors.,* (2001) 7 SCC 71).

23. The Statute is not to be construed in light of certain notions that the legislature might have had in mind, or what the legislature is expected to have said, or what the legislature might have done, or what the duty of the legislature to have said or done was. The Courts have to administer the law as they find it, and it is not permissible for the Court to twist the clear language of the enactment, in order to avoid any real, or imaginary hardship which such literal interpretation may cause.

24. In view of the above, it becomes crystal clear that, under the garb of interpreting the provision, the Court does not have the power to add or subtract even a single word, as it would not amount to interpretation, but legislation.

25. The matter requires to be considered in the light of the aforesaid settled legal propositions.

The Service Selection Board (CPOs) 91, selected 154 persons to be appointed as Assistant Commandant (Direct Entry), and they were then sent for training in two separate batches. Batch No.16 consisted of 67 officers who joined the training on 1.2.1993, while Batch No.17 consisted of 87 officers who joined the training on 2.7.1993. They could not be sent for training in one batch, even though they had been selected through the same competitive examination, due to administrative reasons i.e., character verification etc. Respondent no.1, who was promoted from the feeding cadre, joined his post on 15.3.1993. Thus, it is evident that he was placed in the promotional cadre, prior to the commencement of the training of Batch No.17 on 2.7.1993.

26. The learned Single Judge dealt with the statutory provisions contained in Rule 3 and held as under:

> "A perusal of the above makes it apparent that in the case of the officers who have been promoted their seniority is to be determined on the basis of continuous appointment on a day in which they are selected for promoted to that rank. In case of direct entrants their inter–se seniority is to be determined on the basis of aggregate marks obtained by them. Inter-se seniority of the officers mentioned at serial No.(l) (ii) and (iii) is to be determined according to the date of their continuous appointment in the rank. Proviso to the rule is clear. It is specifically mentioned that in the case of direct entrants, the date of appointment shall be the date of commencement of their training course at the Border Security Force Academy."

In light of the above, relief had been granted to respondent no.1. The Division Bench concurred with the said interpretation.

27. If we apply the settled legal propositions referred to hereinabove, no other interpretation is permissible. The language of the said rule is crystal clear. There is no ambiguity with respect to it. The validity of the rule is not under challenge. In such a fact-situation, it is not permissible for the court to

interpret the rule otherwise. The said proviso will have application only in a case where officers who have been selected in pursuance of the same selection process are split into separate batches. Interpreting the rule otherwise, would amount to adding words to the proviso, which the law does not permit.

28. If the contention of the appellants is accepted, it would amount to fixing their seniority from a date prior, to their birth in the cadre. Admittedly, the appellants (17th batch), joined training on 2.7.1993 and their claim is to fix their seniority from the Ist of February, 1993 i.e. the date on which, the 16th batch joined training. Such a course is not permissible in law.

The facts and circumstances of the case neither require any interpretation, nor reading down of the rule.

29. Shri R. Venkataramani, learned Senior counsel for the appellants, has placed very heavy reliance upon the judgment of the Delhi High Court (*Dinesh Kumar v. UOI & Ors.*) dated 14.2.2011 wherein, certain relief was granted to the petitioner therein, in view of the fact that there was some delay in joining training, in relation to passing the fitness test set by the Review Medical Board. The court granted relief, in light of the facts and circumstances of the case, without interpreting Rule 3 of the Rules 1978. Thus, the said judgment, in fact, does not lay down any law. The case at hand is easily distinguishable from the above, as that was a case where seniority and promotion had been granted on a notional basis, with retrospective effect and it was held that the person to whom the same had been granted, was entitled to all consequential benefits.

30. Thus, in view of the above, the appeals lack merit and therefore, are accordingly dismissed.

K.K.T. Appeals dismissed.

SPECIAL OFFICER, COMMERCE, NORTH EASTERN ELECTRICITY COMPANY OF ORISSA (NESCO) & ANR.
V.
M/S RAGHUNATH PAPER MILLS PRIVATE LIMITED & ANR.
(Civil Appeal No. 7899 of 2012)

NOVEMBER 09, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Electricity – Application for power supply connection – By the owner of the premises, who had purchased the property of a company in liquidation through auction – The distributing licencee demanding arrears of electricity dues outstanding against the premises in question as per Regulation 13(10)(b) of Electricity Code, 2004 – Writ Petition by the applicant seeking quashing of the demand letter and direction for electric supply – Single Judge directing to provide electricity connection – Order confirmed by Division Bench of High Court – On appeal, held: Orders of the courts below are correct – The application was for fresh service connection and not for transfer thereof from the name of the erstwhile company – Therefore Regulation 13(10)(b) not applicable and the applicant was not liable to pay the arrears – Section 43 of Electricity Act casts a duty on the licencee to give power supply on an application – The terms and conditions u/s. 43 does not include payment of arrears of dues – Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004 – Regulations 3,10 and 13(10)(b) – Electricity Act, 2004 – s. 43.

The respondent No. 1 purchased the unit in question in an auction sale conducted by Official Liquidator on "as is where is" and "whatever there is" basis. As there was no supply of electricity in the unit, he made application for power supply. The appellant, instead of supplying

power, directed respondent No. 1 to pay the arrears of electricity dues outstanding against the premises in question.

Respondent No. 1 filed Writ Petition praying for quashing of the demand letter. Single Judge of High Court allowed the Petition, directing the appellant to provide electricity to the unit. Writ Appeal against the order of the Single Judge was dismissed by Division Bench of the High Court. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1. Sub-clause 10(b) of Regulation 13 of Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004 applies to a request for transfer of service connection but not to a fresh connection. Section 43 of the Electricity Act, 2003 casts a duty on every distributing licencee, in the case on hand, the appellant, to supply electricity on the application made by the owner or occupier of any premises within 1 month after receipt of the application. No doubt, it should be only after fulfilling the conditions such as installation of machinery, deposit of security etc. The other regulations, viz., Regulation Nos. 3 and 10 and various Forms would show the words "other dues including the security as may be payable" does not mean and were not meant to convey that a new applicant for fresh connection shall pay arrears of electricity dues or other dues for the same premises "payable by the earlier consumer" as stated in Regulation 10. The term "other dues" refers to security and other charges payable for a new connection in terms of the conditions of supply but not the arrears of electricity dues payable by earlier consumer who was in default. [Paras 12, 13, 14 and 15] [79-D-E; 80-B-F]

2. Regulation 13(10)(b) of Sub-clause 109(b) of the

Electricity Supply Code is not applicable to respondent No. 1. Respondent No. 1, after purchase of the said Unit in an auction sale conducted by the Official Liquidator on "as is where is" and "whatever there is" basis applied for a fresh service connection for supply of energy. In other words, respondent No. 1 has not applied for transfer of service connection from the name of the erstwhile company to its name. [Para 11] [78-H; 79-A-C]

Isha Marbles vs. Bihar State Electricity Board and Anr. **(1995) 2SCC 648: 1995 (1) SCR 847;** *Ahmedabad Electricity Co. Ltd. vs.Gujarat Inns Pvt. Ltd. and Ors.* **(2004) 3 SCC 587: 2004 (3) SCR 23;** *Haryana State Electricity Board vs. Hanuman Rice Mills, Dhanauriand Ors*. **(2010) 9 SCC 145: 2010 (10) SCR 217 – relied on.**

Paschimanchal Vidyut Vitran Nigam Ltd. and Ors. vs. DVS Steelsand Alloys Pvt. Ltd. and Ors. **(2009) 1 SCC 210: 2008 (15) SCR 766– distinguished.**

Case Law Reference:

1995 (1) SCR 847	**Relied on**	**Para 16**
2008 (15) SCR 766	**Distinguished**	**Para 17**
2004 (3) SCR	**Relied on**	**Para 18**
2010 (10) SCR 217	**Relied on**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7899 of 2012.

From the Judgment & Order dated 04.11.2010 of the Orissa High Court, Cuttack in Writ Appeal No. 237 of 2010.

Suresh Chandra Tripathy for the Appellants.

P.P. Rao, R.K. Gupta, S.K. Gupta, M.K. Singh, Shekhar Kumar for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 04.11.2010 passed by the High Court of Orissa at Cuttack in Writ Appeal No. 237 of 2010 whereby the Division Bench while affirming the order dated 05.08.2010 passed by the learned single Judge dismissed the appeal filed by the appellants herein.

3. Brief Facts:

a) In the year 2007, pursuant to the order of the Company Judge, High Court of Orissa, in Companies Act Case No. 25 of 2005, the Official Liquidator, made an advertisement for sale of movable and immovable assets and properties of the Factory Unit of M/s Konark Paper & Industries Limited which was in liquidation on "as is where is and whatever there is" basis.

b) The sale was confirmed in favour of respondent No.1 – M/s Raghunath Paper Mills Pvt. Ltd., being the highest bidder, and the possession of the Unit was handed over on 28.03.2008. Since there was no power supply, respondent No.1 made an application to the Chief Executive Officer, North Eastern Electricity Supply Company of Orissa Limited (in short " the NESCO") for restoration of the same. Respondent No. 1 also executed an agreement dated 27.03.2009 with the NESCO for supply of construction power in the Unit. There being no reply from the side of the NESCO, respondent No.1, vide letter dated 26.08.2009, again requested for permanent supply of power. By letter dated 21.05.2010, the NESCO directed respondent No.1 to pay the arrears of electricity dues amounting to Rs. 79,02,262/- outstanding against the premises in question.

c) Being aggrieved, respondent No.1 filed a petition being Writ Petition (C) No. 9807 of 2010 before the High Court of Orissa praying for quashing of the demand letter dated 21.05.2010 issued by the NESCO with a direction to provide permanent supply of power.

d) Learned single Judge, by order dated 05.08.2010, after considering various provisions of law governing the issue in question allowed the petition and directed the NESCO to provide electricity to the Unit of respondent No.1 within a period of 7 days from the date of his judgment.

e) Dissatisfied with the decision of the learned single Judge, the appellants filed Writ Appeal No. 237 of 2010 before the Division Bench of the High Court. The Division Bench, by order dated 04.11.2010, finding no illegality in the order of the learned single Judge, dismissed the appeal filed by the appellants.

f) Aggrieved by the said decision, the appellants have preferred this appeal by way of special leave petition before this Court.

4. Heard Mr. Suresh Chandra Tripathy, learned counsel for the appellants and Mr. P.P. Rao, learned senior counsel for respondent No.1.

5. The only point for consideration in this appeal is whether a Company, which purchased the property of another Company under liquidation through auction, is liable to pay the arrears of electricity dues outstanding against the erstwhile Company.

6. It is not in dispute that respondent No. 1 was the highest bidder and the sale was confirmed in its favour and possession of the Unit was handed over on 28.03.2008 itself. It is further seen that after getting the possession and after finding that there is no supply power in the premises in question, respondent No. 1 made an application for availing the same to the Chief Executive Officer, NESCO. Since there was no reply on their part, respondent No. 1, by letter dated 26.08.2009, again requested for permanent supply of electricity, for which, by letter dated 21.05.2010, the NESCO directed respondent No. 1 to pay the arrears of electricity dues amounting to Rs. 79,02,262/- outstanding against the premises which was purchased in

auction through Official Liquidator. Being aggrieved by the same, respondent No. 1 challenged the said demand order before the High Court. Learned single Judge, with reference to various guidelines/rules applicable, quashed the demand order dated 21.05.2010 and the Division Bench also affirmed the same which necessitated filing of the above appeal.

7. At the foremost, it is useful to refer the original order of demand dated 21.05.2010 issued by the NESCO which reads as under:-

"NORTH EASTERN ELECTRICITY SUPPLY COMPANY OF ORISSA LTD.
Corporate Office, Januganj, Balasore-756 019, Orissa
Regd. Office: Plot No.N-1/22, Nayapalli,
Bhubaneswar-751 012, Orissa

No. FC/CO/238 12595(3) Dated: 21.05.2010

To By Regd. Post

The Director
M/s Raghunath Paper Mill (P) Ltd.
At-Jharia, Rupsa
Basta, Dist. Balasore

Sub:- Payment of arrear electricity dues amounting to Rs. 79,02,262/- against the premises.

Ref: Your Letter No. Nil dated 13.01.2010

Sir,

With reference to the subject cited above, you are requested to pay the arrear electricity dues amounting to Rs. 79,02,262/- outstanding against the premises to which you intend to avail power. On clearance of arrear electricity dues, necessary permission letter for providing power supply shall be issued in your favour.

Please arrange to pay the above arrear immediately for necessary action regarding power connection to your unit.

Yours faithfully
Sd/-
Special Officer (Commerce)

CC to EE, BTED, Basta for information and necessary action.

CC to SEEC, Balasore for information and necessary action"

8. It is not in dispute that respondent No. 1 has purchased the said unit from the Official Liquidator in pursuance of the advertisement for sale and the sale was confirmed on payment of the sale consideration and possession of the unit was handed over on 28.03.2008. It is also relevant to mention here that the Official Liquidator, pursuant to the order of the Company Judge, High Court of Orissa in Companies Act Case No. 25 of 2005, made an advertisement for the sale of movable and immovable assets and properties of the Factory Unit of M/s Konark Paper & Industries Ltd. covering the leasehold land, buildings/sheds, plant and machinery, furniture and fixtures etc., which was in liquidation on "as is where is" and "whatever there is" basis. Inasmuch as respondent No. 1 satisfied all the conditions, made full payment of sale consideration, the possession of the Unit was handed over by the Official Liquidator to respondent No. 1 on 28.03.2008.

9. After taking possession of the Unit on "as is where is" and "whatever there is" basis, in order to establish a paper unit in the premises, respondent No. 1 made an application on 10.12.2008 to the NESCO for availing power of 100 KW at 33 KV. It is not in dispute that during the construction period of Basta feeder line to the Unit, respondent No. 1 executed an agreement with the NESCO dated 27.03.2009 for availing the

required load and deposited security amount of Rs. 1,65,156/ , however, even after completion of the work, the NESCO did not provide power supply to the Unit on the ground of arrears of electricity dues amounting to Rs. 79,02,262/- against the premises. According to the appellant-NESCO, without clearance of the outstanding dues for the electricity charges by the previous owner, respondent No. 1 is not entitled to power supply. On the other hand, it is the stand of respondent No. 1 that inasmuch as the application is not for seeking transfer of power from a previous owner and the Unit was purchased on "as is where is" and "whatever there is" basis after fulfilling all the formalities/conditions and in the absence of any privity of contract between respondent No. 1 and the NESCO, the demand for clearance of arrears of electricity dues is not justified.

10. Now, let us consider the relevant provisions of the Orissa Electricity Regulatory Commission Distribution (Conditions of Supply), Code, 2004 (in short 'the Electricity Supply Code'). Sub-clause 10 of Regulation 13 of the Electricity Supply Code is as follows:-

"(10) Transfer of service connection:-

(a) Subject to the Regulation 8, the transfer of service connection shall be effected within 15 days from the date of receipt of complete application.

(b) The service connection from the name of a person to the name of another consumer shall not be transferred unless the arrear charges pending against the previous occupier are cleared.

Provided that this shall not be applicable when the ownership of the premises is transferred under the provisions of the State Financial Corporation Act."

11. It is the case of the appellant that as per the above provision, viz., sub-clause 10(b) of Regulation 13 of the

Electricity Supply Code, unless respondent No. 1 pays the arrears of electricity dues against the erstwhile company, electricity supply cannot be restored to its Unit. We are of the view that the reading of the above sub-clause makes it clear that the said provision is not applicable to respondent No. 1. We have already quoted that respondent No. 1, after purchase of the said Unit in an auction sale conducted by the Official Liquidator on "as is where is" and "whatever there is" basis has applied for a fresh service connection for supply of energy (emphasis supplied). In other words, respondent No. 1 has not applied for transfer of service connection from the name of the erstwhile company to its name. To make it clear, respondent No. 1 applied for a fresh connection for its Unit after purchasing the same from the Official Liquidator. It is also not in dispute that the arrears of electricity dues were levied against the premises in question, on the other hand, it was levied against the erstwhile company.

12. From the above factual details in the case on hand and in the light of sub-clause 10(b) of Regulation 13 of the Electricity Supply Code, we hold that the said clause applies to a request for transfer of service connection but not to a fresh connection. The interpretation of this clause by learned single Judge as well as by the Division Bench was correct being reasonable, just and fair.

13. Similarly, Section 43 of the Electricity Act, 2003 speaks about supply of electricity on request which is as under:-

> **"43. Duty to supply on request.-** (1) Save as otherwise provided in this Act, every distribution licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply:
>
> x x x
>
> x x x

> Explanation:--For the purposes of this sub-section, "application" means the application complete in all respects in the appropriate form, as required by the distribution licensee, along with documents showing payment of necessary charges and other compliances:
>
> x x x
>
> x x x"

Section 43 of the Electricity Act, 2003 casts a duty on every distributing licencee, in the case on hand, the appellant, to supply electricity on the application made by the owner or occupier of any premises within 1 month after receipt of the application. No doubt, it should be only after fulfilling the conditions such as installation of machinery, deposit of security etc.

14. We were also taken through the other regulations, viz., Regulation Nos. 3 and 10 and various Forms which would show the words "other dues including the security as may be payable" does not mean and were not meant to convey that a new applicant for fresh connection shall pay arrears of electricity dues or other dues for the same premises "payable by the earlier consumer" as stated in Regulation 10.

15. As rightly pointed out by Mr. P.P. Rao, learned senior counsel for respondent No. 1, the absence of these words in para 3 conclusively shows that the term "other dues" refers to security and other charges payable for a new connection in terms of the conditions of supply but not the arrears of electricity dues payable by earlier consumer who was in default.

16. In *Isha Marbles vs. Bihar State Electricity Board and Another* (1995) 2 SCC 648, a three-Judge Bench of this Court had an occasion to consider a similar question, viz., whether the auction-purchaser is liable to meet the liability of old consumer of electricity to the premises which is purchased by

him in the auction sale from Bihar State Financial Corporation under Section 29(1) of the State Financial Corporations Act, 1951. After considering relevant provisions of the Electricity Act and the Regulations, this Court held as under:-

> "56. From the above it is clear that the High Court has chosen to construe Section 24 of the Electricity Act correctly. There is no charge over the property. Where that premises comes to be owned or occupied by the auction-purchaser, when such purchaser seeks supply of electric energy he cannot be called upon to clear the past arrears as a condition precedent to supply. What matters is the contract entered into by the erstwhile consumer with the Board. The Board cannot seek the enforcement of contractual liability against the third party. Of course, the bona fides of the sale may not be relevant.
>
> 61. .....It is impossible to impose on the purchasers a liability which was not incurred by them.
>
> 62. No doubt, from the tabulated statement above set out, the auction-purchasers came to purchase the property after disconnection but they cannot be "consumer or occupier" within the meaning of the above provisions till a contract is entered into.
>
> 63. We are clearly of the opinion that there is great reason and justice in holding as above. Electricity is public property. Law, in its majesty, benignly protects public property and behoves everyone to respect public property. Hence, the courts must be zealous in this regard. But, the law, as it stands, is inadequate to enforce the liability of the previous contracting party against the auction-purchaser who is a third party and is in no way connected with the previous owner/occupier. It may not be correct to state, if we hold as we have done above, it would permit dishonest consumers transferring their units from one hand to another, from time to time, infinitum without the payment of the dues to the extent of lakhs and lakhs of rupees and

> each one of them can easily say that he is not liable for the liability of the predecessor in interest....."

17. In *Paschimanchal Vidyut Vitran Nigam Ltd. & Ors. vs. DVS Steels & Alloys Pvt. Ltd. & Ors.* AIR 2009 SC 647= (2009) 1 SCC 210, the question whether the supplier can recover electricity dues from the purchaser of a sub-divided plot was considered by this Court. The following conclusion is relevant:-

> "9. The supply of electricity by a distributor to a consumer is "sale of goods". The distributor as the supplier, and the owner/occupier of a premises with whom it enters into a contract for supply of electricity are the parties to the contract. A transferee of the premises or a subsequent occupant of a premises with whom the supplier has no privity of contract cannot obviously be asked to pay the dues of his predecessor-in-title or possession, as the amount payable towards supply of electricity does not constitute a "charge" on the premises. A purchaser of a premises, cannot be foisted with the electricity dues of any previous occupant, merely because he happens to be the current owner of the premises. The supplier can therefore neither file a suit nor initiate revenue recovery proceedings against a purchaser of a premises for the outstanding electricity dues of the vendor of the premises in the absence of any contract to the contrary.

Learned counsel for the appellant heavily relied on para 10 of the very same judgment which reads as under:-

> 10. But the above legal position is not of any practical help to a purchaser of premises. When the purchaser of a premises approaches the distributor seeking a fresh electricity connection to its premises for supply of electricity, the distributor can stipulate the terms subject to which it would supply electricity. It can stipulate as one of the conditions for supply, that the arrears due in regard to the supply of electricity made to the premises when it was

> in the occupation of the previous owner/occupant, should be cleared before the electricity supply is restored to the premises or a fresh connection is provided to the premises. If any statutory rules govern the conditions relating to sanction of a connection or supply of electricity, the distributor can insist upon fulfilment of the requirements of such rules and regulations. If the rules are silent, it can stipulate such terms and conditions as it deems fit and proper to regulate its transactions and dealings. So long as such rules and regulations or the terms and conditions are not arbitrary and unreasonable, courts will not interfere with them."

If we apply the above principles as pointed out by Mr. Tripathy, learned counsel for the appellant, undoubtedly, respondent No. 1-purchaser of the premises is liable to pay entire arrears or outstanding of power dues. However, as pointed out by Mr. P.P. Rao, learned senior counsel, respondent No. 1 is not a party to the contract with the supplier, i.e., the NESCO. We have already quoted the relevant clauses, particularly, sub-Clause 10(b) of Regulation 13 of the Electricity Supply Code, which is not applicable to respondent No. 1 herein. In other words, as mentioned in the earlier paras, in the case on hand, respondent No. 1 has not applied for transfer of service connection from the name of the erstwhile company to its name but applied for a fresh connection to its Unit after purchasing the same from the Official Liquidator.

18. It is also relevant to refer a decision of a three-Judge Bench of this Court reported in *Ahmedabad Electricity Co. Ltd. vs. Gujarat Inns Pvt. Ltd. and Others,* (2004) 3 SCC 587. This Court, after finding that the cases are of fresh connection, in para 3, held as under:-

> "3…..We are clearly of the opinion that in case of a fresh connection though the premises are the same, the auction-purchasers cannot be held liable to clear the arrears incurred by the previous owners in respect of power supply

> to the premises in the absence of there being a specific statutory provision in that regard….."

19. In a recent decision, i.e. in *Haryana State Electricity Board vs. Hanuman Rice Mills, Dhanauri and Others,* (2010) 9 SCC 145, this Court, after referring to all the earlier decisions including *Isha Marbles* (supra) and *Paschimanchal Vidyut Vitran Nigam Ltd.* (supra) etc., summarized the position in the following manner which is as under:-

> "12. ….(i) Electricity arrears do not constitute a charge over the property. Therefore in general law, a transferee of a premises cannot be made liable for the dues of the previous owner/occupier.
>
> (ii) Where the statutory rules or terms and conditions of supply which are statutory in character, authorise the supplier of electricity to demand from the purchaser of a property claiming reconnection or fresh connection of electricity, the arrears due by the previous owner/occupier in regard to supply of electricity to such premises, the supplier can recover the arrears from a purchaser."

20. In the light of the above discussion, specific factual details regarding the position of respondent No. 1 which purchased the said premises under court auction sale from the Official Liquidator on "as is where is" and "whatever there is" basis and in the light of the regulations quoted above, particularly, sub-clause 10(b) of Regulation 13, we hold that the request was not for the transfer from the previous owner to the purchaser, on the other hand, it was a request for a fresh connection for the Unit of respondent No. 1 herein. We are in entire agreement with the decision arrived at by learned single Judge as affirmed by the Division Bench of the High Court.

21. In view of the above, we find no merit in the appeal, consequently, the same is dismissed.

K.K.T. Appeal dismissed.

SANGEET & ANR.
v.
STATE OF HARYANA
(Criminal Appeal Nos. 490-491 of 2011)

NOVEMBER 20, 2012

[K.S. RADHAKRISHNAN AND MADAN B. LOKUR, JJ.]

Sentence/Sentencing:

Death sentence – Award of – By courts below – On Conviction under provisions of IPC – On appeal held: In the facts of the case and in view of the uncertainty as to whether the punishment should be life imprisonment or death sentence, death sentence is reduced to sentence of life imprisonment – Penal Code, 1860 – ss. 302, 307, 148.

*Death sentence – Grant of – Approach of court – Approach of aggravating and mitigating circumstances while granting death sentence needs a fresh look – Such approach was not endorsed in *Bachan Singh's case, but still it is adopted by courts – Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal and a balance sheet cannot be drawn up for comparing the two as both are distinct and unrelated – Even though *Bachan Singh's case intended 'principled sentencing', the sentencing has become 'judge centric' – Nature of crime continues to play a more important role than the 'crime and criminal' – *Bachan Singh case has not encouraged standardization and categorization of crimes and even otherwise it is not possible to categorize and standardize all crimes – Code of Criminal Procedure 1973 – s. 354(3).*

Remission of Sentence to a life convict – Consideration for grant of remission is statutory right – Courts cannot restrain the appropriate Government from granting remission or restrain a convict to apply for remission – To prevent arbitrary

exercise of power to grant remission, legislature has built-in procedural and substantive checks in Cr.P.C. – Life imprisonment means imprisonment for the life span of the convict with procedural and substantive checks laid down in Cr.P.C. for his early release – Before exercising powers of remission u/s. 432 Cr.P.C., appropriate Government must obtain the opinion of the presiding Judge of the convicting or confirming court – Code of Criminal Procedure, 1973 – ss. 432 and 433A – Penal Code, 1860 – s. 45.

Code of Criminal Procedure 1973 – s. 432 – Application of – Discussed.

Six accused, including the appellants-accused were convicted u/ss. 302, 307, 148. 449 r/w s. 149 IPC and five of the accused were convicted u/s. 25 (1-B) of Arms Act, 1959. Appellants-accused were sentenced to death and others were sentenced to life imprisonment. High Court confirmed the judgment of trial court. In the present appeal, notice was limited to the question of sentence.

Partly allowing the appeal, the Court

HELD: 1. In the present case, there is considerable uncertainty on the punishment to be awarded in capital offences – whether it should be life imprisonment or death sentence. Due to this uncertainty, awarding a sentence of life imprisonment, in cases such as the present one is not unquestionably foreclosed. More so when, in this case, there is no evidence (contrary to the conclusion of the High Court) that the body of one of the deceased was burnt by appellant-accused 'S' from below the waist with a view to destroy evidence of her having been subjected to sexual harassment and rape. There is also no evidence (again contrary to the conclusion of the High Court) that appellant-accused 'N' was a professional killer. Therefore, the appeals are allowed to the extent that the death penalty awarded to the appellants is converted into a

sentence of life imprisonment. The appellants should be awarded a life sentence, subject to the faithful implementation of the provisions of Cr.P.C. [Paras 1, 81 and 82] [96-A-B; 128-C-E]

2.1 This Court has not endorsed the approach of aggravating and mitigating circumstances in ****Bachan Singh* **case. However, this approach has been adopted in several decisions. This needs a fresh look. In any event, there is little or no uniformity in the application of this approach. The conclusion of the Constitution Bench in ****Bachan Singh* **case was that the sentence of death ought to be given only in the rarest of rare cases and it should be given only when the option of awarding the sentence of life imprisonment is "unquestionably foreclosed". ****Bachan Singh* **case, therefore, made two very significant departures from *****Jagmohan Singh* **case. The departures were: (i) in the award of punishment by deleting any reference to the aggravating and mitigating circumstances of a crime and (ii) in introducing the circumstances of the criminal. Despite the legislative change outlined in Section 354(3) Cr.P.C. viz. that for persons convicted of murder, "life imprisonment is the rule and death sentence an exception" and ****Bachan Singh* **case discarding proposition (iv)(a) of *****Jagmohan Singh* **case, this Court in ******Machhi Singh* **case revived the "balancing" of aggravating and mitigating circumstances through a balance sheet theory and this theory held the field post ******Machhi Singh* **case. [Paras 24, 25, 29 and 80] [105-C-E; 107-E-F; 126-H; 127-A]

Bachan Singh v. State of Punjab* **(1980) 2 SCC 684; ***Jagmohan Singh v. State of U.P.* **(1973) 1 SCC 20;** *Swamy Shraddananda (2) vs. State of Karnataka* **(2008) 13 SCC 767: 2008 (11) SCR 93;** *Aloke Nath Dutta v. State of West Bengal* **(2007) 12 SCC 230: 2006 (10) Suppl. SCR 662;** *Santosh Kumar Satishbhushan Bariyar v. State of*

Maharashtra **(2009) 6 SCC 498: 2009 (9) SCR 90;** ****Machhi Singh and Ors. v. State of Punjab* **(1983) 3 SCC 470:1983 (3) SCR 413 – referred to.**

2.2 Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The aggravating and mitigating circumstances approach not only need a fresh look but the necessity of adopting this approach also needs a fresh look in the light of the conclusions in ****Bachan Singh* **case. Even though ****Bachan Singh* **case intended "principled sentencing", sentencing has now really become judge-centric. This aspect of the sentencing policy i.e. focus should be on 'crime and the criminal', as introduced by the Constitution Bench in ****Bachan Singh* **case, seems to have been lost in transition. Despite ****Bachan Singh* **case primacy still seems to be given to the nature of the crime. The circumstances of the criminal, referred to in ****Bachan Singh* **appear to have taken a bit of a back seat in the sentencing process. In the sentencing process, both the crime and the criminal are equally important. [Paras 33, 34 and 80] [108-G-H; 109-A-C; 127-B-C]

Bachan Singh v. State of Punjab* **(1980) 2 SCC 684; *Swamy Shraddananda (2) v. State of Karnataka* **(2008) 13 SCC 767: 2008 (11) SCR 93;** *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* **(2009) 6 SCC 498: 2009 (9) SCR 90;** *B.A. Umesh v. Registrar General, High Court of Karnataka* **(2011) 3 SCC 85:2011 (2) SCR 367;** *Sushil Murmu v. State of Jharkhand* **(2004) 2 SCC 338: 2003 (6) Suppl. SCR 702;** *Mohd. Chaman v. State (NCT of Delhi)* **(2001) 2 SCC 28;** *Dilip Premnarayan Tiwari v. State of Maharashtra* **(2010) 1 SCC 775:2009 (16) SCR 322;** *Sebastian v. State of Kerala* **(2010) 1 SCC 58;** *Rajesh Kumar v. State* **(2011) 13 SCC 706;** *Amit v. State of Uttar Pradesh*

(2012) 4 SCC 107:2012 (1) SCR 1009; *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* **(2009) 6 SCC 498: 2009 (9) SCR 90;** *Ravji v. State of Rajasthan* **(1996) 2 SCC 175: 1995 (6) Suppl. SCR 195 ;** *Dilip Premnarayan Tiwari v. State of Maharashtra* **(2010) 1 SCC 775: 2009 (16) SCR 322;** *Shivu v. Registrar General High Court of Karnataka* **(2007) 4 SCC 713: 2007 (2) SCR 555;** *Rajendra Pralhadrao Wasnik v. State of Maharashtra* **(2012) 4 SCC 37:2012 (2) SCR 225;** *Mohd. Mannan v. State of Bihar* **(2011) 5 SCC 317: 2011 (5) SCR 518 – referred to.**

2.3 The standardization and categorization of crimes which was attempted in ******Machhi Singh* **case for the practical application of the rarest of the rare case principle, has not received further importance from Supreme Court, although it is referred to from time to time. This only demonstrates that though emphasis on 'crime and criminal' in the development of a sound sentencing policy is still alive, it is a little unsteady in its application, despite ****Bachan Singh* **case. Even otherwise it is not possible to standardize and categorize all crimes. [Paras 52, 54 and 80] [114-A-B, G-H; 127-D-E]

Bachan Singh v. State of Punjab* **(1980) 2 SCC 684;****Machhi Singh and Ors. v. State of Punjab* **(1983) 3 SCC 470:1983 (3) SCR 413 – referred to.**

3.1 Some decisions delivered by this Court seems to suggest that the remission power of the appropriate Government has effectively been nullified by awarding sentences of 20 years, 25 years and in some cases without any remission. This is not permissible. This Court (or any Court for that matter) cannot restrain the appropriate Government from granting remission of a sentence to a convict. The appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence,

whatever be the reason. It is true that a convict undergoing a sentence does not have right to get a remission of sentence, but he certainly does have a right to have his case considered for the grant of remission. The grant of remissions is statutory. However, to prevent its arbitrary exercise, the legislature has built in some procedural and substantive checks in the statute. These need to be faithfully enforced. [Paras 58, 59 and 80] [115-H; 116-A-D; 127-E-F]

State of Haryana v. Mahender Singh **(2007) 13 SCC 606: 2007 (11) SCR 932;** *State of Haryana v. Jagdish* **(2010) 4 SCC 216: 2010 (3) SCR 716 – relied on.**

Dalbir Singh v. State of Punjab **(1979) 3 SCC 745:1979 (3) SCR 1059;** *Swamy Shraddananda (2) v. State of Karnataka* **(2008) 13 SCC 767: 2008 (11) SCR 93 – referred to.**

3.2 Section 45 of IPC defines life as denoting the life of a human being, unless the contrary appears from the context. Therefore, when a punishment for murder is awarded u/s. 302 IPC, it must be imprisonment for life, where life denotes the life of the convict or death. The term of sentence spanning the life of the convict, can be curtailed by the appropriate Government for good and valid reasons in exercise of its powers u/s. 432 Cr.P.C. Broadly, this Section statutorily empowers the appropriate Government to suspend the execution of a sentence or to remit the whole or any part of the punishment of a convict [sub-section (1)]. But, the statute provides some inherent procedural and substantive checks on the arbitrary exercise of this power. [Para 61] [117-A-C]

Samjuben Gordhanbhai Koli v. State of Gujarat **(2010) 13 SCC 466: 2010 (12) SCR 247 – referred to.**

3.3 An exercise of power by the appropriate Government under sub-section (1) of Section 432 Cr.P.C. cannot be *suo motu* for the simple reason that this sub-section is only an enabling provision. The appropriate Government is enabled to "override" a judicially pronounced sentence, subject to the fulfillment of certain conditions. Those conditions are found either in the Jail Manual or in statutory rules. [Para 63] [119-D-F]

3.4 The statutory procedure u/s. 432 Cr.P.C. seems quite reasonable in as much as there is an application of mind to the issue of grant of remission. It also eliminates "discretionary" or *en masse* release of convicts on "festive" occasions since each release requires a case-by-case basis scrutiny. [Para 63] [120-A-B]

State of Haryana v. Mohinder Singh **(2000) 3 SCC 394: 2000 (1) SCR 698 – referred to.**

3.5 For exercising the power of remission to a life convict, the Cr.P.C. places not only a procedural check but also a substantive check. This check is through Section 433-A of the Cr.P.C. which provides that when the remission of a sentence is granted in a capital offence, the convict must serve at least fourteen years of imprisonment. [Para 65] [120-D-E]

Gopal Vinayak Godse v. State of Maharashtra **AIR 1961 SC 600: 1961 SCR 210;** *Maru Ram v. Union of India* **(1981) 1 SCC 107;** *Ashok Kumar v. Union of India* **(1991) 3 SCC 498: 1991 (2) SCR 858;** *Kishori Lal v. Emperor* **AIR 1945 PC 64;** *State of Madhya Pradesh v. Ratan Singh* **(1976) 3 SCC 470: 1976 SCR 552 – referred to.**

3.6 There is a misconception that a prisoner serving a life sentence has an indefeasible right to release, on completion of either fourteen years or twenty years imprisonment. The prisoner has no such right. A convict

undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under Section 432 Cr.P.C., which in turn is subject to the procedural checks in that Section and the substantive check in Section 433-A Cr.P.C. [Para 74] [124-G-H; 125-A]

3.7 The application of Section 432 Cr.P.C. to a convict is limited. A convict serving a definite term of imprisonment is entitled to earn a period of remission or even be awarded a period of remission under a statutory rule framed by the appropriate Government or under the Jail Manual. This period is then offset against the term of punishment given to him. In such an event, if he has undergone the requisite period of incarceration, his release is automatic and Section 432 Cr.P.C. will not even come into play. This Section will come into play only if the convict is to be given an "additional" period of remission for his release, that is, a period in addition to what he has earned or has been awarded under the Jail Manual or the statutory rules. [Para 75] [125-A-D]

3.8 In the case of a convict undergoing life imprisonment, he will be in custody for an indeterminate period. Therefore, remissions earned by or awarded to such a life convict are only notional. In his case, to reduce the period of incarceration, a specific order u/s. 432 Cr.P.C. will have to be passed by the appropriate Government. However, the reduced period cannot be less than 14 years as per Section 433-A Cr.P.C. [Para 76] [125-D-E]

3.9 What Section 302 IPC provides for, is only two punishments – life imprisonment and death penalty. In several cases, this Court has proceeded on the postulate that life imprisonment means fourteen years of incarceration, after remissions. The calculation of fourteen years of incarceration is based on another

postulate, namely that a sentence of life imprisonment is first commuted (or deemed converted) to a fixed term of twenty years on the basis of the Karnataka Prison Rules, 1974 and a similar letter issued by the Government of Bihar. Apparently, rules of this nature exist in other States as well. Thereafter, remissions earned or awarded to a convict are applied to the commuted sentence to work out the period of incarceration to fourteen years. [Para 78] [125-G-H; 126-A-C]

Swamy Shraddananda (2) v. State of Karnataka **(2008) 13 SCC 767:2008 (11) SCR 93 – referred to.**

3.10 This re-engineered calculation can be made only after the appropriate Government artificially determines the period of incarceration. The procedure apparently being followed by the appropriate Government is that life imprisonment is artificially considered to be imprisonment for a period of twenty years. It is this arbitrary reckoning that has been prohibited in *#Ratan Singh* case. A failure to implement *#Ratan Singh* case has led this Court in some cases to carve out a special category in which sentences of twenty years or more are awarded, even after accounting for remissions. If the law is applied meaning thereby that life imprisonment is imprisonment for the life span of the convict, with procedural and substantive checks laid down in the Cr.P.C. for his early release the court would reach a legally satisfactory result on the issue of remissions. This makes an order for incarceration for a minimum period of 20 or 25 or 30 years unnecessary. [Para 79] [126-C-F]

#State of Madhya Pradesh v. Ratan Singh **(1976) Suppl. 3 SCC 470:1976 Suppl. SCR 552 – referred to.**

3.11 Remission can be granted under Section 432 Cr.P.C. in the case of a definite term of sentence. The power under this Section is available only for granting

"additional" remission, that is, for a period over and above the remission granted or awarded to a convict under the Jail Manual or other statutory rules. If the term of sentence is indefinite (as in life imprisonment), the power u/s. 432 Cr.P.C. can certainly be exercised but not on the basis that life imprisonment is an arbitrary or notional figure of twenty years of imprisonment. [Para 80] [127-F-H; 128-A]

3.12 Before actually exercising the power of remission under Section 432 Cr.P.C. the appropriate Government must obtain the opinion (with reasons) of the presiding judge of the convicting or confirming Court. Remissions can, therefore, be given only on a case-by-case basis and not in a wholesale manner. [Para 80] [128-A-B]

Case Law Reference:

(1980) 2 SCC 684	**Referred to**	**Para 29**
(1973) 1 SCC 20	**Referred to**	**Para 29**
2006 (10) Suppl. SCR 662	**Referred to**	**Para 30**
2009 (9) SCR 90	**Referred to**	**Paras 30, 32 and 34**
2008 (11) SCR 93	**Referred to**	**Paras 30,32, 55,58 and 78**
1995 (6) Suppl. SCR 195	**Referred to**	**Para 34**
2009 (16) SCR 322	**Referred to**	**Para 35**
2007 (2) SCR 555	**Referred to**	**Para 36**
2012 (2) SCR 225	**Referred to**	**Para 37**
2011 (5) SCR 518	**Referred to**	**Para 38**
2011 (2) SCR 367	**Referred to**	**Para 42**
2003 (6) Suppl. SCR 702	**Referred to**	**Para 43**

(2001) 2 SCC 28	**Referred to**	**Para 45**
2009 (16) SCR 322	**Referred to**	**Para 46**
(2010) 1 SCC 58	**Referred to**	**Para 47**
(2011) 13 SCC 706	**Referred to**	**Para 49**
2012 (1) SCR 1009	**Referred to**	**Para 50**
1983 (3) SCR 413	**Referred to**	**Para 52**
2007 (11) SCR 932	**Relied on**	**Para 59**
2010 (3) SCR 716	**Relied on**	**Para 59**
1979 (3) SCR 1059	**Referred to**	**Para 60**
2010 (12) SCR 247	**Referred to**	**Para 62**
2000 (1) SCR 698	**Referred to**	**Para 64**
1961 SCR 210	**Referred to**	**Para 67**
(1981) 1 SCC 107	**Referred to**	**Para 67**
1991 (2) SCR 858	**Referred to**	**Para 67**
1976 Suppl. SCR 552	**Referred to**	**Paras 70 and 73**
AIR 1945 PC 64	**Referred to**	**Para 72**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 490-491 of 2011.

From the Judgment & Order dated 21.07.2010 of the High Court of Punjab & Haryana at Chandigarh in criminal appeal No. 6-DB of 2010 and in Murder Reference No. 7 of 2009.

Shekhar Prit Jha, Vikarant Bhardwaj, Bipin Kumar Jha for the Appellants.

Kamal Mohan Gupta, Sanjeev Kumar, Gaurav Teotia for the Respondent.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. In these appeals, this Court issued notice limited to the question of the sentence awarded to the appellants. They were awarded the death penalty, which was confirmed by the High Court. In our opinion, the appellants in these appeals against the order of the High Court should be awarded a life sentence, subject to the faithful implementation of the provisions of the Code of Criminal Code, 1973.

The facts:

2. In view of the limited notice issued in these appeals, it is not necessary to detail the facts. However, it may be mentioned that as many as six persons (including the appellants) were accused of various offences under the Indian Penal Code (for short the IPC) and the Arms Act, 1959. They were convicted by the Additional Sessions Judge, Rohtak by his judgment and order dated 13th November, 2009 in Sessions Case No. 47 of 2004/2009 of the offence of murder (Section 302 of the IPC), attempt to murder (Section 307 of the IPC), rioting, armed with a deadly weapon (Section 148 of the IPC), house trespass in order to commit an offence punishable with death (Section 449 of the IPC) read with Section 149 of the IPC (every member of an unlawful assembly is guilty of an offence committed in prosecution of a common object). Five of the accused were convicted of an offence under Section 25(1-B) of the Arms Act, 1959. Except the appellants, all of them were given a sentence of rigorous imprisonment for life and payment of fine. The appellants, as mentioned above, were sentenced to death.

3. The Trial Judge found the accused guilty of having committed the murder of Ranbir, Bimla (his wife), Seema (wife of Amardeep) and Rahul the three-year-old child of Amardeep and Seema and grandson of Ranbir.

4. The Trial Judge found that accused Ram Phal believed that Amardeep's family had performed some black magic which led to the death of his (Ram Phal) son Ved Pal soon after

his marriage. Apparently, with a view to take revenge, Ram Phal and the other accused committed the crimes aforementioned.

5. The Trial Judge found that the bodies of Ranbir, Bimla (his wife) and Seema (wife of Amardeep) had bullet injuries and other injuries inflicted by a sharp-edged weapon called 'Kukri'. The body of Seema was also burnt from below the waist. As far as Rahul (a three-year-old boy) is concerned the upper portion of his head was blown off by a firearm injury. Amardeep also had a grievous injury but he survived and was the star witness for the prosecution. On these broad facts the Trial Judge convicted the appellants and others.

6. Thereafter, the Trial Judge heard the convicts under Section 235(2) of the Code of Criminal Procedure on the question of sentence. In his brief statement, appellant Sandeep stated that he is married and has a five-year-old daughter and aged parents to look after. Appellant Narender also gave a brief a brief statement that he is not married and has aged parents to look after. The Trial Judge considered the judgments of this Court, inter alia, in *Bachan Singh v. State of Punjab,* (1980) 2 SCC 684 and *Machhi Singh and Ors. v. State of Punjab,* (1983) 3 SCC 470. Thereafter, by his order dated 18th November, 2009 the Trial Judge handed down the sentences mentioned above.

7. The Trial Judge found that the crime committed by the appellants was brutal in nature. As far as Narender is concerned he had blown off the upper portion of the head of three-year-old Rahul, son of Amardeep by the use of a firearm. As far as Sandeep is concerned, even after giving a gun shot injury on the head of Seema he poured kerosene oil on her and set her ablaze. Taking note of the fact that the entire family of Ranbir (except Amardeep) was wiped out by the accused in a brutal and merciless manner, the Trial Judge held that the crime committed by them fell in the category of the rarest of rare cases, inviting the death penalty. The death sentence awarded to the appellants was however, subject to confirmation by the

Punjab & Haryana High Court to which a reference was separately made.

8. The Punjab & Haryana High Court by its Judgment and Order dated 21st July, 2010 in Murder Reference No. 7 of 2009 confirmed the death sentence.

9. The High Court opined that the crime was committed in a pre-meditated, cold-blooded, cruel and diabolic manner while the victims were sleeping. The convicts were armed with deadly weapons like firearms and kukris etc. which they used unhesitatingly and indiscriminately to commit murders and cause a life threatening injury to Amardeep. It was held that Seema's body was burnt by Sandeep from below the waist with a view to destroy evidence of her having been subjected to sexual harassment and rape. Narender was found to be a professional killer. It was held that the act of the appellants fell in the category of rarest of rare cases and as such a death penalty was warranted.

10. We heard the learned Legal Aid Counsel on behalf of the appellants and record our appreciation for the keen interest taken by him in the case and the efforts put in. We also heard learned counsel for the State and have gone through the record as well as the statement given by the appellants under Section 235 (2) of the Criminal Procedure Code. We have given our anxious consideration to the question of sentence to be awarded to the appellants.

Leading judgments on the death penalty:

11. Any discussion on the subject of death penalty should actually commence with the Constitution Bench decision in *Bachan Singh*. However, it may be more appropriate to travel back in time to *Jagmohan Singh v. State of U.P.* (1973) 1 SCC 20 for the limited purpose of indicating an important legislative change that had taken place in the meanwhile.

12. *Jagmohan Singh* was decided when the Code of

Criminal Procedure, 1898 (for short the old Code) was in force. Section 367(5) of the old Code provided that if an accused person is convicted of an offence punishable with death, and he is sentenced to a punishment other than death, the Court was required to state the reason why a sentence of death was not passed. Section 367(5) of the old Code reads as follows:-

> "If the accused is convicted of an offence punishable with death, and the court sentences him to any punishment other than death, the court shall in its judgment state the reason why sentence of death was not passed."

13. *Bachan Singh* was, however, heard and decided when the Code of Criminal Procedure, 1973 (for short the Cr.P.C) had come into force with effect from 1st April, 1974. The Cr.P.C contained Section 354(3), which provided that for an offence punishable with death, the first option for punishment would be imprisonment for life (or imprisonment for a term of years) and the second option would be a sentence of death. Section 354(3) of the Cr.P.C reads as follows:-

> "When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."

14. The Cr.P.C. effectively reversed the position as it existed under the old Code and also placed a requirement that if a sentence of death is awarded, the Court should record special reasons for awarding that sentence.

15. In *Bachan Singh*, two issues came up for consideration before the Constitution Bench. The first issue related to the constitutional validity of the death penalty for murder as provided in Section 302 of the IPC and the second related to "the sentencing procedure embodied in sub-section (3) of Section 354 of the Code of Criminal Procedure, 1973".

16. While answering the above issues, the following questions were framed for consideration:-

> "(i) Whether death penalty provided for the offence of murder in Section 302 of the Penal Code is unconstitutional.
>
> (ii) If the answer to the foregoing question be in the negative, whether the sentencing procedure provided in Section 354(3) of the Code of Criminal Procedure, 1973 (Act 2 of 1974) is unconstitutional on the ground that it invests the court with unguided and untrammelled discretion and allows death sentence to be arbitrarily or freakishly imposed on a person found guilty of murder or any other capital offence punishable under the Indian Penal Code with death or, in the alternative, with imprisonment for life."

17. Insofar as the first question is concerned, the Constitution Bench answered it in the negative. As regards the second question, the Constitution Bench referred to and considered *Jagmohan Singh* and culled out several propositions from that decision. The Constitution Bench did not disagree with any of the propositions, except to the extent of tweaking proposition (iv)(a) and proposition (v)(b) in view of the changed legislative policy. For the present, we are concerned only with these two propositions. However for convenience, all the propositions culled out from *Jagmohan Singh* are reproduced below:-

> "(i) The general legislative policy that underlines the structure of our criminal law, principally contained in the Indian Penal Code and the Criminal Procedure Code, is to define an offence with sufficient clarity and to prescribe only the maximum punishment therefor, and to allow a very wide discretion to the Judge in the matter of fixing the degree of punishment.

With the solitary exception of Section 303, the same policy permeates Section 302 and some other sections of the Penal Code, where the maximum punishment is the death penalty.

(ii)-(a) No exhaustive enumeration of aggravating or mitigating circumstances which should be considered when sentencing an offender, is possible. "The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler plate' or a statement of the obvious that no Jury (Judge) would need." (referred to *McGoutha v. California,* (1971) 402 US 183).

(b) The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment.

(iii) The view taken by the plurality in *Furman v. Georgia* (1972) 408 US 238 decided by the Supreme Court of the United States, to the effect, that a law which gives uncontrolled and unguided discretion to the Jury (or the Judge) to choose arbitrarily between a sentence of death and imprisonment for a capital offence, violates the Eighth Amendment, is not applicable in India. We do not have in our Constitution any provision like the Eighth Amendment, nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply "the due process" clause. There are grave doubts about the expediency of transplanting western experience in our country. Social conditions are different and so also the general intellectual level. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area.

(iv)(a) This discretion in the matter of sentence is to be exercised by the Judge judicially, after balancing all the

aggravating and mitigating circumstances of the crime.

(b) The discretion is liable to be corrected by superior courts. The exercise of judicial discretion on well recognised principles is, in the final analysis, the safest possible safeguard for the accused.

In view of the above, it will be impossible to say that there would be at all any discrimination, since crime as crime may appear to be superficially the same but the facts and circumstances of a crime are widely different. Thus considered, the provision in Section 302, Penal Code is not violative of Article 14 of the Constitution on the ground that it confers on the Judges an unguided and uncontrolled discretion in the matter of awarding capital punishment or imprisonment for life.

(v)(a) Relevant facts and circumstances impinging on the nature and circumstances of the crime can be brought before the court at the preconviction stage, notwithstanding the fact that no formal procedure for producing evidence regarding such facts and circumstances had been specifically provided. Where counsel addresses the court with regard to the character and standing of the accused, they are duly considered by the court unless there is something in the evidence itself which belies him or the Public Prosecutor challenges the facts.

(b) It is to be emphasised that in exercising its discretion to choose either of the two alternative sentences provided in Section 302 Penal Code, "the court is principally concerned with the facts and circumstances whether aggravating or mitigating, which are connected with the particular crime under inquiry. All such facts and circumstances are capable of being proved in accordance with the provisions of the Indian Evidence Act in a trial regulated by the CrPC. The trial does not come to an end until all the relevant facts are proved and the counsel on

both sides have an opportunity to address the court. The only thing that remains is for the Judge to decide on the guilt and punishment and that is what Sections 306(2) and 309(2), CrPC purport to provide for. These provisions are part of the procedure established by law and unless it is shown that they are invalid for any other reasons they must be regarded as valid. No reasons are offered to show that they are constitutionally invalid and hence the death sentence imposed after trial in accordance with the procedure established by law is not unconstitutional under Article 21"."(emphasis added in the judgment).

18. It will be seen from proposition (iv)(a) that Jagmohan Singh laid down that discretion in the matter of sentencing is to be exercised by the judge after balancing all the aggravating and mitigating circumstances "of the crime".

19. *Jagmohan Singh* also laid down in proposition (v)(b) that while choosing between the two alternative sentences provided in Section 302 of the IPC (sentence of death and sentence of life imprisonment), the Court is principally concerned with the aggravating or mitigating circumstances connected with the "particular crime under inquiry".

20. Since the focus was on the crime, we call this, for convenience, Phase I of an evolving sentencing policy.

21. As mentioned above, while accepting all other propositions laid down in *Jagmohan Singh*, the Constitution Bench in *Bachan Singh* did not fully accept proposition (iv)(a) and (v)(b). This is explained in paragraph 161 to paragraph 166 of the Report where it is specifically mentioned that these two propositions need to be "adjusted and attuned" to the shift in the legislative policy.

22. The Constitution Bench observed that under the old Code, both the sentence of death and the sentence of imprisonment for life provided under Section 302 of the IPC

could be imposed after weighing the aggravating and mitigating circumstances of the particular case. However, in view of Section 354(3) of the Cr.P.C. a punishment of imprisonment for life should normally be imposed under Section 302 of the IPC but a sentence of death could be imposed as an exception. Additionally, as per the legislative requirement if a sentence of death is to be awarded, special reasons need to be recorded. In a sense, the legislative policy now virtually obviated the necessity of balancing the aggravating and mitigating circumstances of the crime for the award of punishment in respect of an offence of murder (although "aggravating and mitigating circumstances" are repeatedly referred to in the judgment, including as "relevant circumstances" that must be given "great weight"). Therefore, the Constitution Bench (after a discussion in paragraphs 161 and 162 of the Report) "adjusted and attuned" proposition (iv)(a) by deleting the reference to "balancing all the aggravating and mitigating circumstances of the crime" to read as follows:-

> "(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence."

23. The Constitution Bench also did not fully accept the postulate in proposition (v)(b) that while making the choice of sentence, including the sentence under Section 302 of the IPC, the Court should be principally concerned with the circumstances connected with the particular crime under inquiry (paragraph 163 of the Report). The Constitution Bench laid down that not only the relevant circumstances of the crime should be factored in, but due consideration must also given to the circumstances of the criminal. Consequently, the Constitution Bench re-formulated proposition (v)(b) to read as follows: -

"(b) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."

24. The conclusion of the Constitution Bench under these circumstances was that the sentence of death ought to be given only in the rarest of rare cases and it should be given only when the option of awarding the sentence of life imprisonment is "unquestionably foreclosed".

25. *Bachan Singh*, therefore, made two very significant departures from *Jagmohan Singh*. The departures were: (i) in the award of punishment by deleting any reference to the aggravating and mitigating circumstances of a crime and (ii) in introducing the circumstances of the criminal. These departures are really the crux of the matter, as far as we are concerned in this case.

26. *Bachan Singh* effectively opened up Phase II of a sentencing policy by shifting the focus from the crime to the crime and the criminal. This is where Bachan Singh marks a watershed in sentencing. But, how effective has been the implementation of Bachan Singh?

Issue of aggravating and mitigating circumstances:

27. In making the shift from the crime to the crime and the criminal, the Constitution Bench in Bachan Singh looked at the suggestions given by learned counsel appearing in the case. These suggestions, if examined, indicate that in so far as aggravating circumstances are concerned, they refer to the crime. They are:-

"(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

In so far as mitigating circumstances are concerned, they refer to the criminal. They are: -

"(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

28. The Constitution Bench made it absolutely clear that the suggestions given by learned counsel were only indicators and not an attempt to make an exhaustive enumeration of the circumstances either pertaining to the crime or the criminal. The Constitution Bench hoped and held that in view of the "broad illustrative guide-lines" laid down, the Courts "will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) [of the Cr.P.C.] viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception."

29. Despite the legislative change and *Bachan Singh* discarding proposition (iv)(a) of *Jagmohan Singh*, this Court in Machhi Singh revived the "balancing" of aggravating and mitigating circumstances through a balance sheet theory. In doing so, it sought to compare aggravating circumstances pertaining to a crime with the mitigating circumstances pertaining to a criminal. It hardly need be stated, with respect, that these are completely distinct and different elements and cannot be compared with one another. A balance sheet cannot be drawn up of two distinct and different constituents of an

incident. Nevertheless, the balance sheet theory held the field post *Machhi Singh*.

30. The application of the sentencing policy through aggravating and mitigating circumstances came up for consideration in *Swamy Shraddananda (2) v. State of Karnataka,* (2008) 13 SCC 767. On a review, it was concluded in paragraph 48 of the Report that there is a lack of evenness in the sentencing process. The rarest of rare principle has not been followed uniformly or consistently. Reference in this context was made to *Aloke Nath Dutta v. State of West Bengal,* (2007) 12 SCC 230 which in turn referred to several earlier decisions to bring home the point.

31. The critique in *Swamy Shraddananda* was mentioned (with approval) in *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra,* (2009) 6 SCC 498 while sharing this Court's "unease and sense of disquiet" in paragraphs 109, 129 and 130 of the Report. In fact, in paragraph 109 of the Report, it was observed that

> "… the balance sheet of aggravating and mitigating circumstances approach invoked on a case-by-case basis has not worked sufficiently well so as to remove the vice of arbitrariness from our capital sentencing system. It can be safely said that the *Bachan Singh* threshold of "the *rarest of rare* cases" has been most variedly and inconsistently applied by the various High Courts as also this Court."

32. It does appear that in view of the inherent multitude of possibilities, the aggravating and mitigating circumstances approach has not been effectively implemented.

33. Therefore, in our respectful opinion, not only does the aggravating and mitigating circumstances approach need a fresh look but the necessity of adopting this approach also needs a fresh look in light of the conclusions in *Bachan Singh*.

It appears to us that even though *Bachan Singh i*ntended "principled sentencing", sentencing has now really become judge-centric as highlighted in *Swamy Shraddananda* and *Bariyar*. This aspect of the sentencing policy in Phase II as introduced by the Constitution Bench in *Bachan Singh* seems to have been lost in transition.

Issue of crime and the criminal:

34. Despite *Bachan Singh*, primacy still seems to be given to the nature of the crime. The circumstances of the criminal, referred to in *Bachan Singh* appear to have taken a bit of a back seat in the sentencing process. This was noticed in Bariyar with reference to *Ravji v. State of Rajasthan,* (1996) 2 SCC 175. It was observed that "curiously" only characteristics relating to the crime, to the exclusion of the criminal were found relevant to sentencing. It was noted that *Ravji* has been followed in several decisions of this Court where primacy has been given to the crime and circumstances concerning the criminal have not been considered. In paragraph 63 of the Report it is noted that *Ravji* was rendered per incuriam and then it was observed that:-

> "It is apparent that *Ravji* has not only been considered but also relied upon as an authority on the point that in heinous crimes, circumstances relating to [the] criminal are not pertinent."

35. It is now generally accepted that *Ravji* was rendered per incuriam (see, for example, *Dilip Premnarayan Tiwari v. State of Maharashtra,* (2010) 1 SCC 775). Unfortunately, however, it seems that in some cases cited by learned counsel the circumstances pertaining to the criminal are still not given the importance they deserve.

36. In *Shivu v. Registrar General, High Court of Karnataka,* (2007) 4 SCC 713, the principle of 'just desserts' was applied and the death penalty awarded to the convicts was

upheld. The circumstances of the convicts were not considered for reducing the death penalty.

37. *Rajendra Pralhadrao Wasnik v. State of Maharashtra,* (2012) 4 SCC 37 was a case of rape and murder of a three-year-old child in a vicious and brutal manner. This Court confirmed the sentence of death after taking into consideration the brutal nature of the crime but not the circumstances of the criminal.

38. *Mohd. Mannan v. State of Bihar,* (2011) 5 SCC 317 was a case of a brutal rape and murder of a seven-year-old girl. While confirming the sentence of death, this Court referred to the nature of the crime and the extreme indignation of the community. On that basis, it leaned towards awarding the death sentence and observed in paragraph 24 of the Report as follows:-

> "When the crime is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community and when collective conscience of the community is petrified, one has to lean towards the death sentence."

39. A little later in paragraph 26 of the Report, this Court concluded that the convict was a menace to society and it was held as follows:

> "We are of the opinion that the appellant is a menace to the society and shall continue to be so and he cannot be reformed. We have no manner of doubt that the case in hand falls in the category of the rarest of rare cases and the trial court had correctly inflicted the death sentence which had rightly been confirmed by the High Court."

40. The judgment does not, with respect, indicate the material that led this Court to conclude what aroused the intense and extreme indignation of the community. Except the nature

of the crime, it is not clear on what basis it concluded that the criminal was a menace to society and "shall continue to be so and he cannot be reformed".

41. In some other cases, aggravating circumstances pertaining to the criminal (not the crime) have been considered relevant. Reference may be made to two decisions rendered by this Court which, incidentally, seem to have overlooked the presumption of innocence.

42. *B.A. Umesh v. Registrar General, High Court of Karnataka,* (2011) 3 SCC 85 was a case where the convict was found guilty of rape, murder and robbery. The crime was carried out in a depraved and merciless manner. Two days after the incident, the local public caught him while he was attempting to escape from a house where he made a similar attempt to rob and assault a lady. There was nothing in law to show that the convict was guilty of the second offence in as much as no trial was held. There were some recoveries from his house, which indicated that the convict had committed crimes in other premises also. Again, there was nothing in law to show that he was found guilty of those crimes. On these facts, despite the guilt of the criminal not having been established in any other case, the convict was found incapable of rehabilitation and the death sentence awarded to him was confirmed.

43. *Sushil Murmu v. State of Jharkhand,* (2004) 2 SCC 338 was a case of child sacrifice. This Court confirmed the death sentence awarded to the criminal after considering the fact that he was being tried for a similar offence. Significantly, the convict was still an under-trial and had not been found guilty of that similar offence. Nevertheless, this was found relevant for upholding the death sentence awarded to him.

44. We also have some cases where, despite the nature of the crime, some criminals have got the benefit of "mitigating circumstances" and their death penalty has been reduced to

imprisonment for life or for a term without remission.

45. *Mohd. Chaman v. State (NCT of Delhi),* (2001) 2 SCC 28 was a case where the convict had raped a one-and-a-half year old child who died as a result of the unfortunate incident. This Court found that the crime committed was serious and heinous and the criminal had a dirty and perverted mind and had no control over his carnal desires. Nevertheless, this Court found it difficult to hold that the criminal was such a dangerous person that to spare his life would endanger the community. This Court reduced the sentence to imprisonment for life since the case was one in which a "humanist approach" should be taken in the matter of awarding punishment.

46. Dilip Premnarayan Tiwari was a case in which three convicts had killed two persons and grievously injured two others, leaving them for dead. A third victim later succumbed to his injuries. While noticing that the crime was in the nature of, what is nowadays referred to as 'honour killing', this Court reduced the death sentence awarded to two of the criminals to imprisonment for life with a direction that they should not be released until they complete 25 years of actual imprisonment. The third criminal was sentenced to undergo 20 years of actual imprisonment. That these criminals were young persons who did not have criminal antecedents weighed in reducing their death sentence.

47. *Sebastian v. State of Kerala,* (2010) 1 SCC 58 was a case in which the criminal had raped and murdered a two-year-old child. He was found to be a pedophile with "extremely violent propensities". Earlier, in 1998, he was convicted of an offence under Section 354 of the IPC, that is, assault or use of criminal force on a woman with intent to outrage her modesty, an offence carrying a maximum sentence of two years imprisonment with fine. Subsequently, he was convicted for a more serious offence under Sections 302, 363 and 376 of the IPC but an appeal was pending against his conviction. The convict also appears to have been tried for the murder of

several other children but was acquitted in 2005 with the benefit of doubt, the last event having taken place three days after he had committed the rape and murder of the two year old child.

48. Notwithstanding the nature of the offence as well as his "extremely violent propensities", the sentence of death awarded to him was reduced to imprisonment for the rest of his life.

49. *Rajesh Kumar v. State,* (2011) 13 SCC 706 was a case in which the appellant had murdered two children. One of them was four and a half years old and the criminal had slit his throat with a piece of glass which he obtained from breaking the dressing table. The other child was an infant of eight months who was killed by holding his legs and hitting him on the floor. Despite the brutality of the crime, the death sentence awarded to this convict was reduced to that of life imprisonment. It was held that he was not a continuing threat to society and that the State had not produced any evidence to show that he was incapable of reform and rehabilitation.

50. *Amit v. State of Uttar Pradesh,* (2012) 4 SCC 107 was a case in which a three-year-old child was subjected to rape, an unnatural offence and murder. The convict was also found guilty of causing the disappearance of evidence. The sentence of death awarded to him was reduced to imprisonment for life subject to remissions. It was held that there was nothing to suggest that he would repeat the offence. This Court proceeded on the premise that the convict might reform over a period of years since there was no evidence of any earlier offence committed by him.

51. Reference has been made to these decisions cited by learned counsel, certainly not with a view to be critical of the opinion expressed, but with a view to demonstrate the judge-centric approach to sentencing adverted to in *Swamy Shraddananda* and endorsed in *Bariyar* and the existence of the uncertainty principle in awarding life imprisonment or the death penalty.

Standardization and categorization of crimes:

52. Despite *Bachan Singh,* the "particular crime" continues to play a more important role than the "crime and criminal" as is apparent from some of the cases mentioned above. Standardization and categorization of crimes was attempted in *Machhi Singh* for the practical application of the rarest of rare cases principle. This was discussed in *Swamy Shraddananda*. It was pointed out in paragraph 33 of the Report that the Constitution Bench in *Jagmohan Singh* and *Bachan Singh* "had firmly declined to be drawn into making any standardization or categorization of cases for awarding death penalty". In fact, in *Bachan Singh* the Constitution Bench gave over half a dozen reasons against the argument for standardization or categorization of cases. Swamy Shraddananda observed that *Machhi Singh* overlooked the fact that the Constitution Bench in *Jagmohan Singh* and *Bachan Singh* had "resolutely refrained" from such an attempt. Accordingly, it was held that even though the five categories of crime (manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime and personality of victim of murder) delineated in *Machhi Singh* provide very useful guidelines, nonetheless they could not be taken as inflexible, absolute or immutable.

53. Indeed, in *Swamy Shraddananda* this Court went so far as to note in paragraph 48 of the Report that in attempting to standardize and categorize crimes, *Machhi Singh* "considerably enlarged the scope for imposing death penalty" that was greatly restricted by *Bachan Singh*.

54. It appears to us that the standardization and categorization of crimes in *Machhi Singh* has not received further importance from this Court, although it is referred to from time to time. This only demonstrates that though Phase II in the development of a sound sentencing policy is still alive, it is a little unsteady in its application, despite *Bachan Singh*.

Issue of remission of sentence:

55. *Swamy Shraddananda* and some of the decisions referred to therein have taken us to Phase III in the evolution of a sound sentencing policy. The focus in this phase is on criminal law and sentencing, and we are really concerned with this in the present case. The issue under consideration in this phase is the punishment to be given in cases where the death penalty ought not to be awarded, and a life sentence is inadequate given the power of remission available with the appropriate Government under Section 432 of the Cr.P.C. In such a situation, what is the punishment that is commensurate with the offence?

56. In *Swamy Shraddananda* this Court embarked on a journey to answer this question. In doing so, this Court noted the mandate of Bachan Singh that we must not only look at the crime but also give due consideration to the circumstances of the criminal. It was noted that this Court "must lay down a good and sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission and to be carried out as directed by the Court so that it may be followed in appropriate cases as a uniform policy not only by this Court but also by the High Court, being the superior courts in their respective States." The subject of discussion in this phase, therefore, is remission under Section 432 of the Cr.P.C. of a sentence awarded for a capital offence.

57. It is necessary, in this context, to be clear that the constitutional power under Article 72 and Article 161 of the Constitution is, as yet, not the subject matter of discussion, particularly in this case. Nor is the power of commutation under Section 433 of the Cr.P.C. under discussion. What is under limited discussion in this case is the remission power available to the appropriate Government under Section 432 of the Cr.P.C.

58. A reading of some recent decisions delivered by this

Court seems to suggest that the remission power of the appropriate Government has effectively been nullified by awarding sentences of 20 years, 25 years and in some cases without any remission. Is this permissible? Can this Court (or any Court for that matter) restrain the appropriate Government from granting remission of a sentence to a convict? What this Court has done in Swamy Shraddananda and several other cases, by giving a sentence in a capital offence of 20 years or 30 years imprisonment without remission, is to effectively injunct the appropriate Government from exercising its power of remission for the specified period. In our opinion, this issue needs further and greater discussion, but as at present advised, we are of the opinion that this is not permissible. The appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence, whatever the reason.

59. It is true that a convict undergoing a sentence does not have right to get a remission of sentence, but he certainly does have a right to have his case considered for the grant of remission, as held in *State of Haryana v. Mahender Singh,* (2007) 13 SCC 606 and *State of Haryana v. Jagdish,* (2010) 4 SCC 216.

60. Swamy Shraddananda approached this issue from a particular perspective, namely, what could be the "good and sound legal basis" to give effect to the observations of this Court in *Dalbir Singh v. State of Punjab,* (1979) 3 SCC 745 that:

> "..... we may suggest that life imprisonment which strictly means imprisonment for the whole of the man's life but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts, where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large."

61. We look at the issue from a slightly different perspective. Section 45 of the IPC defines life as denoting the life of a human being, unless the contrary appears from the context. Therefore, when a punishment for murder is awarded under Section 302 of the IPC, it might be imprisonment for life, where life denotes the life of the convict or death. The term of sentence spanning the life of the convict, can be curtailed by the appropriate Government for good and valid reasons in exercise of its powers under Section 432 of the Cr.P.C. Broadly, this Section statutorily empowers the appropriate Government to suspend the execution of a sentence or to remit the whole or any part of the punishment of a convict [sub-section (1)]. But, the statute provides some inherent procedural and substantive checks on the arbitrary exercise of this power.

Procedural check on arbitrary remissions:

62. There does not seem to be any decision of this Court detailing the procedure to be followed for the exercise of power under Section 432 of the Cr.P.C. But it does appear to us that sub-section (2) to sub-section (5) of Section 432 of the Cr.P.C. lay down the basic procedure, which is making an application to the appropriate Government for the suspension or remission of a sentence, either by the convict or someone on his behalf. In fact, this is what was suggested in *Samjuben Gordhanbhai Koli v. State of Gujarat,* (2010) 13 SCC 466 when it was observed that since remission can only be granted by the executive authorities, the appellant therein would be free to seek redress from the appropriate Government by making a representation in terms of Section 432 of the Cr.P.C.

Section 432 of the Cr.P.C. reads as follows:-

> **432. Power to suspend or remit sentences** — (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

> (2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.
>
> (3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.
>
> (4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.
>
> (5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:
>
> Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and—
>
> (a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in Section 433, the expression "appropriate Government" means, —

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

63. It appears to us that an exercise of power by the appropriate Government under sub-section (1) of Section 432 of the Cr.P.C. cannot be *suo motu* for the simple reason that this sub-section is only an enabling provision. The appropriate Government is enabled to "override" a judicially pronounced sentence, subject to the fulfillment of certain conditions. Those conditions are found either in the Jail Manual or in statutory rules. Sub-section (1) of Section 432 of the Cr.P.C. cannot be read to enable the appropriate Government to "further override" the judicial pronouncement over and above what is permitted by the Jail Manual or the statutory rules. The process of granting "additional" remission under this Section is set into motion in a case only through an application for remission by the convict or on his behalf. On such an application being made, the appropriate Government is required to approach the presiding judge of the Court before or by which the conviction was made or confirmed to opine (with reasons) whether the application

should be granted or refused. Thereafter, the appropriate Government may take a decision on the remission application and pass orders granting remission subject to some conditions, or refusing remission. Apart from anything else, this statutory procedure seems quite reasonable in as much as there is an application of mind to the issue of grant of remission. It also eliminates "discretionary" or en masse release of convicts on "festive" occasions since each release requires a case-by-case basis scrutiny.

64. It must be remembered in this context that it was held in *State of Haryana v. Mohinder Singh,* (2000) 3 SCC 394 that the power of remission cannot be exercised arbitrarily. The decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 of the Cr.P.C. does provide this check on the possible misuse of power by the appropriate Government.

Substantive check on arbitrary remissions:

65. For exercising the power of remission to a life convict, the Cr.P.C. places not only a procedural check as mentioned above, but also a substantive check. This check is through Section 433-A of the Cr.P.C. which provides that when the remission of a sentence is granted in a capital offence, the convict must serve at least fourteen years of imprisonment. Of course, the requirement of a minimum of fourteen years incarceration may perhaps be relaxed in exercising power under Article 72 and Article 161 of the Constitution and Section 433 of the Cr.P.C. but, as mentioned above, we are presently not concerned with these provisions and say nothing in this regard, one way or the other.

66. Section 433-A of the Cr.P.C. reads as follows:-

433-A. Restriction on powers of remission or commutation in certain cases.— Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person

for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

67. In this context, it is necessary to refer to the decisions of the Constitution Bench in *Gopal Vinayak Godse v. State of Maharashtra,* AIR 1961 SC 600 and *Maru Ram v. Union of India,* (1981) 1 SCC 107. Both these decisions were considered in *Ashok Kumar v. Union of India,* (1991) 3 SCC 498.

68. In *Godse* the Constitution Bench dealt with the plea of premature release and held that life imprisonment means that the prisoner will remain in prison for the rest of his life. Credit for remissions given or awarded has a meaning only if the imprisonment is for a definite period. Since life imprisonment is for an indefinite period, remissions earned or awarded are really theoretical. This is what this Court had to say:-

"Briefly stated the legal position is this: Before Act 26 of 1955 a sentence of transportation for life could be undergone by a prisoner by way of rigorous imprisonment for life in a designated prison in India. After the said Act, such a convict shall be dealt with in the same manner as one sentenced to rigorous imprisonment for the same term. Unless the said sentence is commuted or remitted by appropriate authority under the relevant provisions of the Indian Penal Code or the Code of Criminal Procedure, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison. The rules framed under the Prisons Act enable such a prisoner to earn remissions – ordinary, special and State – and the said remissions will be given credit towards his term of imprisonment. For the purpose of working out the remissions the sentence of transportation for life is ordinarily equated with a definite

period, but it is only for that particular purpose and not for any other purpose. As the sentence of transportation for life or its prison equivalent, the life imprisonment, is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predicate the time of his death. That is why the rules provide for a procedure to enable an appropriate government to remit the sentence under Section 401 [now Section 432] of the Code of Criminal Procedure on a consideration of the relevant factors, including the period of remissions earned."

69. *Maru Ram* affirmed the view taken in Godse that in matters of life imprisonment, remissions earned or awarded are unreal and become relevant only if there is a fictional quantification of the period of imprisonment. More importantly, it was held that remissions earned or awarded cannot be the basis for the determination of the fictional period of imprisonment. It was held (in paragraph 25 of the Report):-

"Ordinarily where a sentence is for a definite term, the calculus of remissions may benefit the prisoner to instant release at that point where the subtraction result is zero. Here, we are concerned with life imprisonment and so we come upon another concept bearing on the nature of sentence which has been highlighted in Godse case. Where the sentence is indeterminate and of uncertain duration, the result of subtraction from an uncertain quantity is still an uncertain quantity and release of the prisoner cannot follow except on some fiction of quantification of a sentence of uncertain duration."

70. It was then held in the same paragraph:-

"Since death was uncertain, deduction by way of remission did not yield any tangible date for release and so the prayer of Godse was refused. The nature of a life sentence is incarceration until death, judicial sentence of imprisonment for life cannot be in jeopardy merely because

of the long accumulation of remissions." (emphasis given by us).

71. On the basis of the above decisions, the conclusion drawn in Ashok Kumar was that remissions have a limited scope. They have no significance till the exercise of power under Section 432 of the Cr.P.C. It was held, in the following words:-

> "It will thus be seen from the ratio laid down in the aforesaid two cases that where a person has been sentenced to imprisonment for life the remissions earned by him during his internment in prison under the relevant remission rules have a limited scope and must be confined to the scope and ambit of the said rules and do not acquire significance until the sentence is remitted under Section 432, in which case the remission would be subject to limitation of Section 433-A of the Code, or constitutional power has been exercised under Article 72/161 of the Constitution."

72. On this issue, it was questioned in *Godse* whether there is any provision of law where under a sentence for life imprisonment, without any formal remission by the appropriate Government, can be automatically treated as one for a definite period. It was observed that no such provision is found in the Indian Penal Code, Code of Criminal Procedure or the Prisons Act. It was noted that though the Government of India stated before the Judicial Committee of the Privy Council in *Kishori Lal v. Emperor,* AIR 1945 PC 64 that, having regard to Section 57 of the IPC, twenty years imprisonment was equivalent to a sentence of transportation for life, the Judicial Committee did not express its final opinion on that question. However, in *Godse* the Constitution Bench addressed this in the light of the Bombay Rules governing the remission system and concluded that orders of the appropriate Government under Section 401 of the Criminal Procedure Code [now Section 432 of the Cr.P.C] are a pre-requisite for release. It was held that a prisoner sentenced to transportation for life has no indefeasible

right to an unconditional release on the expiry of a particular term including remissions. "The rules under the Prisons Act do not substitute a lesser sentence for a sentence of transportation for life."

73. This view was followed in *State of Madhya Pradesh v. Ratan Singh,* (1976) 3 SCC 470 in the following words:-

> "It is, therefore, manifest from the decision of this Court [in Godse] that the Rules framed under the Prisons Act or under the Jail Manual do not affect the total period which the prisoner has to suffer but merely amount to administrative instructions regarding the various remissions to be given to the prisoner from time to time in accordance with the rules. This Court further pointed out that the question of remission of the entire sentence or a part of it lies within the exclusive domain of the appropriate Government under Section 401 of the Code of Criminal Procedure and neither Section 57 of the Indian Penal Code nor any Rules or local Acts can stultify the effect of the sentence of life imprisonment given by the court under the Indian Penal Code. In other words, this Court has clearly held that a sentence for life would enure till the lifetime of the accused as it is not possible to fix a particular period of the prisoner's death and remissions given under the Rules could not be regarded as a substitute [of a lesser sentence] for a sentence of transportation for life. In these circumstances, therefore, it is clear that the High Court was in error in thinking that the respondent was entitled to be released as of right on completing the term of 20 years including the remissions."

74. Under the circumstances, it appears to us there is a misconception that a prisoner serving a life sentence has an indefeasible right to release on completion of either fourteen years or twenty years imprisonment. The prisoner has no such right. A convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under Section 432 of

the Cr.P.C. which in turn is subject to the procedural checks in that Section and the substantive check in Section 433-A of the Cr.P.C.

75. In a sense, therefore, the application of Section 432 of the Cr.P.C. to a convict is limited. A convict serving a definite term of imprisonment is entitled to earn a period of remission or even be awarded a period of remission under a statutory rule framed by the appropriate Government or under the Jail Manual. This period is then offset against the term of punishment given to him. In such an event, if he has undergone the requisite period of incarceration, his release is automatic and Section 432 of the Cr.P.C. will not even come into play. This Section will come into play only if the convict is to be given an "additional" period of remission for his release, that is, a period in addition to what he has earned or has been awarded under the Jail Manual or the statutory rules.

76. In the case of a convict undergoing life imprisonment, he will be in custody for an indeterminate period. Therefore, remissions earned by or awarded to such a life convict are only notional. In his case, to reduce the period of incarceration, a specific order under Section 432 of the Cr.P.C. will have to be passed by the appropriate Government. However, the reduced period cannot be less than 14 years as per Section 433-A of the Cr.P.C.

77. Therefore, Section 432 of the Cr.P.C. has application only in two situations: (1) Where a convict is to be given "additional" remission or remission for a period over and above the period that he is entitled to or he is awarded under a statutory rule framed by the appropriate Government or under the Jail Manual. (2) Where a convict is sentenced to life imprisonment, which is for an indefinite period, subject to procedural and substantive checks.

78. What Section 302 of the IPC provides for is only two punishments – life imprisonment and death penalty. In several cases, this Court has proceeded on the postulate that life

imprisonment means fourteen years of incarceration, after remissions. The calculation of fourteen years of incarceration is based on another postulate, articulated in *Swamy Shraddananda*, namely that a sentence of life imprisonment is first commuted (or deemed converted) to a fixed term of twenty years on the basis of the Karnataka Prison Rules, 1974 and a similar letter issued by the Government of Bihar. Apparently, rules of this nature exist in other States as well. Thereafter, remissions earned or awarded to a convict are applied to the commuted sentence to work out the period of incarceration to fourteen years.

79. This re-engineered calculation can be made only after the appropriate Government artificially determines the period of incarceration. The procedure apparently being followed by the appropriate Government is that life imprisonment is artificially considered to be imprisonment for a period of twenty years. It is this arbitrary reckoning that has been prohibited in *Ratan Singh*. A failure to implement *Ratan Singh* has led this Court in some cases to carve out a special category in which sentences of twenty years or more are awarded, even after accounting for remissions. If the law is applied as we understand it, meaning thereby that life imprisonment is imprisonment for the life span of the convict, with procedural and substantive checks laid down in the Cr.P.C. for his early release we would reach a legally satisfactory result on the issue of remissions. This makes an order for incarceration for a minimum period of 20 or 25 or 30 years unnecessary.

Conclusion:

80. The broad result of our discussion is that a relook is needed at some conclusions that have been taken for granted and we need to continue the development of the law on the basis of experience gained over the years and views expressed in various decisions of this Court. To be more specific, we conclude:

1. This Court has not endorsed the approach of

aggravating and mitigating circumstances in *Bachan Singh*. However, this approach has been adopted in several decisions. This needs a fresh look. In any event, there is little or no uniformity in the application of this approach.

2. Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The use of the mantra of aggravating and mitigating circumstances needs a review.

3. In the sentencing process, both the crime and the criminal are equally important. We have, unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing.

4. The Constitution Bench of this Court has not encouraged standardization and categorization of crimes and even otherwise it is not possible to standardize and categorize all crimes.

5. The grant of remissions is statutory. However, to prevent its arbitrary exercise, the legislature has built in some procedural and substantive checks in the statute. These need to be faithfully enforced.

6. Remission can be granted under Section 432 of the Cr.P.C. in the case of a definite term of sentence. The power under this Section is available only for granting "additional" remission, that is, for a period over and above the remission granted or awarded to a convict under the Jail Manual or other statutory rules. If the term of sentence is indefinite (as in life imprisonment), the power under Section 432 of the Cr.P.C. can certainly be exercised but not on the basis that life imprisonment is an arbitrary or

notional figure of twenty years of imprisonment.

7. Before actually exercising the power of remission under Section 432 of the Cr.P.C. the appropriate Government must obtain the opinion (with reasons) of the presiding judge of the convicting or confirming Court. Remissions can, therefore, be given only on a case-by-case basis and not in a wholesale manner.

81. Given these conclusions, we are of the opinion that in cases such as the present, there is considerable uncertainty on the punishment to be awarded in capital offences – whether it should be life imprisonment or death sentence. In our opinion, due to this uncertainty, awarding a sentence of life imprisonment, in cases such as the present is not unquestionably foreclosed. More so when, in this case, there is no evidence (contrary to the conclusion of the High Court) that Seema's body was burnt by Sandeep from below the waist with a view to destroy evidence of her having been subjected to sexual harassment and rape. There is also no evidence (again contrary to the conclusion of the High Court) that Narender was a professional killer.

82. Therefore, we allow these appeals to the extent that the death penalty awarded to the appellants is converted into a sentence of life imprisonment, subject to what we have said above.

83. We place on record our appreciation for the efforts put in by both learned counsel for the assistance rendered in this case.

K.K.T. Appeals partly allowed.

INDRA KUMAR PATODIA & ANR.

v.

RELIANCE INDUSTRIES LTD. AND ORS.

(Criminal Appeal No. 1837 of 2012 etc.)

NOVEMBER 22, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Negotiable Instruments Act, 1881 – ss. 138 and 142 – Complaint under – Without signature – But verified by the complainant – Maintainability – Held: The complaint without signature is maintainable, when such complaint is verified by the complainant and process is issued by the Magistrate after due verification – The complaint is required necessarily to be in writing and need not be signed – Legislative intent was that 'writing' does not pre-suppose that the same has to be signed – 'Signature' within the meaning of 'writing' would be adding words to the Section, which the legislature did not contemplate – Code of Criminal Procedure, 1973 – ss. 2 (d) – General Clauses Act, 1897 – ss. 3(56) and 3(65) – Interpretation of Statutes.

Interpretation of Statutes – Interpretation of non-obstante clause – Held: While interpreting non-obstante clause, the Court is required to find out the extent to which the legislature intended to exclude a provision and the context in which such clause is used.

Words and Phrases – 'Complaint in writing' – Meaning of, in the context of s. 142(a) of Negotiable Instruments Act, 1881.

The question for consideration in the present appeals was whether the complaint u/s.138 of Negotiable Instruments Act, 1881, without signature of the complainant is maintainable, when such complaint is

verified by the complainant and the process is issued by the Magistrate after verification.

Dismissing the appeals, the Court

HELD: 1.1 The complaint u/s.138 of Negotiable Instruments Act, 1881, without signature, is maintainable, when such complaint is verified by the complainant and the process is issued by the Magistrate after due verification. The prosecution of such complaint is maintainable. [Para 19] [147-E-F]

1.2 A *non obstante* clause has to be given restricted meaning and when the section containing the said clause does not refer to any particular provisions which intends to over-ride, but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself. There requires to be a determination as to which provisions answers the description and which does not. While interpreting the *non obstante* clause, the Court is required to find out the extent to which the legislature intended to do so and the context in which the *non obstante* clause is used. [Para 12] [141-E-G]

1.3 Section 2(d) Cr.P.C. provides that the complaint needs to be oral or in writing. The *non obstante* clause in Section 142 of the Act, when it refers to Cr.P.C, only excludes the oral part in such definition. Thus, the *non obstante* clause in s. 142(a) is restricted to exclude two things only from Cr.P.C. i.e. (a) exclusion of oral complaints and (b) exclusion of cognizance on complaint by anybody other than the payee or the holder in due course. [Paras 12 and 13] [141-G-H; 142-A]

1.4 Section 190 Cr.P.C. provides that a Magistrate can take cognizance on a complaint which constitutes such an offence irrespective of who had made such complaint

or on a police report or upon receiving information from any person other than a police officer or upon his own knowledge. *Non obstante* clause, when it refers to the core, restricts the power of the Magistrate to take cognizance only on a complaint by a payee or the holder in due course and excludes the rest of Section 190 Cr.P.C. In other words, none of the other provisions of the Cr.P.C. are excluded by the said *non obstante* clause, hence, the Magistrate is therefore required to follow the procedure under Section 200 Cr.P.C., once he has taken the complaint of the payee/holder in due course and record statement of the complainant and such other witnesses as present at the said date. Here, Cr.P.C. specifically provides that the same is required to be signed by the complainant as well as the witnesses making the statement. [Para13] [142-A-D]

1.5 Mere presentation of the complaint is only the first step and no action can be taken unless the process of verification is complete and, thereafter, the Magistrate has to consider the statement on oath, that is, the verification statement under Section 200 Cr.P.C. and the statement of any witness, and the Magistrate has to decide whether there is sufficient ground to proceed. Section 203 Cr.P.C. provides that the Magistrate if is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint. A person could be called upon to answer a charge of false complaint/perjury only on such verification statement and not mere on the presentation of the complaint as the same is not on oath and, therefore, need to obtain the signature of the person. Apart from the above Section, the legislative intent becomes clear that "writing" does not pre-suppose that the same has to be signed. Various sections in Cr.P.C. viz. Sections 61, 70, 154, 164 and 281, when contrasted with Section 2(d) clarify that the legislature was clearly of the intent that a written complaint need not be signed. [Para 13] [143-B-G]

1.6 The legislature has made it clear that wherever it required a written document to be signed, it should be mentioned specifically in the section itself, which is missing both from Section 2(d) Cr.P.C. as well as Section 142 of the Act. The General Clauses Act, 1897 too draws a distinction between writing and signature and defines them separately. Section 3(56) defines signature and Section 3(65) defines writing. Writing as defined by General Clauses Act requires that the same is representation or reproduction of "words" in a visible form and does not require signature. "Signature" within the meaning of "writing" would be adding words to the Section, which the legislature did not contemplate. [Para 13 & 14] [145-B-D, G]

1.7 In the present case, the complaint was presented in person and on the direction by the Magistrate, the complaint was verified and duly signed by the authorized officer of the Company-the complainant. No prejudice has been caused to the accused for non-signing the complaint. The statement made on oath and signed by the complainant safeguards the interest of the accused. In view of the same, the requirements of Section 142(a) of the Act is that the complaint must necessarily be in writing and the complaint can be presented by the payee or holder in due course of the cheque and it need not be signed by the complainant. If the legislature intended that the complaint under the Act, apart from being in writing, is also required to be signed by the complainant, the legislature would have used different language and inserted the same at the appropriate place. The correct interpretation would be that the complaint under Section 142(a) of the Act requires to be in writing as at the time of taking cognizance, the Magistrate will examine the complainant on oath and the verification statement will be signed by the complainant. [Para 15] [146-A-D]

Pankajbhai Nagjibhai Patel vs. State of Gujarat and Anr. **(2001) 2 SCC 595: 2001 (1) SCR 337;** *K. Bhaskaran vs. Sankaran Vaidhyan Balan* **(1999) 7 SCC : 1999 (3) Suppl. SCR 271;** *M.M.T.C. Ltd. and Anr. vs. Medchl Chemicals and Pharma (P) Ltd. and Anr.* **(2002) 1 SCC 234: 2001 (5) Suppl. SCR 265 – referred to.**

2. In view of the scheme of the Act and various provisions of Cr.P.C., the crucial date for computing the period of limitation is the date of filing of the complaint or initiating criminal proceedings and not the date of taking cognizance by the Magistrate. In the present case, the complaint was filed well within the time. [Para 18] [147-B-C]

Japani Sahoo vs. Chandra Sekhar Mohanty **(2007) 7 SCC 394: 2007(8) SCR 582 – relied on.**

Case Law Reference:

2001 (1) SCR 337	**Referred to**	**Para 10**
1999 (3) Suppl. SCR 271	**Referred to**	**Para 10**
2001 (5) Suppl. SCR 265	**Referred to**	**Para 11**
2007 (8) SCR 582	**Relied on**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1837 of 2012.

From the Judgment & Order dated 17/18.03.2010 of the High Court of Judicature at Bombay in Criminal Appeal No. 287 of 2009.

WITH

Crl. A. No. 1838 of 2012.

Bhagwati Prasad, Vijay Kumar, Bharat L. Gandhi, Shaith A. Jabbar, Vasu Sharma for the Appellants.

Uday U. Lalit, K.R. Sasiprabhu, Bindu K. Nair, Asha Gopalan Nair, Sangeeta Kumar for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. These appeals are filed against the common final judgment and order dated 17/18.03.2010 passed by the High Court of Judicature at Bombay in Criminal Appeal Nos. 287 and 288 of 2009 whereby the Division Bench held that the complaint under Section 138 of the Negotiable Instruments Act, 1881 (in short "the Act") without signature is maintainable when such complaint was subsequently verified by the complainant.

3. Brief facts:

(a) Indra Kumar Patodia and Mahendra Kumar Patodia – the appellants herein are accused in Criminal Complaint being CC No. 1866/SS of 2007 (1866/MISC/1998) filed before the 16th Court of Metropolitan Magistrate, Ballard Estate, Bombay, for the offence punishable under Section 138 read with Sections 141 and 142 of the Act. Respondent No.3 herein is a Company duly registered under the Companies Act, 1956, presently under liquidation and official liquidator has been appointed by the High Court, which has alleged to have issued the cheques to respondent No.1.

(b) Respondent No.1 is the complainant and the manufacturers of Partially Oriented Yarn (POY) and other textile goods. From time to time, Respondent No. 3 used to place orders for the supply of POY to Respondent No. 1 and had issued 57 cheques between 02.12.1997 to 09.03.1998 for the payment of the same.

(c) The aforesaid cheques were deposited by the complainant on 05.04.1998 and were returned by the Bank on 06.04.1998 with the remark "exceeds arrangement". Pursuant to the same, Respondent No.1 issued a notice dated

16.04.1998 to the appellants and demanded the aforesaid amount for which they replied that they have not received any statement of accounts maintained by the complainant regarding the transactions with the accused. In addition to the same, Respondent No.3, vide letter dated 29.05.1998, made various claims for the rate difference, discounts etc., in respect of the transactions, however, Respondent No.1 filed a complaint on 03.06.1998 being Complaint No. 1866/SS of 2007 (1866/MISC/1998) under Section 138 read with Sections 141 and 142 of the Act. On 30.07.1998, the Metropolitan Magistrate recorded the verification statement and issued summons against the appellants and respondent No.3 herein.

(d) The appellants preferred an application being C.C. No. 1332/9/1999 before the Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai for recalling the process issued against them. By order dated 28.08.2003, the Metropolitan Magistrate, dismissed the said application.

(e) Challenging the said order, the appellants and respondent No.3 herein filed an application in the Court of Sessions for Greater Bombay at Bombay bearing Criminal Revision Application No. 749 of 2003. By Order dated 08.10.2004, the Sessions Judge dismissed the said application as not maintainable.

(f) By order dated 26.11.2008, the Metropolitan Magistrate dismissed the complaint and acquitted the accused persons.

(g) Challenging the acquittal of the accused persons, respondent No.1 herein-the complainant, filed appeals being Criminal Appeal Nos. 287 and 288 of 2009 before the learned single Judge of the High Court. The learned single Judge, by order dated 09.07.2009, referred two points for consideration by the larger Bench, viz., (1) In the matter of complaint for the offence punishable under Section 138 of the Act whether the complaint without the signature of the complainant, inspite of verification of complaint, is "non-entia" and whether no

prosecution can lie on such complaint?; and (2) If answer to point No.1 is negative then whether it is a mere irregularity and it can be cured subsequently and whether such subsequent amendment would relate back to the date of filing of the complaint or whether it would hit by the Law of Limitation.

(h) By impugned common judgment dated 17/18.03.2010, the Division Bench of the High Court, disposed of the matter by answering point No.1 in the affirmative holding that the complaint under Section 138 of the Act is maintainable and when such complaint is subsequently verified by the complainant and the process is issued by the Magistrate after verification, it cannot be said that the said complaint is "non-entia" and the prosecution of such complaint is maintainable. Further, it was held that since the answer to point No.1 was in affirmative, it was not necessary to decide point No.2 and directed to place the appeals for deciding the same on merits.

(i) Aggrieved by the said decision, the appellants have filed the above appeals by way of special leave before this Court.

4. Heard Mr. Bhagwati Prasad, learned senior counsel for the appellants and Mr. Uday U. Lalit, learned senior counsel for respondent No.1, Ms. Asha Gopalan Nair, learned counsel for respondent No.2 and Ms. Sangeeta Kumar, learned counsel for respondent No.3.

5. Mr. Bhagwati Prasad, learned senior counsel for the appellants after taking us through the relevant provisions of the Negotiable Instrument Act, 1881, the Code of Criminal Procedure, 1973 (in short 'the Code') and the order of the learned single Judge as well as the reference answered by the Division Bench raised the following contentions:

i) the complaint under Section 141 in respect of dishonour of cheque under Section 138 of the Act without signature of the complainant is not maintainable;

ii) there is no provision in the Act regarding verification.

Even otherwise, the verification was signed by the complainant after expiry of the limitation period, hence, the impugned complaint is liable to be rejected; and

iii) inasmuch as the Act is a special Act, it must prevail over procedures provided in the Code.

On the other hand, Mr. Lalit, learned senior counsel for the contesting first respondent-the complainant contended that in the light of the language used in Section 2(d) read with various provisions of the Code and Section 142 of the Act, the complaint, as filed and duly verified before the Magistrate and putting signature therein, satisfies all the requirements. He further submitted that the conclusion of the Division Bench upholding the complaint and the issuance of summons for appearance of the accused are valid and prayed for dismissal of the above appeals.

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

7. From the rival contentions, the only question for consideration before this Court is that whether the complaint without signature of the complainant under Section 138 of the Act is maintainable when such complaint is verified by the complainant and the process is issued by the Magistrate after verification.

8. The word "complaint" has been defined in Section 2(d) of the Code which reads thus:

> "2 (d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."

Keeping the above definition in mind, let us see the scheme of the statute and the legislative intent in bringing the Act.

9. The Act was amended by Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment Act) 1988 wherein new Chapter XVII was incorporated for penalties in case of dishonour of cheques due to insufficiency of funds in the account of the drawer of the cheque. These provisions were incorporated in order to encourage the culture of use of cheques and enhancing the credibility of the instrument. The insertion of the new Chapter and amendments in the Act are aimed at early disposal of cases relating to dishonour of cheques, enhancing punishment for offenders, introducing electronic image of a truncated cheque and a cheque in the electronic form as well as exempting an official nominees director from prosecution under the Act. For our purpose, Section 142 of the Act is relevant which reads thus:

> "142. Cognizance of offences.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-
>
> (a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;
>
> (b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:
>
> Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.
>
> (c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138."

As pointed out, the controversy in our case, concentrates on construction of Section 142(a) of the Act and in particular

phrase "a complaint in writing" employed therein. It provides that notwithstanding anything contained in the Code, no Court shall take cognizance of any offence punishable under Section 138 of the Act except upon a "complaint in writing" made by the payee or as the case may be the holder in due course of the cheque. The important question in the instant case is what is meant by 'complaint in writing'. Whether complaint should be in writing simpliciter or complaint being in writing requires signature below such writing.

10. The object and scope of Sections 138 and 142 of the Act has been considered by this Court in *Pankajbhai Nagjibhai Patel vs. State of Gujarat and Another,* (2001) 2 SCC 595. In that case, Judicial Magistrate of the First Class, after convicting an accused for an offence under Section 138 of the Act sentenced him to imprisonment for six months along with a fine of Rs.83,000/- The conviction and sentence were confirmed by the Sessions Judge in appeal and the revision filed by the convicted person was dismissed by the High Court. When the SLP was moved, the counsel confined his contention to the question whether a Judicial Magistrate of the First Class could have imposed sentence of fine beyond Rs. 5,000/- in view of the limitation contained in Section 29(2) of the Code. Learned counsel for the respondent contended the decision of this Court in *K. Bhaskaran vs. Sankaran Vaidhyan Balan,* (1999) 7 SCC 510 to the effect that power of Judicial Magistrate of First Class is limited in the matter of imposing a sentence of fine of Rs. 5,000/- is not correct in view of the non obstante clause contained in Section 142 of the Act. After hearing both the parties, this Court held that Section 138 of the Act provides punishment as imprisonment for a term which may extend to one year or fine which may extend to twice the amount of cheque or with both. Section 29(2) of the Code contains limitation for a Magistrate of First Class in the matter of imposing fine as a sentence or as part of sentence. After quoting Section 29(2) of the Code as well as Section 142 of the Act, this Court has concluded thus:

"6. It is clear that the aforesaid non obstante expression is intended to operate only in respect of three aspects, and nothing more. The first is this: Under the Code a Magistrate can take cognizance of an offence either upon receiving a complaint, or upon a police report, or upon receiving information from any person, or upon his own knowledge except in the cases differently indicated in Chapter XIV of the Code. But Section 142 of the NI Act says that insofar as the offence under Section 138 is concerned no court shall take cognizance except upon a complaint made by the payee or the holder in due course of the cheque.

7. The second is this: Under the Code a complaint could be made at any time subject to the provisions of Chapter XXXVI. But so far as the offence under Section 138 of the NI Act is concerned such complaint shall be made within one month of the cause of action. The third is this: Under Article 511 of the First Schedule of the Code, if the offence is punishable with imprisonment for less than 3 years or with fine only under any enactment (other than the Indian Penal Code) such offence can be tried by any Magistrate. Normally Section 138 of the NI Act which is punishable with a maximum sentence of imprisonment for one year would have fallen within the scope of the said Article. But Section 142 of the NI Act says that for the offence under Section 138, no court inferior to that of a Metropolitan Magistrate or Judicial Magistrate of the First Class shall try the said offence.

8. Thus, the non obstante limb provided in Section 142 of the NI Act is not intended to expand the powers of a Magistrate of the First Class beyond what is fixed in Chapter III of the Code. Section 29, which falls within Chapter III of the Code, contains a limit for a Magistrate of the First Class in the matter of imposing a sentence as noticed above i.e. if the sentence is imprisonment it shall

not exceed 3 years and if the sentence is fine (even if it is part of the sentence) it shall not exceed Rs 5000."

11. It is also relevant to refer a decision of this Court in *M.M.T.C. Ltd. and Another vs. Medchl Chemicals and Pharma (P) Ltd. and Another,* (2002) 1 SCC 234. The question in that decision was whether a complaint filed in the name and on behalf of the company by its employee without necessary authorization is maintainable. After analyzing the relevant provisions and language used in Sections 138 and 142(a) of the Act, this Court held that such complaint is maintainable and held that want of authorization can be rectified even at a subsequent stage. This Court further clarified that the only eligibility criteria prescribed by Section 142 is that the complaint must be by the payee or the holder in due course. This Court held that this criteria is satisfied as the complaint is in the name and on behalf of the appellant-Company. It was further held that even presuming, that initially there was no authority, still the company can, at any stage, rectify the defect. It was further held that at a subsequent stage the company can send a person who is competent to represent the company and concluded that the complaint could thus not have been quashed on this ground.

12. It is clear that the non obstante clause has to be given restricted meaning and when the section containing the said clause does not refer to any particular provisions which intends to over ride but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself. In other words, there requires to be a determination as to which provisions answers the description and which does not. While interpreting the non obstante clause, the Court is required to find out the extent to which the legislature intended to do so and the context in which the non obstante clause is used. We have already referred to the definition of complaint as stated in Section 2(d) of the Code which provides that the same needs to be in oral or in writing. The non obstante clause, when it refers to the Code only excludes the oral part in such definition.

13. According to us, the non obstante clause in Section 142(a) is restricted to exclude two things only from the Code i.e. (a) exclusion of oral complaints and (b) exclusion of cognizance on complaint by anybody other than the payee or the holder in due course. Section 190 of the Code provides that a Magistrate can take cognizance on a complaint which constitutes such an offence irrespective of who had made such complaint or on a police report or upon receiving information from any person other then a police officer or upon his own knowledge. Non obstante clause, when it refers to the core, restricts the power of the Magistrate to take cognizance only on a complaint by a payee or the holder in due course and excludes the rest of Section 190 of the Code. In other words, none of the other provisions of the Code are excluded by the said non obstante clause, hence, the Magistrate is therefore required to follow the procedure under Section 200 of the Code once he has taken the complaint of the payee/holder in due course and record statement of the complainant and such other witnesses as present at the said date. Here, the Code specifically provides that the same is required to be signed by the complainant as well as the witnesses making the statement. Section 200 of the Code reads thus:

"200. Examination of complainant.- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them."

Mere presentation of the complaint is only the first step and no action can be taken unless the process of verification is complete and, thereafter, the Magistrate has to consider the statement on oath, that is, the verification statement under Section 200 and the statement of any witness, and the Magistrate has to decide whether there is sufficient ground to proceed. It is also relevant to note Section 203 of the Code which reads as follows:

"203. Dismissal of complaint.- If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing."

It is also clear that a person could be called upon to answer a charge of false complaint/perjury only on such verification statement and not mere on the presentation of the complaint as the same is not on oath and, therefore, need to obtain the signature of the person. Apart from the above section, the legislative intent becomes clear that "writing" does not pre-suppose that the same has to be signed. Various sections in the Code when contrasted with Section 2(d) clarify that the legislature was clearly of the intent that a written complaint need not be signed. For example, Sections 61, 70, 154, 164 and 281 are reproduced below:

"61. Form of summons.

Every summons issued by a court under this Code shall be in writing, in duplicate, signed by the presiding officer of such court or by such other officer as the High Court may, from time to time, by rule direct, and shall bear the seal of the court.

70. Form of warrant of arrest and duration.

(1) Every warrant of arrest issued by a court under this Code shall be in writing, signed by the presiding officer of such court and shall bear the sea] of the court.

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

154. Information in cognizable cases.

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. .....

164. Recording of confessions and statements.

Xxx xxxx

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect-

281. Record of examination of accused.

(1) Whenever the accused is examined by a Metropolitan Magistrate, the Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the court and such memorandum shall be signed by the Magistrate and shall form part of the record….."

A perusal of the above shows that the legislature has made it clear that wherever it required a written document to be signed, it should be mentioned specifically in the section itself, which is missing both from Section 2(d) as well as Section 142.

14. The General Clauses Act, 1897 too draws a distinction between writing and signature and defines them separately. Section 3(56) defines signature and Section 3(65) defines writing which reads thus:

"In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context,-

56. "Sign" with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include, "mark", with its grammatical variation and cognate expressions,

65. Expressions referring to "writing" shall be construed as including references to printing, lithography, photography and other modes of representing or reproducing words in a visible form,"

Writing as defined by General Clauses Act requires that the same is representation or reproduction of "words" in a visible form and does not require signature. "Signature" within the meaning of "writing" would be adding words to the section which the legislature did not contemplate.

15. In the case on hand, the complaint was presented in person on June 3, 1998 and on the direction by the Magistrate, the complaint was verified on July 30, 1998 and duly signed by the authorized officer of the Company-the complainant. As rightly pointed out by the Division Bench, no prejudice has been caused to the accused for non-signing the complaint. The statement made on oath and signed by the complainant safeguards the interest of the accused. In view of the same, we hold that the requirements of Section 142(a) of the Act is that the complaint must necessarily be in writing and the complaint can be presented by the payee or holder in due course of the cheque and it need not be signed by the complainant. In other words, if the legislature intended that the complaint under the Act, apart from being in writing, is also required to be signed by the complainant, the legislature would have used different language and inserted the same at the appropriate place. In our opinion, the correct interpretation would be that the complaint under Section 142(a) of the Act requires to be in writing as at the time of taking cognizance, the Magistrate will examine the complainant on oath and the verification statement will be signed by the complainant.

16. It is the contention of Mr. Bhagwati Prasad, learned senior counsel for the appellant that the limitation period expired on the date of verification and the complaint cannot be entertained. In view of the above discussion, we are unable to accept the said contention.

17. In *Japani Sahoo vs. Chandra Sekhar Mohanty,* (2007) 7 SCC 394, in para 48, this Court held that "so far as the complainant is concerned, as soon as he files a complaint in a competent court of law, he has done everything which is required to be done by him at that stage. Thereafter, it is for the Magistrate to consider the matter to apply his mind and to take an appropriate decision of taking cognizance, issuing process or any other action which the law contemplates". This Court further held that "the complainant has no control over those

proceedings". Taking note of Sections 468 and 473 of the Code, in para 52, this Court held that "for the purpose of computing the period of limitation, the relevant date must be considered as the date of filing of the complaint or initiating criminal proceedings and not the date of taking cognizance by a Magistrate or issuance of process by a Court".

18. In the light of the scheme of the Act and various provisions of the Code, we fully endorse the above view and hold that the crucial date for computing the period of limitation is the date of filing of the complaint or initiating criminal proceedings and not the date of taking cognizance by the Magistrate. In the case on hand, as pointed out earlier, the complaint was filed on June 3, 1998 which is well within the time and on the direction of the Magistrate, verification was recorded by solemn affirmation by authorized representatives of the complainant and after recording the statement and securing his signature, the learned Magistrate passed an order issuing summons against the accused under Sections 138/142 of the Act.

19. In the light of the above discussion, taking note of various provisions of the Act and the Code which we have adverted above, we hold that the complaint under Section 138 of the Act without signature is maintainable when such complaint is verified by the complainant and the process is issued by the Magistrate after due verification. The prosecution of such complaint is maintainable and we agree with the conclusion arrived at by the Division Bench of the High Court. Consequently, both the appeals fail and are dismissed.

K.K.T. Appeals dismissed.

RAKESH KAPOOR

v.

STATE OF HIMACHAL PRADESH

(Criminal Appeal No. 1839 of 2012)

NOVEMBER 22, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Prevention of Corruption Act, 1988 – ss. 7 and 13(2) – Prosecution under – Demand and acceptance of illegal gratification – Conviction by trial court – High Court confirmed conviction u/s. 13(2) while setting aside conviction u/s. 7 – On appeal, held: Conviction u/s. 13(2) cannot be sustained in absence of the substantive charge u/s. 13(1)(a) and also in view of acquittal u/s. 7 – Conviction is also not sustainable in view of lacuna in the prosecution case as regards demand of the bribe – Accused is entitled to benefit of doubt and hence acquitted.

The appellant-accused was prosecuted u/ss. 7 and 13(2) of Prevention of Corruption Act, 1988. The prosecution case was that the accused had demanded money from PW1-complainant for granting licence to run his hotel by a telephone call. PW-1 made a complaint to the police. The police laid a trap. PW-3 was the shadow witness. The accused was charged u/s. 7 and 13(2) of the Act. The treated currency notes were recovered from the accused. Trial Court convicted him u/ss. 7 and 13(2) of the Act. High Court set aside the conviction u/s. 7 and confirmed the conviction u/s. 13(2). Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. The criminal misconduct which is defined in Section 13(1)(a) of Prevention of Corruption Act, 1988

has not been included in the charge. In such a circumstance, the accused lost an important opportunity to defend himself, particularly, when he was acquitted u/s. 7 of the Act. In the light of the undisputed factual position that conviction of the appellant u/s. 7 has been set aside by the High Court and in the absence of any appeal by the State against such acquittal and substantive charge u/s.13(1)(a), the conviction u/s.13(2) cannot be sustained. [Para 9] [157-G-H; 158-A-B]

Joseph Kurian Philip Jose vs. State of Kerala **(1994) 6 SCC 535: 1994 (4) Suppl. SCR 122 ;** *Wakil Yadav and Anr. vs. State of Bihar* **(2000) 10 SCC 500 – relied on.**

2.1 Except the oral testimony of PWs 1 and 3, there is no other proof in respect of the demand of bribe money and the I.O. could not collect the telephone call details from the department concerned. Accordingly, there is no material/evidence for the demand of bribe. Even the official witness, who helped in the search of the accused, was examined as PW-14 but did not support the prosecution case and turned hostile. In the absence of the demand and acceptance, the accused is entitled to the benefit of doubt. [Para 11] [159-E-H 160-A]

Banarsi Dass vs. State of Haryana **(2010) 4 SCC 450: 2010 (4) SCR 383 – relied on.**

C.M. Girish Babu vs. CBI **(2009) 3 SCC 779: 2009 (2) SCR 1021;** *Suraj Mal vs. State (Delhi Admn.)* **(1979) 4 SCC 725 – referred to.**

2.2 Another important aspect which is in favour of the appellant accused is that the order, namely, granting licence in favour of PW-1 – the complainant was made ready before the alleged occurrence. When the order itself was ready and available that too in the hands of the complainant, the demand of the accused as claimed by

the prosecution is highly improbable. This aspect has also not been properly explained. [Para 12] [160-A-B, C]

2.3 Thus in view of the lacunae in the prosecution case, by giving the benefit of doubt to the accused, the judgment of the High Court and the trial Court is set aside and the accused is acquitted of the remaining offence under Section 13(2) of the Act. [Para 13] [160-D]

Case Law Reference:

1994 (4) Suppl. SCR 122	**relied on**	**Para 7**
(2000) 10 SCC 500	**relied on**	**Para 8**
2010 (4) SCR 383	**relied on**	**Para 10**
2009 (2) SCR 1021	**referred to**	**Para 10**
(1979) 4 SCC 725	**referred to**	**Para 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1839 of 2012.

From the Judgment & Order dated 08.09.2011 of the High Court of Himachal Pradesh at Shimla in Cr. Appeal No. 713 of 2008.

Parag P. Tripathi, Kunal Bahri, Mukesh Anand, Suresh Chandra Tripathy for the Appellant.

Kiran Bala Sahay, Mohit Kumar Shah for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 08.09.2011 passed by the High Court of Himachal Pradesh at Shimla in Criminal Appeal No. 713 of 2008 whereby the High Court while partly allowing the appeal filed

by the appellant herein set aside the conviction under Section 7 of the Prevention of Corruption Act, 1988 (for short 'the P.C. Act') and upheld the conviction and sentence awarded by the trial Court under Section 13(2) of the P.C. Act.

3. Brief facts:

(a) In January, 2003, the appellant had been posted as Divisional Tourism Development Officer, Dharamshala, H.P. His duty includes issuing permits for running of buildings as guest houses/hotels, by registering them as such and fixing the tariff for different types of rooms/accommodation in the said buildings.

(b) One Nirwan Singh is having a Tea Orchard and a house in Cheelgari in Dharamshala. He executed a general power of attorney in favour of the complainant - Sukhjit Singh Sidhu for managing his aforesaid properties. He renovated the said house and converted and converted it into a hotel and sought permission for registration and for fixing of tariff for the same from the appellant herein.

(c) On 28.04.2003, the appellant officially inspected the site of the hotel. After inspection, the appellant found everything in order and asked the complainant to go ahead with the running of the hotel. The complainant also requested him to give official permission to run the same. On 02.05.2003, the appellant recorded a note for registration of the same fixing tariff for different rooms. However, formal letter of registration and order of fixation of tariff had not been issued.

(d) It is the case of the prosecution that on 04.05.2003, the complainant received a telephonic call from the appellant at about 4.00 p.m. informing him that his case for registration of hotel and fixation of tariff had been cleared and that he could collect the registration certificate on the next day by paying him Rs. 10,000/-.

(e) The complainant being an Ex-serviceman not inclined

to give bribe and therefore, he shared this conversation with his friend Ashwani Bhatia (PW-3) and on 05.05.2003, both of them went to the Police Station, A.C. Zone, Dharamshala and lodged a complaint. They carried with them ten currency notes of the denomination of Rs.1,000/- each and produced the same before the police. The currency notes of Rs. 1,000/- each amounting to Rs.10,000/- were treated by the Vigilance Police with phenolphthalein powder and their numbers were noted down and handed over to the complainant asking him to give the same to the accused on demand with a direction to not to tamper with the same in any manner. The police asked Ashwani Bhatia (PW-3) to act as a shadow witness and requested him to go to the office of the appellant with the complainant and give signal to them as and when the bribe money stood paid.

(f) Thereafter, the members of the raiding party (Vigilance Police) took shelter near the office of the accused. At about 6.55 p.m., after receiving signal from the shadow witness, the raiding party caught hold of the appellant. The appellant was asked to produce the currency notes taken by him as bribe and the same had been taken out from the right pocket of his pant. The number of the currency notes were got tallied as the same which were shown to the police earlier. The appellant was arrested and grounds of arrest intimated to him. The case was committed to the Court of Special Judge, Kangra at Dharamshala.

(g) Vide judgment dated 16.10.2008, the Special Judge, on perusal of the record, held the appellant guilty and convicted him for the offences punishable under Sections 7 and 13(2) of the P.C. Act. Vide order dated 03.11.2008, the Special Judge sentenced the appellant to undergo Rigorous Imprisonment (RI) for two years and to pay a fine of Rs.10,000/-, in default, to further undergo simple imprisonment for 6 months.

(h) Being aggrieved, the appellant preferred an appeal being Criminal Appeal No. 713 of 2008 before the High Court

of Himachal Pradesh. The High Court, by impugned judgment dated 08.09.2011, partly allowed the appeal and set aside the conviction under Section 7 of the P.C. Act and confirmed the same under Section 13(2) of the said Act.

(i) Aggrieved by the said order of the High Court, the appellant preferred this appeal by way of special leave petition.

4. Heard Mr. Parag P. Tripathi, learned senior counsel for the appellant and Ms. Kiran Bala Sahay, learned counsel for the respondent-State.

5. Mr. Tripathi, learned senior counsel for the appellant, after taking us through all the materials, the decision of the trial Judge and the reasoning of the High Court submitted that conviction of the appellant under Section 13(2) of the P.C. Act is unsustainable in law since his conviction under Section 7 has been set aside by the High Court. He further submitted that inasmuch as Section 13(2) of the P.C. Act merely provides for punishment for criminal misconduct which is defined in Section 13(1), the substantive provision applicable in the case is Section 13(1)(a) of the P.C. Act. He further pointed out that Section 13(1)(a) was held inapplicable since the offence under Section 7 was not proved, hence, there cannot be any conviction under Section 13(2) without there being a conviction under Section 7 of the Act. He further submitted that in the absence of any evidence for the demand of bribe, the conviction is liable to be set aside. He also pointed out that though according to the prosecution, a demand was made to Shri S.S. Sidhu (PW-1), the complainant, over mobile phone, no call record was produced and reliance based on the contradictory statement of Shri Dharam Chand (PW-18), I.O., cannot be accepted. He further submitted that since the order, viz., registration certificate was made ready before the alleged demand of bribe on 02.05.2003, the entire case of the prosecution for demand and acceptance does not hold good. On the other hand, Ms. Kiran Bala Sahay, learned counsel for

the State supported the case of the prosecution and, according to her, the High Court was fully justified in convicting the appellant.

6. We have carefully considered the rival contentions and perused all the relevant materials.

7. At the foremost, in order to understand the stand of both the parties, it is useful to refer the charge sheet which reads as under:

"IN THE COURT OF SH. C.B. BAROWALIA, SPECIAL JUDGE, KANGRA AT DHARAMSHALA

STATE VS. RAKESH KAPOOR

CHARGE SHEET CC2/05

I, C.B. Barowalia, Special Judge, Kangra at Dharamshala do hereby charge you accused Rakesh Kapoor son of Shri Joginder Paul (HAS Officer), resident of H.No. 702, Old Chari Road, Dharamshala, District Kangra as under:-

That on 05.05.2003, at about 6.55 p.m. while you were posted as Divisional Tourism Development Officer at Dharamshala and being a Public Servant obtained Rs.10,000/- for the registration of Hotel of Shri N.S. Gill which was your official duty as a motive for doing the said official act and thereby committed an offence punishable under Section 7 of the Prevention of Corruption Act, 1988 and within my cognizance.

That on the above said date, time and place you being Divisional Tourism Development Officer at Dharamshala, District Kangra accepted a gratification of Rs.10,000/- other than legal remuneration from the complainant for registration of his Hotel and thus you committed the offence of criminal misconduct punishable under Section 13(2) of

the Prevention of Corruption Act, 1988 and within my cognizance.

And I hereby direct that you be tried by this Court for the aforesaid charges.

Sd/-
Special Judge
Kangra at Dharamshala"

A reading of the charge sheet shows that the claim made by the prosecution in paras 2 and 3 is one and the same. It is not in dispute that the High Court on appreciation of the evidence led in by the prosecution and the stand taken by the defence exonerated the appellant in respect of the offence punishable under Section 7 of the P.C Act. Now, the moot question for consideration is whether in the absence of Section 7, conviction under Section 13(2) is permissible, particularly, when there is no reference to Section 13(1)(a) of the P.C. Act. It is not in dispute that Section 13(2) only speaks about punishment for committing criminal misconduct. Section 13(2) reads thus:

"13. Criminal misconduct by a public servant.- (1) xxx xxx

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine."

We have already extracted the charge sheet which contains the offence under Sections 7 and 13(2) of the P.C. Act. The relevant substantive provision is Section 13(1)(a) which reads thus:

"13. Criminal misconduct by a public servant.- (1) A public servant is said to commit the offence of criminal misconduct,-

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in section 7; or

xxx xxx"

In the light of the language used in Section 13(1)(a) and in view of the conclusion by the High Court that the offence under Section 7 has not made out, the prosecution has not explained how Section 13(1)(a) is applicable. In this regard, it is useful to refer the decision of this Court in Joseph Kurian Philip Jose vs. State of Kerala, (1994) 6 SCC 535. The case relates to popularly known as 'Punalur Liquor Tragedy' in Kerala in which certain persons died and others received injuries due to consumption of poisonous adulterated arrack, ethyl alcohol adulterated with methyl alcohol. After investigation, a case under Section 272 IPC and Section 57(a) of the Kerala Abkari Act was registered. After trial, A-1 was convicted and sentenced under Sections 272 and 328 of the IPC along with the relevant provisions of the Kerala Abkari Act and the High Court confirmed the same, who filed an appeal before this Court. The High Court, however, set aside the similar conviction and sentence of A-4 recorded by the Court of Sessions and instead convicted him under Section 109 IPC for having abetted commission of offence punishable under Sections 272 and 328 IPC whereunder, without specificity, he was awarded rigorous imprisonment for two years. The said order was also under challenge before this Court. In para 13, this Court has held as under:

"……Going by the High Court findings, Section 109 IPC could in no case be attracted and more so without charge to that effect put to A-4 to plead at the trial. Section 109 IPC is by itself an offence though punishable in the context of other offences. A-4 suffered a trial for substantive offences under the IPC and the Abkari Act.

When his direct involvement in these crimes could not be established, it is difficult to uphold the view of the High Court that he could lopsidedly be taken to have answered the charge of abetment and convicted on that basis. There would, as is plain, be serious miscarriage of justice to the accused in causing great prejudice to his defence. The roles of the perpetrator and the abettor of the crime are distinct, standing apart from each other. The High Court was thus in error in employing Section 109 IPC to hold A-4 guilty. We thus set aside the conviction of A-4 and order his acquittal on all charges".

8. In *Wakil Yadav and Another vs. State of Bihar,* (2000) 10 SCC 500, this Court held that when the appellant was charged and convicted along with others for offences under Section 302 read with Section 149 IPC, the High Court cannot convict him for the offence under Section 302 read with Section 109 in appeal. In that case, it is undisputed that no charge was framed against the appellant with the aid of Section 109. As in *Joseph Kurian* (supra), here again, this Court held that Section 109 IPC is a distinct offence. In this way, this Court held that *"the appellant having faced trial for being a member of an unlawful assembly which achieved the common object of killing the deceased, could in no event be substitutedly convicted for offence under Section 302 IPC with the aid of Section 109 IPC. There was obviously thus not only a legal flaw but also a great prejudice to the appellant in projecting his defence. He, on such error committed by the High Court, has rightly earned his acquittal…."* By saying so, this Court allowed the appeal of the accused and set aside the conviction and sentence imposed on him.

9. The criminal misconduct which is defined in Section 13(1)(a) has not been included in the charge. In such a circumstance, the accused lost an important opportunity to defend himself, particularly, when he was acquitted under Section 7 of the Act. By applying the ratio rendered in the

above decisions and in the light of the undisputed factual position that conviction of the appellant under Section 7 has been set aside by the High Court and in the absence of any appeal by the State against such acquittal and substantive charge under Section 13(1)(a), the conviction under Section 13(2) cannot be sustained.

10. Coming to the next argument that there was absolutely no demand for bribe and in the absence of such claim by the accused duly established by the prosecution, the conviction cannot be sustained. In support of the above claim, learned counsel for the appellant relied on the decision of this Court in *Banarsi Dass vs. State of Haryana,* (2010) 4 SCC 450. It was an appeal under Article 136 of the Constitution of India filed against the judgment and order of conviction dated 20.11.2002 passed by the learned single Judge of the High Court of Punjab and Haryana at Chandigarh. In that case, it was contended before this Court that there is no evidence to prove demand and voluntary acceptance of the alleged bribe so as to attract the offence under Section 5(2) of the Prevention of Corruption Act, 1947. The other contentions were also raised regarding merits with which we are not concerned. The accused was charged for the offence punishable under Section 5(2) of the 1947 Act as well as Section 161 (since repealed) of the IPC. In para 23, this Court held that "to constitute an offence under Section 161 IPC, it is necessary for the prosecution to prove that there was demand of money and the same was voluntarily accepted by the accused". It was further held that "similarly in terms of Section 5(1)(d) of the Act, the demand and acceptance of the money for doing a favour in discharge of his official duties is sine qua non to the conviction of the accused". In para 25, this Court quoted the decision rendered in *C.M. Girish Babu vs. CBI,* (2009) 3 SCC 779 and held that mere recovery of money from the accused by itself is not enough in the absence of substantive evidence of demand and acceptance. In the sama para, a reference was also made to *Suraj Mal vs. State (Delhi Admn.)* (1979) 4 SCC 725 wherein

this Court took the view that mere recovery of tainted money from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. This Court further held that mere recovery by itself cannot prove the charge of the prosecution against the accused in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe. After underlying the above principles, and noting that 2 prosecution witnesses turned hostile, while giving the benefit of doubt on technical ground to the accused, this Court, set aside the judgment of the High Court and acquitted the accused of both the charges i.e. under Section 161 IPC and under Section 5(2) of the 1947 Act.

11. In the case on hand, though prosecution heavily relied on the evidence of PW-1, the complainant that the demand was made to him over mobile phone, admittedly the call details have not been summoned. No doubt, the statement of PW-1, according to the prosecution is corroborated by Ashwani Bhatia (PW-3) who stated that he overheard PW-1 saying that he had brought the money, when the latter went to the office of the appellant in the evening of 05.05.2003. Interestingly, the I.O. who was examined as PW-18 has mentioned that PW-1 received the demand from the accused over landline and, hence, he could not secure those call details. Whatever may be the reason, the fact remains that except the oral testimony of PWs 1 and 3, there is no other proof in respect of the demand of bribe money and the I.O. could not collect the call details as stated by PW-1 from the department concerned. Accordingly, learned senior counsel for the appellant is right in contending that there is no material/evidence for the demand of bribe. In the light of the categorical enunciation in *Banarsi Dass* (supra), in the absence of the demand and acceptance, the accused is entitled to the benefit of doubt. In addition to the same, in the case on hand, even the official witness, Shri Madan Singh-who helped in the search of the accused- Municipal

Commissioner, was examined as PW-14 but did not support the prosecution case and turned hostile.

12. Another important aspect which is in favour of the appellant accused is that the order, namely, granting licence in favour of PW-1 – the complainant was made ready before the alleged occurrence i.e. on 02.05.2003. In fact, the original order was available on the table and the same was in the hands of PW-1. Admittedly, he did not hand over the original to the I.O. and his only explanation was that he kept it under his custody to continue his business. As rightly pointed out, when the order itself was ready and available that too in the hands of the complainant, the demand of the accused as claimed by the prosecution is highly improbable. This aspect has also not been properly explained.

13. In the light of the above discussion and in view of the lacunae in the prosecution case, by giving the benefit of doubt to the accused, we hereby set aside the judgment of the High Court and the trial Court and acquit the accused of the remaining offence under Section 13(2) of the P.C. Act. Since the appellant was ordered to be released on bail on 13.02.2012 by this Court, the bail bonds shall stand discharged. The appeal is allowed.

K.K.T. Appeal allowed.

JEETU @ JITENDERA & ORS.
v.
STATE OF CHHATTISGARH
(Criminal Appeal No. 1986 of 2012)

DECEMBER 04, 2012

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

Appeal – Appeal against conviction – Conviction by trial court under the provisions of IPC – In appeal, counsel for the convicts not challenging their conviction, but only seeking lenient sentence – High Court maintained the conviction and reduced the sentence – On appeal, held: It is obligation of the Court to decide the appeal on merits and not accept the concession and proceed to deal with the sentence – Such plea bargaining is impermissible in law and defeats the fundamental purpose of the justice delivery system – Code of Criminal Procedure, 1973 – Chapter XXIA – ss. 265A and 265L (as inserted by the Criminal Law Amendment Act, 2005) – Plea Bargaining – Penal Code, 1860 – ss. 147 and 327/149.

The appellants-accused were convicted u/ss. 147 and 327/149 IPC by the trial court and were sentenced to three months R1 for the offence u/s. 147 and to three years RI for the offence u/s. 327 IPC. In appeal, the counsel for the accused did not challenge the conviction, but sought for lenient sentence. High Court maintained the conviction, but reduced the sentence from 3 years RI to 1 year RI. Hence the present appeal.

Allowing the appeal and remitting the matter to High Court, the Court

HELD: 1. In an appeal against conviction, the appellate court is under duty and obligation to look into

the evidence adduced in the case and arrive at an independent conclusion. Even if the High Court chooses to dismiss the appeal summarily, some brief reasons should be given so as to enable this Court to judge whether or not the case requires any further examination. If no reasons are given, the task of this Court becomes onerous inasmuch as this Court would be required to perform the function of the High Court itself by reappraising the entire evidence resulting in serious harassment and expense to the accused. [Paras 16 and 19] [168-C-D; 171-C]

Dagadu v. State of Maharashtra **AIR 1982 SC 1218;** *Govinda Kadtuji Kadam and Ors. v. The State of Maharashtra* **AIR 1970 SC 1033: 1970 (3) SCR 525 ;** *Sita Ram and Ors. v. The State of Uttar Pradesh* **AIR 1979 SC 745: 1979 (2) SCR 1085;** *Padam Singh v. State of U.P.* **2000 (1) SCJ 143 – relied on.**

2. Sometimes the accused enters into a plea bargaining. The counsel for the appellants before the High Court did not challenge the conviction but sought imposition of a lenient sentence. The High Court has not made any effort to satisfy its conscience and accepted the concession given by the counsel in a routine manner. When a convicted person prefers an appeal, he has the legitimate expectation to be dealt with by the Courts in accordance with law. He has intrinsic faith in the criminal justice dispensation system and it is the sacred duty of the adjudicatory system to remain alive to the said faith. That apart, he has embedded trust in his counsel that he shall put forth his case to the best of his ability assailing the conviction and to do full justice to the case. That apart, a counsel is expected to assist the Courts in reaching a correct conclusion. Therefore, it is the obligation of the Court to decide the appeal on merits and not accept the concession and proceed to deal with the

sentence, for the said mode and method defeats the fundamental purpose of the justice delivery system. The same being impermissible in law should not be taken resort to. It should be borne in mind that a convict who has been imposed substantive sentence is deprived of his liberty, the stem of life that should not ordinarily be stenosed, and hence, it is the duty of the Court to see that the cause of justice is subserved with serenity in accordance with the established principles of law. [Paras 17, 18 and 21] [168-D; 169-F-G; 172-B-G]

Thippaswamy v. State of Karnataka **AIR 1983 SC 747;** *State of Uttar Pradesh v. Chandrika* **(1999) 8 SCC 638: 1999 (4) Suppl. SCR 239;** *Madanlal Ramchandra Daga v. State of Maharashtra* **AIR 1968 SC 1267: 1968 SCR 34;** *Murlidhar Meghraj Loya v. State of Maharashtra* **(1976) 3 SCC 684: 1977 (1) SCR 1;** *Ganeshmal Jashraj v. Govt. of Gujarat* **(1980) 1 SCC 363: 1980 (1) SCR 1114;** *Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. And Anr.* **(2007) 6 SCC 528: 2007 (4) SCR 1122 ;** *Babu Rajirao Shinde v. State of Maharashtra* **(1971) 3 SCC 337;** *Siddanna Apparao Patil v. State of Maharashtra* **(1970) 1 SCC 547: 1970 (3) SCR 909 – relied on.**

Case Law Reference:

AIR 1982 SC 1218	**Relied on**	**Para 16**
1970 (3) SCR 525	**Relied on**	**Para 16**
1979 (2) SCR 1085	**Relied on**	**Para 16**
AIR 1983 SC 747	**Relied on**	**Para 17**
1999 (4) Suppl. SCR 239	**Relied on**	**Para 18**
1968 SCR 34	**Relied on**	**Para 18**
1977 (1) SCR 1	**Relied on**	**Para 18**

1980 (1) SCR 1114	**Relied on**	**Para 18**
2000 (1) SCJ 143	**Relied on**	**Para 19**
2007 (4) SCR 1122	**Relied on**	**Para 20**
(1971) 3 SCC 337	**Relied on**	**Para 20**
1970 (3) SCR 909	**Relied on**	**Para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1986 of 2012.

From the Judgment and Order dated 17.08.2012 of the High Court of Chhattisgarh at Bilaspur in Criminal Appeal No. 639 of 2009.

C.N. Sree Kumar, Prakash Ranjan Nayak and Reshmitha R. Chandran for the Appellants.

C.D. Singh and Sunny Choudhary for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The present appeal by special leave is directed against the judgment of conviction and order of sentence passed by the High Court of Chattisgarh at Bilaspur in Criminal Appeal No. 639 of 2009 whereby the High Court affirmed the conviction of the appellant for offences punishable under Sections 147 and 327/149 of the Indian Penal Code (for short "the I.P.C."), but reduced the sentence from three years rigorous imprisonment on the second score to one year and maintained the sentence of rigorous imprisonment for three months in respect of the offence on the first score i.e. Section 147, I.P.C. Be it noted, both the sentences were directed to be concurrent.

3. The facts as has been exposited are that on the basis of an F.I.R. lodged by the informant, Aarif Hussain, PW-10, at

11.50 P.M. on 16.4.2008 alleging that about 10.00 P.M. when he was going towards Telibandha P.S., the accused persons met him near Telibandha chowk and demanded Rs.500/- for liquor and on his refusal they took him towards Awanti Vihar railway crossing in an auto rickshaw and assaulted him, Crime Case No. 129/2008 was registered under Sections 327, 366 and 323 read with Section 34 of the I.P.C. at the concerned police station. After the criminal law was set in motion, said Aarif Hussain was medically examined by Dr. Vishwanath Ram Bhagat, PW-1, and as per the injury report, Exhbt. P-1, he had sustained four injuries on his person. The investigating officer, after completing the investigation, placed the charge sheet on 6.8.2008 against the accused persons for offences punishable under Sections 147, 327, 364-A, 323 and 34 of the I.P.C. before the learned trial Magistrate who committed the matter to the court of Sessions.

4. The learned Additional Sessions Judge, considering the material on record, framed charges for offences punishable under Sections 148, 329/149 and 364/149 of the I.P.C.

5. The accused persons abjured their guilt and pleaded false implication in the crime in question.

6. The prosecution, in order to substantiate its stand, examined eleven witnesses and exhibited number of documents. The defence, in support of its plea, chose not to adduce any evidence.

7. The learned trial judge, on the basis of the ocular and documentary evidence brought on record, came to hold that the accused persons were not guilty of the offences under Sections 148, 329/149 and 364/149 of the I.P.C. but found them guilty for the offences as mentioned earlier and sentenced them as has been stated hereinbefore.

8. Being aggrieved by the aforesaid decision of conviction and order of sentence, the accused-appellant preferred

Criminal Appeal No. 639 of 2009. Before the High Court, the learned counsel for the appellants did not press the appeal as far as the conviction aspect is concerned and confined the submissions as regards the imposition of sentence highlighting certain mitigating circumstances.

9. At this juncture, we think it seemly to reproduce what the learned single Judge has recorded about the submission of the learned counsel for the accused-appellants: -

> "Learned counsel appearing for the appellants submits that he is not pressing this appeal as far as it relates to conviction part of the impugned judgment and would confine his argument to the sentence part thereof only. He submits that the incident had taken place more than four years back, there was no premeditation and on the spur of moment the incident had taken place, appellant Nos. 1, 4 & 5 have already remained in jail for 23 days and appellant No. 2 for 166 days whereas appellant No. 3 is in jail for last about 18 months, all the appellants are young boys having no criminal antecedents against them, therefore, the sentence imposed on them may be reduced to the period already undergone by them."

10. Be it noted, the learned counsel for the State resisted the aforesaid submission and contended that regard being had to the gravity of the offence, no leniency should be shown to the appellants.

11. The learned single Judge did not address himself with regard to the legal sustainability of the conviction. He took note of the submission advanced at the bar and reduced the rigorous imprisonment to one year from three years. As a consequence of the reduction in sentence, all the accused-appellants barring appellant No. 3 therein were sent to custody to suffer the remaining part of the sentence imposed on them. Being dissatisfied, the present appeal has been preferred by accused Nos. 1, 4 and 5.

12. We have heard Mr. C.N. Sreekumar, learned counsel for the appellant, and Mr. C.D. Singh, learned counsel for the respondent State.

13. Questioning the legal substantiality of the decision passed by the learned single Judge, it is contended by Mr. Sreekumar that the conviction under Section 327 is not sustainable inasmuch as no charge was framed under Section 383 of the IPC. It is his further submission that the prosecution has miserably failed to establish its case beyond reasonable doubt; and had the evidence been appreciated in an apposite manner, the conviction could not have been sustained. Alternatively, it is argued that in any case, there could have been a conviction only under Section 323 of the I.P.C. and for the said offence, the sentence of one year rigorous imprisonment is absolutely disproportionate and excessive.

14. Mr. C.D. Singh, learned counsel for the State, per contra, propounded that for proving an offence under Section 327 of the I.P.C., framing of charge under Section 383 of the I.P.C is not warranted. It is urged by him that the material brought on record clearly prove the offences to the hilt against the accused-appellants and, therefore, no fault can be found with the delineation made by the High Court.

15. The hub of the matter, as we perceive, really pertains to the justifiability and legal propriety of the manner in which the High Court has dealt with the appeal. It is clear as day that it has recorded the proponement of the learned counsel for the appellants relating to non-assail of the conviction, extenuating factors for reduction of sentence and proceeded to address itself with regard to the quantum of sentence. It has not recorded its opinion as regards the correctness of the conviction.

16. The learned counsel for the appellants has made an effort to question the pregnability of the conviction recorded by the learned trial Judge on many a score. But, a significant one, the conclusion is sans delineation on merits. We are required

to address whether deliberation on merits was the warrant despite a concession given in that regard by the learned counsel for the appellants. Section 374 of the Code of Criminal Procedure, 1973 (for short "the Code") deals with appeals from conviction. Section 382 of the Code deals with petition of appeal. Section 384 of the Code deals with summary dismissal of appeal. A three Judge Bench in *Dagadu v. State of Maharashtra*[1] referred to the decisions in *Govinda Kadtuji Kadam and others v. The State of Maharashtra* [2] and *Sita Ram and others v. The State of Uttar Pradesh*[3] and thereafter opined that even if the High Court chooses to dismiss the appeal summarily, some brief reasons should be given so as to enable this Court to judge whether or not the case requires any further examination. If no reasons are given, the task of this Court becomes onerous inasmuch as this Court would be required to perform the function of the High Court itself by reappraising the entire evidence resulting in serious harassment and expense to the accused.

17. It is apt to note that sometimes the accused enters into a plea bargaining. Prior to coming into force of Chapter 21 A dealing with plea bargaining under Sections 265 A and 265 L by Act 2 of 2006, the concept of plea bargaining was not envisaged under the Code. In *Thippaswamy v. State of Karnataka*[4], the accused pleaded guilty and was eventually convicted by the learned Magistrate under Section 304 A of the IPC and was sentenced to pay a sum of Rs.1000/- towards fine. He did not avail the opportunity to defend himself. On an appeal preferred by the State, the High Court found him guilty maintaining the sentence of fine and additionally imposed a substantive sentence of rigorous imprisonment for a period of one year. A three-Judge Bench of this Court took note of the

1. AIR 1982 SC 1218.
2. AIR 1979 SC 1033.
3. AIR 1979 SC 745.
4. AIR 1983 SC 747.

fact that it was a case of plea bargaining and observed that had the accused known that he would not be let off with a mere sentence of fine but would be imprisoned, he would not have pleaded guilty. In that context, this Court observed as follows:-

> "It would be clearly violative of Article 21 of the Constitution to induce or lead an accused to plead guilty under a promise or assurance that he would be let off lightly and then in appeal or revision, to enhance the sentence. Of course when we say this, we do not for a moment wish to suggest that the Court of appeal or revision should not interfere where a disproportionately low sentence is imposed on the accused as a result of plea-bargaining. But in such a case, it would not be reasonable, fair just to act on the plea of guilty for the purpose of enhancing the sentence. The Court of appeal or revision should, in such a case, set aside the conviction and sentence of the accused and remand the case to the trial court so that the accused can, if he so wishes, defend himself against the charge and if he is found guilty, proper sentence can be passed against him."

After so holding, the conviction was set aside and the matter was sent back to the trial Magistrate with a direction that the accused shall be afforded a proper and adequate opportunity to defend himself. It was further ruled that if he was guilty as a result of the trial, the judicial Magistrate may impose proper sentence upon him and, on the other hand, if he is not found guilty, he may be acquitted.

18. As is evincible from the impugned judgment, the learned counsel for the appellants before the High Court did not challenge the conviction but sought imposition of a lenient sentence. In *State of Uttar Pradesh v. Chandrika*[5], the High Court in an appeal accepted the plea bargain and maintained the conviction of the respondent under Section 304 Part 1 of

5. (1999) 8 SCC 638.

I.P.C but altered the sentence to the period of imprisonment already undergone and to pay a fine of Rs. 5000/-, in default of payment, to suffer R.I. for six months. Be it noted, the High Court had not stated the actual period of imprisonment undergone by the respondent therein. This Court took note of the judgment and order of conviction and sentence passed by the learned sessions Judge who had convicted him under Section 304 Part I of I.P.C and sentenced him to undergo eight years' R.I. At the time of hearing of appeal, the finding of conviction was not challenged with a view to bargain on the question of sentence. The learned single Judge accepted the bargain and partly allowed the appeal by altering the sentence. The legal acceptability of the said judgment was called in question by the State before this Court. Taking note of the fact situation, this Court observed that the concept of plea bargaining is not recognized and is against public policy under the criminal justice system. After referring to the decisions in *Madanlal Ramchandra Daga v. State of Maharashtra*[6], *Murlidhar Meghraj Loya v. State of Maharashtra*[7], *Ganeshmal Jashraj v. Govt. of Gujarat*[8] and *Thippaswamy* (supra), a two-Judge Bench ruled thus:-

> "It is settled law that on the basis of plea bargaining the court cannot dispose of the criminal cases. The Court has to decide it on merits. If the accused confesses his guilt, an appropriate sentence is required to be imposed. Further, the approach of the court in appeal or revisions should be to find out whether the accused is guilty or not on the basis of the evidence on record. If he is guilty, an appropriate sentence is required to be imposed or maintained. If the appellant or his counsel submits that he is not challenging the order of conviction, as there is sufficient evidence to connect the accused with the crime,

6. AIR 1968 SC 1267.
7. (1976) 3 SCC 684.
8. (1980) 1 SCC 363.

then also the court's conscience must be satisfied before passing the final order that the said concession is based on the evidence on record. In such cases, sentence commensurating with the crime committed by the accused is required to be imposed. Mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused bargain with the court that as he is pleading guilty the sentence be reduced."

[Emphasis Supplied]

19. In *Padam Singh v. State of U.P.*[9], it has been held that in an appeal against conviction, the appellate court is under duty and obligation to look into the evidence adduced in the case and arrive at an independent conclusion.

20. At this stage, we may refer with profit to a two-Judge Bench decision in *Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. And Another*[10] wherein this Court, after referring to the pronouncements in *Babu Rajirao Shinde v. State of Maharashtra*[11] and *Siddanna Apparao Patil v. State of Maharashtra*[12], opined thus:-

"An appeal is indisputably a statutory right and an offender who has been convicted is entitled to avail the right of appeal which is provided for under Section 374 of the Code. Right of appeal from a judgment of conviction affecting the liberty of a person keeping in view the expansive definition of Article 21 is also a fundamental right. Right of appeal, thus, can neither be interfered with or impaired, nor can it be subjected to any condition.

xxx xxx xxx xxx

9. 2000 (1) SCJ 143.

10. (2007) 6 SCC 528.

11. (1971) 3 SCC 337.

12. (197) 1 SCC 547.

The right to appeal from a judgment of conviction vis-à-vis the provisions of Section 357 of the Code of Criminal Procedure and other provisions thereof, as mentioned hereinbefore, must be considered having regard to the fundamental right of an accused enshrined under Article 21 of the Constitution of India as also the international covenants operating in the field."

21. Tested on the touchstone of the aforesaid legal principles, it is luminescent that the High Court has not made any effort to satisfy its conscience and accepted the concession given by the counsel in a routine manner. At this juncture, we are obliged to state that when a convicted person prefers an appeal, he has the legitimate expectation to be dealt with by the Courts in accordance with law. He has intrinsic faith in the criminal justice dispensation system and it is the sacred duty of the adjudicatory system to remain alive to the said faith. That apart, he has embedded trust in his counsel that he shall put forth his case to the best of his ability assailing the conviction and to do full justice to the case. That apart, a counsel is expected to assist the Courts in reaching a correct conclusion. Therefore, it is the obligation of the Court to decide the appeal on merits and not accept the concession and proceed to deal with the sentence, for the said mode and method defeats the fundamental purpose of the justice delivery system. We are compelled to note here that we have come across many cases where the High Courts, after recording the non-challenge to the conviction, have proceeded to dwell upon the proportionality of the quantum of sentence. We may clearly state that the same being impermissible in law should not be taken resort to. It should be borne in mind that a convict who has been imposed substantive sentence is deprived of his liberty, the stem of life that should not ordinarily be stenosed, and hence, it is the duty of the Court to see that the cause of justice is subserved with serenity in accordance with the established principles of law.

22. Ex consequenti, the appeal is allowed and the judgment

and order passed by the High Court are set aside and the appeal is remitted to the High Court to be decided on merits in accordance with law. As the appellants were on bail during the pendency of the appeal before the High Court and are presently in custody, they shall be released on bail on the said terms subject to the final decision in the appeal.

K.K.T. Appeal allowed & Matter remitted back to High Court.

SANJEEV KUMAR SAMRAT

v.

NATIONAL INSURANCE CO. LTD. AND OTHERS

(Civil Appeal No. 8925 of 2012 etc.)

DECEMBER 11, 2012

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

Motor Vehicles Act, 1988 – ss. 147 and 167 – Insured goods vehicle – Hired – Accident of the vehicle – Causing death of the hirer and its two employees – Claim for compensation – Tribunal holding that Insurance company was liable to pay the compensation – High Court holding that Insurance company was liable only in respect of the hirer and not to its employees – On appeal, held: Order of High Court is correct – The statutory policy only covers the employees of the insured, covered under Workmen's Compensation Act and not any other kind of employee – Workman's Compensation Act, 1923.

The appellant-owner of a goods vehicle, insured the vehicle with the respondent-Insurance Company. The vehicle was hired for carrying goods. When the hirer alongwith his two labourers was going with the goods, the vehicle met with an accident resulting in death of the hirer and the two labourers.

The legal representatives of the deceased filed claim petitions. The Insurance Company took the stand that it was not liable to indemnify the labourers employed by the hirer. Motor Accident Claims Tribunal held that Insurance Company was liable to indemnify the legal heirs of the three deceased. In appeal, Single Jude of High Court held that the Insurance Company was liable to pay the compensation to the legal representatives of the hirer, but not to his employees. Since the Insurance Company

had already deposited the amount of compensation, the Court held that the company was entitle to recover the compensation amount from the owner of the vehicle as regards the compensation amount for the two deceased employees.

Dismissing the appeals, the Court

HELD: 1.1 As per Section 147(1)(b)(i) of the Motor Vehicles Act, the policy is required to cover a person including the owner of the goods or his authorised representative carried in the vehicle. An owner of the goods or his authorised agent is covered under the policy. That is the statutory requirement. It does not cover any passenger. [Para 19] [186-C-D]

1.2 The insurer's liability as regards employee is restricted to the compensation payable under the Workmen's Compensation Act, 1923. The categories of employees which have been enumerated in the sub-clauses (a), (b) and (c) of the proviso (i) to Section 147(1) are the driver of a vehicle, or the conductor of the vehicle, if it is a public service vehicle or in examining tickets on the vehicle, if it is a goods carriage, being carried in the vehicle. [Para 19] [186-C-G]

1.3 It is the settled principle of law that the liability of an insurer for payment of compensation either could be statutory or contractual. On a reading of the proviso to Sub-Section (1) of Section 147 of the Act, it is demonstrable that the insurer is required to cover the risk of certain categories of employees of the insured stated therein. The insurance company is not under statutory obligation to cover all kinds of employees of the insurer as the statute does not show command. That apart, the liability of the insurer in respect of the said covered category of employees is limited to the extent of the liability that arises

under the 1923 Act. There is also a stipulation in Section 147 that the owner of the vehicle is free to secure a policy of insurance providing wider coverage. In that event, the liability would travel beyond the requirement of Section 147 of the Act, regard being had to its contractual nature. But, a pregnant one, the amount of premium would be different. [Para 20] [187-B-E]

Oriental Insurance Co. Ltd. v. Devireddy Konda Reddy and Ors. **(2003) 2 SCC 339: 2003 (1) SCR 537 – relied on.**

Ved Prakash Garg v. Premi Devi and Ors. **(1997) 8 SCC 1: 1997 (4) Suppl. SCR 250 – referred to.**

1.4 On an apposite reading of Sections 147 and 167, the intendment of the Legislature, is to cover the injury to any person including the owner of the goods or his authorised representative carried in a vehicle and an employee who is carried in the said vehicle. A policy is not required to cover the liability of the employee except an employee covered under the 1923 Act and that too in respect of an employee carried in a vehicle. To put it differently, it does not cover all kinds of employees. [Para 24] [189-H; 190-A-B]

1.5 On a contextual reading of the provision, schematic analysis of the Act and the 1923 Act, it is quite limpid that the statutory policy only covers the employees of the insured, either employed or engaged by him in a goods carriage. It does not cover any other kind of employee and therefore, someone who travels not being an authorised agent in place of the owner of goods, and claims to be an employee of the owner of goods, cannot be covered by the statutory policy and to hold otherwise would tantamount to causing violence to the language employed in the Statute. Therefore, the insurer would not be liable to indemnify the insured. [Para 24] [190-B-D]

1.6 The policy in the instant case clearly states that insurance is only for carriage of goods and does not cover use of carrying passengers other than employees not more than six in number coming under the purview of the 1923 Act. On a bare reading of the policy, there can be no iota of doubt that the policy relates to the insured and it covers six employees (other than the driver, not exceeding six in number) and it is statutory in nature. It neither covers any other category of person nor does it increase any further liability in relation to quantum. [Para 25] [190-E; 191-A-B]

National Insurance Company Ltd. v. Baljit Kaur and Ors. **(2004) 2 SCC 1: 2004 (1) SCR 274;** *New India Assurance Co. Ltd. v. Satpal Singh* **(2000) 1 SCC 237:1999 (5) Suppl. SCR 149;** *New India Assurance Co. Ltd. v. Asha Rani and Ors.* **(2003) 2 SCC 223: 2002 (4) Suppl. SCR 543;** *National Insurance Co. Ltd. v. Bommithi Subbhayamma and Ors.* **(2005) 12 SCC 243;** *New India Assurance Co. Ltd. v. Vedwati and Ors.* **(2007) 9 SCC 486: 2007 (2) SCR 918;** *National Insurance Co. Ltd. v. Cholleti Bharatamma and Ors.* **(2008) 1 SCC 423:2007 (11) SCR 531;** *National Insurance Co. Ltd. v. Prembati Patel and Ors.* **(2005) 6 SCC 172: 2005 (3) SCR 655 – relied on.**

New India Assurance Co. Ltd. v. Satpal Singh **(2000) 1 SCC 237: 1999 (5) Suppl. SCR 149 – referred to.**

Case Law Reference:

2004 (1) SCR 274	**Relied on**	**Para 6**
1999 (5) Suppl. SCR 149	**Relied on**	**Para 12**
2002 (4) Suppl. SCR 543	**Relied on**	**Para 13**
(2005) 12 SCC 243	**Relied on**	**Para 15**
2007 (2) SCR 918	**Relied on**	**Para 16**
2007 (11) SCR 531	**Relied on**	**Para 17**
2005 (3) SCR 655	**Relied on**	**Para 18**
2003 (1) SCR 537	**Relied on**	**Para 22**
1997 (4) Suppl. SCR 250	**Referred to**	**Para 23**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8925 of 2012.

From the Judgment & Order dated 13.01.2006 of t he High Court of Himachal Pradesh, Shimla at Shimla in F.A.O. (MVA) No. 175 of 2003.

WITH

C.A. No. 8926 of 2012.

Rajesh Gupta, Harpreet Singh (for K.J. John & Co.) for the Appellant.

M.K. Dua, Karan Chawla, Kishore Rawat for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The centripodal issue that emanates for consideration in these appeals is whether the insurer is obliged under law to indemnify the owner of a goods vehicle when the employees engaged by the hirer of the vehicle travel with the owner of the goods on the foundation that they should be treated as "employees" covered under the policy issued in accordance with the provision contained under Section 147 of the Motor Vehicles Act, 1988 (for brevity "the Act").

3. The expose' of facts are that a truck bearing HP/10/ 0821 was hired on 12.4.2000 for carrying iron rod and cement by one Durga Singh who was travelling with the goods along with two of his labourers. When the vehicle was moving through Khara Patthar to Malethi, 1.5 KM ahead of Khara Patthar, about

4.30 p.m., it met with an accident as a consequence of which the labourers, namely, Nagru Ram and Desh Raj and also Durga Singh, sustained injuries and eventually succumbed to the same.

4. The legal heirs of all the deceased persons filed separate claim petitions under Section 166 of the Act before the Motor Accidents Claims Tribunal (II), Shimla (for short "the tribunal"). Before the tribunal, respondent No. 3, namely, National Insurance Company Ltd., apart from taking other pleas, principally took the stand that it was not liable to indemnify the labourers employed by the hirer. The owner of the truck, the present appellant, admitted the fact of hiring the truck but advanced the plea that the insurer was under legal obligation to indemnify the owner.

5. On consideration of the evidence brought on record, the tribunal came to hold that the legal representatives of Nagru Ram and Desh Raj were covered as per the insurance policy, exhibit RW-2/3/A, as the policy covered six employees and accordingly fixed the liability on the insurer. As far as the legal representative of Desh Raj is concerned, the tribunal treated him as the owner of the goods who was travelling along with the goods and accordingly saddled the liability on the 3rd respondent therein.

6. Being grieved by the awards passed by the tribunal, the insurer preferred FAO (MBA) Nos. 175, 176 and 178 of 2003 before the High Court of Himachal Pradesh at Shimla. In appeal, the learned single Judge, by order dated 13.1.2006, allowed FAO Nos. 175 and 176 of 2003 wherein the legal representatives of the deceased employees were the claimants. As far as FAO No. 178 of 2003 is concerned, the High Court concurred with the finding recorded by the tribunal that Durga Singh was the owner of the goods and travelling along with the goods and, therefore, the insurer was liable to pay compensation to his legal representatives. It is worthy to note that as the insurance company had already deposited the

amount of compensation, the High Court, placing reliance on the decision in *National Insurance Company Ltd. v. Baljit Kaur and Others*[1], directed that the insurance company having satisfied the award shall be entitled to recover the same along with interest from the owner-insured by initiating execution proceedings before the tribunal. Hence, the present appeals at the instance of the owner of the vehicle.

7. We have heard Mr. Rajesh Gupta, learned counsel for the appellant, and Mr. M. K Dua, learned counsel for respondent No. 1.

8. It is submitted by Mr. Gupta that the High Court has committed serious error in coming to hold that an employee of the hirer is not covered without appreciating the terms of the policy which covers the driver and six employees. Learned Counsel has laid emphasis on the words "any person" used in Section 147 of the Act. Referring to the said provision, it is urged by him that the term "employee" has to be given a broader meaning keeping in view the language employed in the policy and also in view of the fact that the Act is a piece of beneficial legislation. It is his further submission that there is a distinction between "passenger" in a goods vehicle and an "employee" of the hirer of the vehicle but the High Court has gravely erred by not appreciating the said distinction in proper perspective.

9. Mr. M.K. Dua, learned counsel for the first respondent, combating the aforesaid proponements, contended that the decision rendered by the High Court is absolutely flawless inasmuch as the entire controversy is covered by many a dictum of this Court some of which have been appositely referred to by the High Court. It is urged by him that the extended meaning which is argued to be given to the term "employee" by the appellant is not legally acceptable as the employee has to be that of the insurer. It is canvassed by him that there is a manifest

1. (2004) 2 SCC 1.

fallacy in the argument propounded on behalf of the appellant that the policy covers such kinds of employees though on the plainest reading of the policy, it would be vivid that the same does not cover such categories of employees. It is his further submission that the policy in question is an "Act Policy" and in the absence of any additional terms in the contract of insurance, the same can be broadened to travel beyond the language employed in the policy to cover the employees of the owner of the goods making the insurer liable.

10. To appreciate the controversy, it is necessary to refer to certain statutory provisions. Section 146 of the Act provides for the necessity for injuries against third party risk. On a reading of the said provision, there can be no trace of doubt that the owner of the vehicle is statutorily obliged to obtain an insurance for the vehicle to cover the third party risk, apart from the exceptions which have been carved out in the said provision. Section 147 of the Act deals with requirements of policies and limits of liability. The relevant part of Section 147 (1) is reproduced below:-

"147. Requirements of policies and limits of liability.- (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-

(a) is issued by a person who is an authorised insurer; or

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)—

(i) against any liability which may be incurred by him in respect of the death of or bodily [injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising

out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required—

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee—

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability."

11. Be it noted, before Section 147(1)(b)(i) came into existence in the present incarnation, it stipulated that a policy of insurance must be a policy which insured the person or classes of persons to the extent specified in sub-section (2) against the liability incurred by him in respect of the death of or bodily injury to any person or damage to any property or third party caused by or arising out of the use of the vehicle in public place.

12. Regard being had to the earlier provision and the amendment, this Court in *New India Assurance Co. Ltd. v. Satpal Singh*[2], scanned the anatomy of the provision and also of Section 149 of the Act and expressed the view that under the new Act, an insurance policy covering the third party risk does not exclude gratuitous passenger in a vehicle, no matter that the vehicle is of any type or class. It was further opined that the decisions rendered under the 1939 Act in respect of gratuitous passengers were of no avail while considering the liability of the insurer after the new Act came into force.

13. The correctness of the said decision came up for consideration before a three-Judge Bench in *New India Assurance Co. Ltd. v. Asha Rani and Others*[3]. The learned Chief Justice, speaking for himself and H.K. Sema, J. took note of Section 147(1) prior to the amendment and the amended provision and the objects and reasons behind the said provision and came to hold as follows:-

> "The objects and reasons of clause 46 also state that it seeks to amend Section 147 to include owner of the goods or his authorised representative carried in the vehicle for the purposes of liability under the insurance policy. It is no doubt true that sometimes the legislature amends the law by way of amplification and clarification of an inherent position which is there in the statute, but a plain meaning being given to the words used in the statute, as it stood prior to its amendment of 1994, and as it stands subsequent to its amendment in 1994 and bearing in mind the objects and reasons engrafted in the amended provisions referred to earlier, it is difficult for us to construe that the expression "including owner of the goods or his authorised representative carried in the vehicle" which was added to the pre-existing expression "injury to any person" is either clarificatory or amplification of the pre-existing

2. (2000) 1 SCC 237.

3. (2003) 2 SCC 223.

> statute. On the other hand it clearly demonstrates that the legislature wanted to bring within the sweep of Section 147 and making it compulsory for the insurer to insure even in case of a goods vehicle, the owner of the goods or his authorised representative being carried in a goods vehicle when that vehicle met with an accident and the owner of the goods or his representative either dies or suffers bodily injury." [Emphasis supplied]

14. S.B. Sinha, J., in his concurring opinion, stated thus: -

> "Furthermore, sub-clause (i) of clause (b) of sub-section (1) of Section 147 speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place, whereas sub-clause (ii) thereof deals with liability which may be incurred by the owner of a vehicle against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place.
>
> An owner of a passenger-carrying vehicle must pay premium for covering the risks of the passengers. If a liability other than the limited liability provided for under the Act is to be enhanced under an insurance policy, additional premium is required to be paid. But if the ratio of this Court's decision in *New India Assurance Co. v. Satpal Singh*[4] is taken to its logical conclusion, although for such passengers, the owner of a goods carriage need not take out an insurance policy, they would be deemed to have been covered under the policy wherefor even no premium is required to be paid." [Emphasis supplied]

Being of the aforesaid view, the three-Judge Bench overruled the decision in *Satpal Singh* (supra).

4. (2000) 1 SCC 237.

15. In *Baljit Kaur* (supra) and *National Insurance Co. Ltd. v. Bommithi Subbhayamma and Others*[5], the aforesaid view was reiterated.

16. In *New India Assurance Co. Ltd. v. Vedwati and Others*[6], after referring to the scheme of the Act and the earlier pronouncements, it has been held that the provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carrier and the insurer would have no liability therefor.

17. In *National Insurance Co. Ltd. v. Cholleti Bharatamma and Others*[7], the Court laid down that the provisions engrafted under Section 147 of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle and hence, any injury to any person in Section 147(1)(b) would only mean a third party and not a passenger travelling in a goods carriage, whether gratuitous or otherwise.

18. At this juncture, we may refer with profit to the decision of a three-Judge Bench in *National Insurance Co. Ltd. v. Prembati Patel and Others*[8] wherein the legal representatives of the driver of the truck had succeeded before the High Court and were granted compensation of Rs.2,10,000/- repelling the contention of the insurer that the liability was restricted as provided under the Workmen's Compensation Act, 1923 (for short "the 1923 Act"). After discussing the schematic postulates of the provision, the Court ruled that where a policy is taken by the owner of the goods vehicle, the liability of the insurance company would be confined to that arising under the 1923 Act in case of an employer. It further observed that the insurance policy being in the nature of a contract, it is permissible for an

5. (2005) 12 SCC 243.
6. (2007) 9 SCC 486.
7. (2008) 1 SCC 423.
8. (2005) 6 SCC 172.

owner to take such a policy whereunder the entire liability in respect of the death of or bodily injury to any such employee as is described in Sub-Sections (a), (b) or (c) of the proviso to Section 147(1)(b) may be fastened upon the insurance company and the insurer may become liable to satisfy the entire award. But for the said purpose, he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company is unlimited.

19. Keeping in view the aforesaid enunciation of law, it is to be seen how the term "employee" used in Section 147 is required to be understood. Prior to that, it is necessary to state that as per Section 147(1)(b)(i), the policy is required to cover a person including the owner of the goods or his authorised representative carried in the vehicle. As has been interpreted by this Court, an owner of the goods or his authorised agent is covered under the policy. That is the statutory requirement. It does not cover any passenger. We are absolutely conscious that the authorities to which we have referred to hereinbefore lay down the principle regarding non-coverage of passengers. The other principle that has been stated is that the insurer's liability as regards employee is restricted to the compensation payable under the 1923 Act. In this context, the question that has been posed in the beginning to the effect whether the employees of the owner of goods would come within the ambit and sweep of the term "employee" as used in Section 147(1), is to be answered. In this context, the proviso to Section 147(1)(b) gains significance. The categories of employees which have been enumerated in the sub-clauses (a), (b) and (c) of the proviso (i) to Section 147(1) are the driver of a vehicle, or the conductor of the vehicle if it is a public service vehicle or in examining tickets on the vehicle, if it is a goods carriage, being carried in the vehicle. It is submitted by the learned counsel for the appellant that sub-clause (c) is of wide import as it covers employees in a goods carriage being carried in a vehicle. The learned counsel for the insurer would submit that it should be read in the context of the entire proviso, regard

being had to the schematic concept of the 1923 Act and the restricted liability of the insurer. It is further urged that contextually read, the meaning becomes absolutely plain and clear that employee which is statutorily mandated to be taken by the insured only covers the employees employed or engaged by the employer as per the policy.

20. It is the settled principle of law that the liability of an insurer for payment of compensation either could be statutory or contractual. On a reading of the proviso to Sub-Section (1) of Section 147 of the Act, it is demonstrable that the insurer is required to cover the risk of certain categories of employees of the insured stated therein. The insurance company is not under statutory obligation to cover all kinds of employees of the insurer as the statute does not show command. That apart, the liability of the insurer in respect of the said covered category of employees is limited to the extent of the liability that arises under the 1923 Act. There is also a stipulation in Section 147 that the owner of the vehicle is free to secure a policy of insurance providing wider coverage. In that event, needless to say, the liability would travel beyond the requirement of Section 147 of the Act, regard being had to its contractual nature. But, a pregnant one, the amount of premium would be different.

21. At this stage, we may usefully refer to Section 167 of the Act which reads as follows: -

> "167. **Option regarding claims for compensation in certain cases.-** Notwithstanding anything contained in the Workmen's Compensation Act, 1923 (8 of 1923) where the death of, or bodily injury to, any person gives rise to a claim for compensation under this Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both."

From the aforesaid provision, it is quite vivid that where a death

or bodily injury to any person gives rise to a claim under the Act as well as under the 1923 Act, the said person is entitled to compensation under either of the Acts, but not under both.

22. Coming to the scheme of the 1923 Act, it is worth noticing that under Section 3 of the said Act, the employer is liable to pay compensation to the workman in respect of personal injury or death caused by an accident arising out of or in the course of his employment. Section 4 provides the procedure how the amount of compensation is to be determined. In this context, we may usefully quote a passage from *Oriental Insurance Co. Ltd. v. Devireddy Konda Reddy and Others*[9]: -

> "....Section 147 of the Act mandates compulsory coverage against death of or bodily injury to any passenger of "public service vehicle". The proviso makes it further clear that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in goods vehicle would be limited to liability under the Workmen's Compensation Act, 1923 (in short "the WC Act"). There is no reference to any passenger in "goods carriage." [Underlining is ours]

23. In *Ved Prakash Garg v. Premi Devi and Others*[10], after referring to the scheme of the 1923 Act in the context of payment of penalty for default by the insurer under Section 4-A of the Act, this Court held thus: -

> "On a conjoint operation of the relevant schemes of the aforesaid twin Acts, in our view, there is no escape from the conclusion that the insurance companies will be liable to make good not only the principal amounts of compensation payable by insured employers but also interest thereon, if ordered by the Commissioner to be paid

9. (2003) 2 SCC 339.

10. (1997) 8 SCC 1.

by the insured employers. Reason for this conclusion is obvious. As we have noted earlier the liability to pay compensation under the Workmen's Compensation Act gets foisted on the employer provided it is shown that the workman concerned suffered from personal injury, fatal or otherwise, by any motor accident arising out of and in the course of his employment. Such an accident is also covered by the statutory coverage contemplated by Section 147 of the Motor Vehicles Act read with the identical provisions under the very contracts of insurance reflected by the policy which would make the insurance company liable to cover all such claims for compensation for which statutory liability is imposed on the employer under Section 3 read with Section 4-A of the Compensation Act."

[Emphasis supplied]

Thereafter, the Bench proceeded to state thus:-

"So far as interest is concerned it is almost automatic once default, on the part of the employer in paying the compensation due, takes place beyond the permissible limit of one month. No element of penalty is involved therein. It is a statutory elongation of the liability of the employer to make good the principal amount of compensation within permissible time-limit during which interest may not run but otherwise liability of paying interest on delayed compensation will ipso facto follow."

Though the said decision was rendered in a different context, yet we have referred to the same only to highlight the liability of the insurer in respect of certain classes of employees.

24. It is worthy to note that sub-clause (i)(c) refers to an employee who is being carried in the vehicle covered by the policy. Such vehicle being a goods carriage, an employee has to be covered by the statutory policy. On an apposite reading

of Sections 147 and 167 the intendment of the Legislature, as it appears to us, is to cover the injury to any person including the owner of the goods or his authorised representative carried in a vehicle and an employee who is carried in the said vehicle. It is apt to state here that the proviso commences in a different way. A policy is not required to cover the liability of the employee except an employee covered under the 1923 Act and that too in respect of an employee carried in a vehicle. To put it differently, it does not cover all kinds of employees. Thus, on a contextual reading of the provision, schematic analysis of the Act and the 1923 Act, it is quite limpid that the statutory policy only covers the employees of the insured, either employed or engaged by him in a goods carriage. It does not cover any other kind of employee and therefore, someone who travels not being an authorised agent in place of the owner of goods, and claims to be an employee of the owner of goods, cannot be covered by the statutory policy and to hold otherwise would tantamount to causing violence to the language employed in the Statute. Therefore, we conclude that the insurer would not be liable to indemnify the insured.

25. Presently, for the sake of completeness, we shall refer to the policy. The policy, exhibit R-2/3/A, clearly states that insurance is only for carriage of goods and does not cover use of carrying passengers other than employees not more than six in number coming under the purview of the 1923 Act. The language used in the policy reads as follows:-

"The Policy does not cover :

1. Use for organized racing, pace-making reliability trial or speed testing

2. Use whilst dwaing a trailer except the towing (other then for reward) or any one disabled mechanically propelled vehicle.

3. Use for varying passengers in the vehicle except

employees (other than driver) not exceeding six in number coming under the purview of Workmen's Compensation Act, 1923."

On a bare reading of the aforesaid policy, there can be no iota of doubt that the policy relates to the insured and it covers six employees (other than the driver, not exceeding six in number) and it is statutory in nature. It neither covers any other category of person nor does it increase any further liability in relation to quantum.

26. In view of the aforesaid analysis, we repel the contentions raised by the learned counsel for the appellant and as a fall-out of the same, the appeals, being sans merit, stand dismissed without any order as to costs.

K.K.T. Appeals dismissed.

AJAY MAKEN
V.
ADESH KUMAR GUPTA & ANR.
(Civil Appeal No. 8919 of 2012)

DECEMBER 11, 2012

[ALTAMAS KABIR, CJI AND J. CHELAMESWAR, J.]

Representation of the People Act, 1951 – s.82 – Election petition – Parties/respondents to the petition – Election of returned candidate (appellant) challenged on ground of commission of corrupt practices – Objection raised by appellant that the election petition was liable to be dismissed for non-impleadment of 'V', another candidate in the said election – He contended that Annexure of the election petition contained allegations of commission of corrupt practice by the appellant, as also by 'V' and in view of s.82(b), 'V' also ought to have been made a respondent to the election petition and failure to so implead him was fatal to the election petition – Held: In the entire body of the election petition there was no reference to any corrupt practice committed by 'V' – Allegations against 'V' were found in a document annexed to the election petition – of which the election petitioner was not the author – hence it cannot be said that the allegations were made in the petition – In order for any other candidate to be made a party to the Election Petition, allegations of corrupt practice would have to be made against him in the Election Petition itself – In absence of any such allegation in the Petition, clause (b) of s.82 will not be attracted – 'V' thus not required to be made a party to the Election Petition – Consequently, non-impleadment of 'V', against whom there were no allegations in the Election Petition, not fatal to the Election Petition.

The second respondent filed election petition before the High Court challenging the election of the returned

candidate (appellant) from the New Delhi Parliamentary Constituency on ground of commission of corrupt practices falling under Section 123(1), (2), (5), (6), (7) read with Section 127(a) of the Representation of the People Act, 1951. The election petitioner impleaded the Returning Officer and the appellant as party-respondents to the election petition. The appellant filed Interlocutory Application (I.A.) invoking Order VII Rule 11 of CPC praying that the election petition be dismissed in compliance with the mandate contained in section 86 of the Act, which stipulates "the High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117". The appellant raised objection inter alia on two grounds – a) for non-compliance with Section 81(3) of the Act and b) for non-impleadment of 'V', another candidate in the said election. He contended that Annexure-I of the election petition not only contained allegations of commission of corrupt practice by the appellant, but also by 'V' and in view of the requirement of Section 82(b) of the Act, 'V' also ought to have been made a respondent to the election petition and failure to so implead him was fatal to the election petition. The I.A. was, however, dismissed, and therefore the instant appeal.

Two issues thus came up for consideration before this Court: a) whether the copy served on the appellant was not a true copy of the original within the meaning of Section 81(3) of the Act and thus the election petition was liable to be dismissed on that ground; and b) whether non-impleadment of 'V' was fatal to the election petition-i.e. whether allegations were made against 'V' in the election petition and if made, was 'V' required to be made a respondent to the election petition.

Adjudicating upon the second issue but remitting the matter to the High Court for consideration afresh of the

objections raised by the appellant in regard to the first issue, the Court

HELD:

Per J. Chelameswar, J.

1.1. It is not clear whether the various deficiencies pointed out pertain to the original copy of the election petition filed in the High Court or the copy served on the appellant. Legally there is a distinction between failure to sign and verify the original copy of the election petition filed in the Court and failure to attest the copy served on the respondent to be a true copy of the election petition. While the latter failure falls within the scope of Section 81(3), the earlier failure falls under sub-Section (1)(c) and sub-Section(2) of Section 83. While the failure to comply with the requirements of Section 81 obligates the High Court to dismiss the election petition, the failure to comply with the requirements of Section 83 is not expressly declared to be fatal to the election petition. [Paras 9, 10] [204-B-D]

1.2. Both, the pleading as well as the finding of the High Court, are as vague as the vagueness could be. Exposition of law without first identifying the relevant "facts in issue" does not promote the cause of justice. The appeal, insofar as the first issue is required to be allowed and remanded to the High Court for an appropriate consideration of the objections raised by the appellant, in accordance with law. [Para 14] [206-G-H; 207-A]

Manohar Joshi v. Nitin Bhaurao Patil and Another **(1996) 1 SCC 169: 1995 (6) Suppl. SCR 421 – relied on.**

Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore & Others **1964 (3) SCR 573;** *Satya Narain v. Dhuja Ram & Others* **(1974) 4 SCC 237: 1974 (3) SCR 20;**

Rajendra Singh v. Smt. Usha Rani & Others **(1984) 3 SCC 339: 1984 (3) SCR 22;** *Chandrakanth Uttam Chodankar v. Dayanand Rayu Mandrakar & Others* **(2005) 2 SCC 188: 2004 (6) Suppl. SCR 916 – referred to.**

2.1. Section 82(b) of the Representation of the People Act, 1951, on a plain reading or on the principle of literal construction, seems to require that all the candidates against whom allegations of commission of corrupt practice are MADE IN THE PETITION must be made parties / respondents to the election petition. [Para 17] [208-C-D]

2.2. The election petitioner made the allegations of commission of various corrupt practices falling under various sub-sections of Section 123 of the Act, by either the appellant or the election agent of the appellant. The election petition particularly contains extensive details of the corrupt practice falling under Section 123(6) r/w Section 77 of the Act. The material facts and particulars of the abovementioned corrupt practice are set out in great detail. It is in the process of the abovementioned narration, the election petitioner made a reference to two annexures viz., Annexure-H and Annexure-I. It is the said Annexure-I, which makes a reference to the name of 'V'. Except a mention in the said annexure, the name of 'V' is not mentioned anywhere in the body of the election petition. The election petitioner referred to the abovementioned Annexure-I in the context of the commission of a corrupt practice falling under Section 123(7) r/w Section 77 of the Act by the appellant. The substance of the allegation, where a reference to Annexure-I is made, is that the complaint, such as the one made by the election petitioner, had also been made by another body called "Youth for equality" to the Election Commission of India and a copy of the complaint, allegedly, made by the said "Youth for

equality" is filed as Annexure-I to the election petition, obviously, for the purpose of deriving support for the allegation made by the election petitioner. [Paras 20, 21] [209-C-E; 210-B-D]

2.3. In a case like the one on hand where the election petitioner does not make any such allegation in the body of the election petition, but such allegations are found in some document annexed to the election petition – of which the election petitioner is not the author – it cannot be said that the allegations are MADE in the petition. Because, firstly, the document annexure is not authored by the election petitioner; secondly, in the entire body of the election petition there is no reference to any corrupt practice committed by 'V'. Making such an allegation against 'V' would in no way help the election petitioner to obtain the relief sought by him in the election petition. The purpose of the annexure is only to derive support to the allegation of the commission of corrupt practice alleged against the appellant only. Therefore, only that much of the content of the annexure as is relevant to the allegations made in the election petition proper must be considered to have become integral part of the election petition. [Para 58 and 59] [226-G-H; 227-A-C]

2.4. To stretch the principle laid down in Sahodrabai case, to say, that an annexure becomes an integral part of the election petition for all purposes and, therefore, hold that the allegations made against 'V' in the annexure by somebody other than the election petitioner would become allegations MADE in the election petition, would lead to absurd results; that is what exactly sought to be done by the appellant. [Para 60] [227-D-E]

Sahodrabai Rai v. Ram Singh Aharwar, **(1968) 3 SCR 13;** *M. Karunanidhi v. H.V. Hande* **(1983) 2 SCC 473 and** *Mulayam Singh Yadav v. Dharam Pal Yadav* **(2001) 7 SCC 98: 2001 (3) SCR 1103 – explained.**

Reserve Bank of India v. Peerless General Finance and Investment Company Limited and Others **(1987) 1 SCC 424: 1987 (2) SCR 1;** *Chief Inspector of Mines v. Ramjee* **AIR 1977 SC 965: 1977 (2) SCR 904;** *Tirath Singh v. Bachittar Singh and Others* **AIR 1955 SC 830: 1955 SCR 457;** *Har Swarup & Another v. Brij Bhushan Saran & Others* **1967 (1) SCR 342;** *Mohan Rai v. Surendra Kumar Taparia & Others* **1969 (1) SCR 630;** *Kashi Nath v. Smt. Kudisa Begum and Others* **(1970) 3 SCC 554;** *Gadnis Bhawani Shankar V v. Faleiro Eduardo Martinho* **(2000) 7 SCC 472: 2000 (2) Suppl. SCR 77 – referred to.**

3. In the result, it is held that the election petition cannot be dismissed on the ground that 'V' is not made a party. But, in so far as the question whether the election petition is required to be dismissed on the ground that the copy served on the appellant is not the true copy of the original within the meaning of Section 81(3), the matter is remitted to the High Court for disposal in accordance with law and in the light of this judgement. [Para 62] [227-H; 228-A-B]

Case Law Reference:

1995 (6) Suppl. SCR 421	**relied on**	**Para 10**
1964 (3) SCR 573	**referred to**	**Para 12**
1974 (3) SCR 20	**referred to**	**Para 12**
1984 (3) SCR 22	**referred to**	**Para 12**
2004 (6) Suppl. SCR 916	**referred to**	**Para 12**
1987 (2) SCR 1	**referred to**	**Para 17**
1977 (2) SCR 904	**referred to**	**Para 18**
1955 SCR 457	**referred to**	**Para 19**
(1968) 3 SCR 13	**explained**	**Para 22**

(1983) 2 SCC 473	**explained**	**Para 22**
2001 (3) SCR 1103	**explained**	**Para 22**
1967 (1) SCR 342	**referred to**	**Para 22**
1969 (1) SCR 630	**referred to**	**Para 22**
(1970) 3 SCC 554	**referred to**	**Para 22**
2000 (2) Suppl. SCR 77	**referred to**	**Para 22**
(1983) 2 SCC 473	**referred to**	**Para 51**

Per CJI. (Concurring)

1. The provisions of Sections 82 and 83 of the Representation of the People Act, 1951 have to be read harmoniously. While Section 82 relates to who should be made parties in the Election Petition, Section 83 relates to the contents of the Petition. As far as Section 82 is concerned, while Clause (a) provides that when in addition to claiming a declaration that the election of all or any of the returned candidates is void, the Petitioner claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates, other than the Petitioner, and where no such further declaration is claimed, all the returned candidates have to be made parties. Clause (b) in addition requires that any other candidate against whom allegations of corrupt practice are made in the Petition, has to be made a party to the Election Petition. The emphasis is on the use of the expression "allegations of any corrupt practice are made in the Petition". In other words, in order for any other candidate to be made a party to the Election Petition, allegations of corrupt practice would have to be made against him in the Election Petition itself. [Para 2] [228-D-H; 229-A]

2. It would be necessary that some allegation of corrupt practice would have to be made in the Election

Petition itself against a person against whom allegations of corrupt practice may separately have been made. In the absence of any such allegation in the Petition, the provisions of clause (b) of Section 82 will not be attracted. [Para 4] [229-D-E]

3. The allegations made against 'V', contained in annexure to the Election Petition, can have no bearing on the facts at issue in the Election Petition itself. 'V' is not required to be made a party to the Election Petition. The non-impleadment of 'V' against whom there were no allegations in the Election Petition is not fatal to the Election Petition. [Para 5] [229-F-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8919 of 2012.

From the Judgment & Order dated 30.05.2011 of the High Court of Delhi at New Delhi in EP No. 20 of 2009, IA No. 13851 of 2009.

K. Parasaran, Pradeep Ranjan Tiwary, Harish Bhanara, Rajeev Kapoor, Praffula Ranjan Tiwary, Atishi Dipankar for the Appellant.

Amarjit Singh Chandhoik, ASG, Ranjit Kumar, Ruby Singh Ahuja, R.N. Karanjawala, Manik Karanjawala, Ruchira Gupta, Deepti Sarin, Shruti Katakey (for Karanjawala & Co.), Arijit Prasad, B.V. Balram Dass, S.S. Chadha, Y. Choudhary, Anil Katiyar for the Respondents.

The Judgments of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted.

2. The appellant herein was declared elected to the 15th Lok Sabha from No.4 New Delhi Lok Sabha Constituency in the election held in the year 2009.

3. Challenging the election of the appellant herein, a voter of the said constituency, filed an election petition No.20 of 2009 in the Delhi High Court. The challenge is on the ground of commission of corrupt practices falling under section 123(1),(2),(5),(6),(7) read with section 127(a) of the Representation of the People Act, 1951 (hereinafter referred to as "the Act"). The election petitioner chose to implead only the Returning Officer of the No.4 New Delhi Parliamentary Constituency and the appellant herein as respondents to the election petition.

4. The appellant herein filed Interlocutory Application No. 13851 of 2009 invoking Order VII Rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the CPC") praying that the election petition be dismissed in compliance with the mandate contained in section 86 of the Act, which stipulates "the High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117". The said I.A., was dismissed by an order dated 30-05-2011. Hence, the Appeal.

5. The substance of the objections raised by the appellant herein in the abovementioned interlocutory application is that the election petition filed by the 2nd respondent herein is liable to be dismissed on three counts:

Firstly, on the ground of non-compliance with Section 81(3);

Secondly, that the election petition does not reveal a complete cause of action as it does not contain all the material facts necessary to constitute to be the cause of action; and

Thirdly, that one Vijay Goel who was also a candidate in the said election is also a necessary party as per the provisions of section 82 of the Act but not impleaded as the respondent.

6. At the outset I must mention that though the 2nd of the

abovementioned objections was pleaded vaguely in the abovementioned interlocutory application, it does not appear to have been pressed before the High Court and certainly not argued before us. So I shall confine our scrutiny to the correctness of the judgment in appeal so far as the objections Nos.1 and 3 of the appellant are concerned.

7. The High Court summarised the contours of the 1st objection at para 3 of the Judgment as follows:

(i) "Not all pages and documents furnished to the second respondent, along with copies of the petition, contained signatures of the petitioner;

(ii) Many portions of the documents filed with the petition were missing;

(iii) Copies of several pages of annexures (to the petition) furnished to the second respondent were dim or illegible;

(iv) The election petition was not properly verified;

(v) The verification clause in the copy furnished to the second respondent did not contain signatures of the petitioner."

8. The relevant portion of the pleadings in this regard are to be found at paras 4 & 5 of the Interlocutory Application as follows:

"4. That the petitioner has filed the election petition in contravention of various provisions of law and the main petition placed before this Hon'ble Court for trial is not completely signed and verified on each and every page of the petition and attested by the petitioner as required by law.

5. That there are number of pages of the petition and documents annexed with the petition which are either not

at all signed by the petitioner and even none of the document/annexure has been verified under the signature of the petitioner as required by law.

The copy of the petition as supplied to the respondent No.2 along with Annexures is annexed herewith as Annexure-'A'.

On scrutiny of the above referred copy of the petition and inspection of the court record, the applicant/Respondent No.2 has found the following deficiencies which are fatal to the petition.

(i) None of the pages except the last two pages of the petition i.e. Page no.36 & 37 are signed by the petitioner.

(ii) Affidavit in support is not as per Delhi High Court Rules and verification of the affidavit is not signed by the petitioner.

(iii) Para'2' of the affidavit at page No.38, is not legible and does not contain the averments similar to the affidavit filed on record.

(iv) Annexures from page No.40 to Page No.79 are neither signed nor verified by the petitioner as required by law.

(v) Page No. 80 to 81 are just illegible initialled by some person but those pages are also not verified.

(vi) Page No. 82 to 98. are not properly paginated, nor signed verified or even initialled by the petitioner.

(vii) Page No.99 to 102 are not signed, initialled or verified by the petitioner as per law.

(viii) Page No. 103 to 113, are not signed, initialled or verified by the petitioner as per law.

(ix) Page No. 114 to 117, are not signed, initialled or

verified by the petitioner as per law.

(x) Page No. 118 to 120, is not signed, initialled or verified by the petitioner as per law, and even not the same as filed.

(xi) Page No. 121 to 133, completely illegal.

(xii) Page no. 134 Blurred, not get printed by the Respondent No.2 not signed or verified as per the law.

(xiii) Page No. 135 illegible and not same as per the petition on board.

(xiv) Page No. 138 to 139 are illegible, and not same as per the petition on board.

(xv) Page No. 144 to 145, page No. 150 to 151, page No. 152 to 280 are illegible, and not same as per the petition on board.

(xvi) Page Nos. 281 to 283 are not the same as filed along with main period, not signed or verified by the Petition as per law.

(xvii) Page No. 284 to 287 are illegible, just initialled by some person as true copy but not the same as filed by petitioner with main petition.

(xviii) Page No. 288 to 296 the pagination in the original petition is different as having various page members as given on typed copies with suffix 'A', neither the typed copies supplied nor the pagination is corrected on copy supplied.

It is humbly submitted that the Registry of the Court has also given chance to the petitioner to rectify the mistakes/ remove objections which could not have been given, as the election petitioner has no right to amend modify the petition or its annexures after filing the same, as the annexures are

to be read with petition as are treated as integral part of the same."

9. It is not clear from the above whether the various deficiencies pointed out by the petitioner pertain to the original copy of the election petition filed in the High Court or the copy served on the appellant herein. The emphasised portions (emphasis is ours) of the above extracts demonstrate the same.

10. Legally there is a distinction between failure to sign and verify the original copy of the election petition filed in the Court and failure to attest the copy served on the respondent to be a true copy of the election petition. While the latter failure falls within the scope of Section 81(3), the earlier failure falls under sub-Section (1)(c) and sub-Section(2) of Section 83. While the failure to comply with the requirements of Section 81 obligates the High Court to dismiss the election petition, the failure to comply with the requirements of Section 83 is not expressly declared to be fatal to the election petition. The said distinction is explained by this Court in *Manohar Joshi v. Nitin Bhaurao Patil and Another* = (1996) 1 SCC 169 paras 20 and 21•.

·20. Section 86 empowersthe High Courts to dismiss an election petition at the threshold if it does not comply with the provisions of Section 81 or Section 82 117 of the Act, all of which are patent defects evident on a bare examination of the election petition as presented. Sub-section (1) of Section 81 requires the checking of limitations with reference to the admitted facts and sub-section (3) thereof requires only a comparison of the copy accompanying the election petition with the election petition itself, as presented. Section 82 requires verification of the required parties to the petition with reference to the relief claimed in the election petition. Section 117 requires verfication of the deposit of security in the High Court in accordance with rules of the High Court. Thus, the compliance of Section 81, 82 and 117 is to be sen with reference to the evident facts found in the election petition and the documents filed along with it at the time of its presentation. This is a ministerial act. There is no scope for any further inquiry for the purpose of Section 86 to ascertain the deficiency, if any, in the election petition found with reference to the requirements of Section 83 of the R.P. Act which is a judicial function. For this reason, the non-compliance of Section 83, is not specified as a ground for dismissal of the election petition under Section 86.

11. However, the High Court categorised the various objections raised in para 5 of the I.A. (extracted earlier), as falling under five heads, which are already extracted (at para 7) earlier by us. Though it appears that while the objections falling under category 1, 3 and 5 pertain to the defects in the copy of the election petition served to the appellant herein, it is not very clear whether the objections falling under categories 2 and 4, referred to above, pertain to the election petition as presented to the High Court or copy thereof served to the appellant herein.

12. Further, of the eighteen objections pointed out under para 5 of the I.A. (extracted above), which one of the said objections falls under which one of the abovementioned five categories, is not identified by the High Court. Apart from that there is no finding in the Judgment under appeal whether any one of the abovementioned eighteen objections is factually correct or not. I regret to record that the High Court simply extracted paragraphs from the Judgments of this Court in *Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore & Others* [1964 (3) S.C.R.573], *Satya Narain v. Dhuja Ram & Others* [(1974) 4 S.C.C 237], *Rajendra Singh v. Smt. Usha Rani & Others* [(1984) 3 S.C.C. 339] and *Chandrakanth Uttam Chodankar v. Dayanand Rayu Mandrakar & Others* [(2005) 2 S.C.C. 188] and disposed of the I.A. holding:

> "17. In view of the above and having regard to the decision in *Chandrakant Uttam Chodankar* (supra), as well as *Murarka Radhey Shyam Ram Kumar* (supra), this Court is of the opinion that in the present instance, the election petitioner had signed on the copies and, therefore, complied with the standard prescribed under Section 81(3). Similarly, the fact that the Registrar of this Court had initially notified some deficiencies which were cured, after which the matter was placed before the Court, which took cognizance of the petition, would mean that the election petitioner was absolved of any fault. There is no doubt that the election petition, as originally presented, was within the time prescribed by law. Moreover, this Court cannot, enquire into the question as to whether and if so, to what extent, the copies furnished to the second respondent were not complaint with Section 81(3) of the Act, that would amount to a mini trial – a procedure unknown to the Act and in fact contrary to its objective. While public interest lies in ensuring that suits or causes which are plainly barred by law, ought to be summarily rejected, equally the court should not be over zealous in the enforcement of provisions which are procedural, though aimed at expeditious trial, require substantial compliance. The larger Bench ruling in Murarka points to this, and the court is inclined to follow the adage that procedure is only a handmaiden, and not mistress of justice."

13. In the second part of the eighteenth objection (in para 5 of the I.A.), the appellant herein pleaded vaguely that the Registry of the High Court gave an opportunity "to the petitioner to rectify the mistakes/remove objections, which could not have been given". The High Court by the impugned Judgment records that "the fact that the Registrar of this Court had initially notified some deficiencies which were cured, after which the matter was placed before the Court, which took cognizance of the petition, would mean that the election petitioner was absolved of any fault".

14. Both, the pleading as well as the finding of the High Court, are as vague as the vagueness could be. Exposition of law without first identifying the relevant "facts in issue", in my opinion, does not promote the cause of justice. The Appeal, insofar as the first issue identified by us in para 5 of the

21. Acceptance of the argument of Shri Jethmalani would amount to reading into Section 86 an additional ground for dismissal of the election petition under Section 86 for non-compliance of Section 83. There is no occasion to do so, particularly when Section 86 being in the nature of a penal provision, has to be construed stricly confined to its plain language.

Judgment, is required to be allowed and remanded to the High Court for an appropriate consideration of the objections raised by the appellant herein, in accordance with law.

15. I shall now deal with the third issue argued before us. Though elaborate submissions were made before us on this issue by the learned senior counsel appearing on either side, the relevant pleading in the petition is very sketchy and is to be found in para 14 of the Interlocutory Application which reads as follows:

> "That in annexures 1 of the petition, the petitioner has annexed a complaint made by the Youth for Equality to the Hon'ble Chief Election Commissioner of India by alleging various irregularities by BJP & Congress Candidates namely Sh. Vijay Goel & Sh. Ajay Maken in New Delhi Parliamentary constituency and in para B sub para (i) at page 15 of the petition a mention of the said complaint is made. The present election petition is apparently a proxy litigation by presenting the present election petition at the instance of the said BJP candidate whose other complaints etc. have been annexed along with the petition.
>
> As per the provisions of section 82 of the Representation of People Act 1951 a petitioner shall join as respondents to his petition. (b) any other candidate against whom allegations of any corrupt practice are made in the petition.
>
> It is not out of place to mention here that in the alleged complaint annexed as Annexure I similar allegations are made against Sh. Vijay Goel, a candidate at the said election which is under challenge and he is a necessary party as per the provisions of Section 82 of the Act."

16. A reading of the above paragraphs leaves us with the impression that the emphasis of the paragraphs is on the belief

of the appellant that the election petition is a proxy litigation undertaken by the election petitioner on behalf of the unsuccessful BJP candidate. It is only in the last sub-paragraph extracted above, a cryptic legal objection is raised that in view of the fact that Annexure-I of the election petition not only contains allegations of commission of corrupt practice by the appellant herein, but also by Vijay Goel (BJP candidate). In view of the requirement of Section 82(b) of the Act, Vijay Goel must also have been made a respondent to the election petition and failure to so implead is fatal to the election petition.

17. No doubt, Section 82(b) on a plain reading or on the principle of literal construction, seems to require that all the candidates against whom allegations of commission of corrupt practice are MADE IN THE PETITION must be made parties / respondents to the election petition. The ISSUE in the case is whether such allegations are MADE against Vijay Goel in the election petition and if MADE, is Vijay Goel required to be made a respondent to the election petition.

18. It is pointed out by this Court in *Reserve Bank of India v. Peerless General Finance and Investment Company Limited and Others* [(1987) 1 SCC 424]:

> "Interpretation must depend on the text and the context..... Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted."

Adopting the principle of literal construction of the Statute alone, in all circumstances without examining the context and scheme of the Statute, may not sub-serve the purpose of the Statute. In the words of Justice Iyer, such an approach would be - - "to see the skin and miss the soul". Whereas, "The judicial key to construction is the composite perception of the deha and the dehi of the provision" (*Chairman, Board of Mining*

Examination and Chief Inspector of Mines v. Ramjee AIR 1977 SC 965).

19. This Court in *Tirath Singh v. Bachittar Singh and Others* (AIR 1955 SC 830) dealing with a question of interpretation of Section 99 of the Act, declined to follow the rule of literal construction of the Statute on the ground that it would lead to absurdity, presumably, not intended by the Statute having regard to the scheme and the purpose of the Act.

20. The election petitioner made the allegations of commission of various corrupt practices falling under various sub-sections of Section 123 of the Act, by either the appellant herein or the election agent of the appellant herein. The election petition particularly contains extensive details of the corrupt practice falling under Section 123(6) r/w Section 77 of the Act, running to 18 typed pages. The material facts and particulars of the abovementioned corrupt practice are set out in great detail. It is in the process of the abovementioned narration, the election petitioner made a reference to two annexures viz., Annexure-H and Annexure-I. That portion of the election petition reads as follows:

> "The petitioner submits that in this regard complaint was filed before the Returning Officer on 5th May, 2009 by Shri Mantu, Independent candidate, New Delhi Parliamentary Constituency. The Complaint specifically states that the respondent No.2 has incurred a huge expenditure on hoardings and had exceeded the prescribed expenditure limit of Rs.25 lakhs. The copy of the complaint dated 5th May, 2009 is marked and annexed herewith as ANNEXURE-H.
>
> Youth for equality had also filed similar complaint with the Election Commissioner of India to take action that all hoarding put up at private places be pulled down and add the market cost on the these site be added to the expenditure account of the candidate. The copy of the complaint to the Election Commissioner of India is marked and annexed herewith as ANNEXURE-I."

21. It is the said Annexure-I, which makes a reference to the name of Vijay Goel. I may make it clear that except a mention in the said annexure, the name of Vijay Goel is not mentioned anywhere in the body of the election petition. It can be seen from the above extracted pleading of the election petitioner that he referred to the abovementioned Annexure-I in the context of the commission of a corrupt practice falling under Section 123(7) r/w Section 77 of the Act by the appellant herein. The substance of the allegation, where a reference to Annexure-I is made, is that the complaint, such as the one made by the election petitioner, had also been made by another body called "Youth for equality" to the Election Commission of India and a copy of the complaint, allegedly, made by the said "Youth for equality" is filed as Annexure-I to the election petition, obviously, for the purpose of deriving support for the allegation made by the election petitioner.

22. Learned senior counsel Shri K. Parasaran appearing for the appellant submitted that in view of the decisions of this Court in *Sahodrabai Rai v. Ram Singh Aharwar,* (1968) 3 SCR 13, *M. Karunanidhi v. H.V. Hande,* (1983) 2 SCC 473 and *Mulayam Singh Yadav v. Dharam Pal Yadav,* (2001) 7 SCC 98, if an election petition contains annexures or schedules attached to it, whose content is not elaborately described in the body of the election petition, but only referred to as containing the factual basis for seeking declaration of nullity of the election of the returned candidate, such annexures or schedules become an integral part of the election petition and, therefore, all the allegations contained in such schedules or annexures become allegations in the election petition. If such allegations pertain to commission of any corrupt practice by any one of the candidates at the election other than the returned candidate, such other candidates are also required to be made parties-respondents to the election petition in view of the law laid down

by this Court in *Har Swarup & Another v. Brij Bhushan Saran & Others* [1967 (1) SCR 342], *Mohan Rai v. Surendra Kumar Taparia & others* [1969 (1) SCR 630], *Kashi Nath v. Smt. Kudisa Begum and Others* [(1970) 3 SCC 554] and *Gadnis Bhawani Shankar V v. Faleiro Eduardo Martinho* [(2000) 7 SCC 472].

23. It is argued by Shri Parasaran that since the election petitioner referred to Annexure I in the body of the election petition without fully describing the content of the same, Annexure I becomes an integral part of the election petition. Since in the said annexure allegations of commission of corrupt practice, similar to the one alleged against the appellant herein, are made against Vijay Goel, the said Vijay Goel also ought to have been impleaded as party-respondent to the election petition in view of the mandate contained in Section 82(b) of the Act. Since, Vijay Goel is not made a party-respondent to the election petition, there is a failure to comply with the requirements of Section 82, which is declared to be fatal to the election petition under Section 86 of the Act.

24. On the other hand, learned senior counsel Shri Ranjit Kumar appearing for the respondent-election petitioner argued that the proposition of law settled by this Court that an annexure or schedule to the election petition becomes an integral part of the election petition only in certain circumstances, but it is also recognised by this Court that in certain other circumstances annexures are only evidence of the allegation contained in the election petition, but not an integral part of the pleading of the election petition. Shri Ranjit Kumar submitted that the purpose of the election petition with reference to the annexure-I is only to derive support to his allegation of the commission of corrupt practice by the appellant herein by demonstrating that such allegation against the appellant is not only made by the election petitioner but also by others during the course of the election. It is neither the intention of the election petitioner to make any allegation of corrupt practice nor seek any relief against Vijay

Goel. Therefore, the election petitioner is not legally obliged to implead Vijay Goel as a party-respondent to the election petition.

25. If the complaint made by the "Youth for equality" to the Election Commission of India contains allegations of commission of corrupt practice not only by the appellant herein, but also by some other candidate at the election, can such allegations against the candidate other than the appellant herein be read as allegations made in the election petition by the extension of fiction judicially created on the interpretation of Section 81(3) of the Act, is the question to be examined.

26. To decide the issue, it is necessary to examine; (1) who can file an election petition; (2) what are the grounds that can be taken; (3) what is the relief that can be claimed and granted; (4) who are required to be made parties; and (5) what is the procedure to be followed in presenting an election petition; and also the scheme of the Act insofar as it is relevant apart from the ratio of the above-referred decisions of this Court.

27. Article 329¥ of the Constitution prohibits the calling in question any election to either the House of the Parliament or the Legislature of a State except by an election petition in such manner as may be provided for by or under any law by the appropriate legislature. The Representation of the People Act, 1951 is such a law made by the Parliament. It deals with the method and manner of conduct of the elections including the resolution of disputes regarding the elections. This court has

¥. 329. Bar to inteference by courts in electoral matters.- [Notwithstanding anything in this Constitution.

(a) the validity of any law relating to the delimitation of constitutencies or the allotment of seats to such constitutencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any court;

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

repeatedly held that an election petition is not a common law proceeding, but a creature of the statute.

28. Part VI of the Act deals with disputes regarding elections. Section 80 stipulates that "no election shall be called in question except by an election petition presented in accordance with the provisions of this part".

29. Section 80A invests the power to try election petitions in the High Court. Section 79(e) defines the High Court to mean, the High Court within the local limits of whose jurisdiction the disputed election took place.

30. Section 81 deals with the presentation of election petitions:

> **"81. Presentation of petitions.**—(1) An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates.
>
> *Explanation.*—In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.
>
> (2) ... (Omitted by Act 47 of 1966, sec.39 (w.e.f. 14.12.1966)
>
> (3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition."

It stipulates:

(i) The grounds on which an election can be challenged;

(ii) The person who are entitled to challenge any election;

(iii) The period of limitation within which the election petition is to be presented;

that (iv) Every election petition shall be accompanied by a many copies thereof as there are respondents to the petition; and

(v) Any such copy shall be attested by the election petitioner to be a true copy of the petition.

31. Section 82 prescribes as to who shall be joined as the respondents to an election petition, the contents of which shall be examined later.

32. Section 83• stipulates that; (a) an election petition shall contain a concise statement of material facts on which the

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. **Section 83. Contents of petition.**-- (1) An election petition-

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, inculding as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the dated and place of the comission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

[Provided that where the petitioner alleges any corrupt practice, the petitioner shall also be accompanied by an affidavit in the prescribed form in supoort of the allegation of such corrupt practice and the particulars thereof.]

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

petitioner relies; (b) that the election petition shall set forth full particulars of any corrupt practices, which the petitioner alleges in the election petition; and (c) the method and manner of verification of election petition. It further stipulates that wherever an allegation of corrupt practice is made in an election petition, the election petition shall be accompanied by an affidavit in the prescribed form and also every annexure or schedule to the petition be signed and verified in the same manner as the petition.

33. Section 84 stipulates the reliefs that can be sought in an election petition. It reads:

> **"84. Relief that may be claimed by the petitioner:** A petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected."

It can be seen from the above that in an election petition the petitioner can claim declaration that; (1) the election of a returned candidate is void; and (2) a further declaration that either the petitioner himself or any other candidate has been duly elected.

34. We have already noticed that section 81 stipulates that an election can be challenged only on one or more of the grounds specified under sections 100[1] and 101[2] of the Act.

1. Section 100-Grounds for declaring election to be void.

[(1) Subject to the provisions of sub-section (2) if [the High Court] is of opinion-

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act [or the Government of Union Territories Act, 1963 (20 of 1963)]; or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of retruned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

Section 100 stipulates various grounds on which election of a returned candidate can be declared to be void, while Section 101 stipulates circumstances under which a further declaration contemplated under Section 84, can be given by the High Court (after declaring the election of a returned candidate to be void) that some candidate other than the returned candidate is duly elected in the said election.

35. What should be the prayer in an election petition is a matter of the petitioner's choice. It is for the petitioner to decide whether he would be satisfied with a declaration of nullity of the election of the returned candidate or a further declaration such as one contemplated under section 101 is to be sought.

(d) that the result of the election in so far as it concernsa returned candidate, has been materially affected-

(i) by the improper acceptance or any nomination, or

(ii) by any corrupt practice committed in the interests of the returned condidate [by an agent other than his election agent], or

(iii) by the improper reception, refusal or rejection of any vote or the reception of an vote which is void, or

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

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

2. **Section 101**- Grounds for which a candidate other than the returned candidate may be declared to have been elected

If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that the himself of any other candidate has been duly elected and [the High Court] is of opinion-

(a) that in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner of such other candidates would have obtained a majority of the valid voles,

the High Court shall, after declaring the election of the returned candidate to be void declare the petitioner or such other condidate, as the case may be, to have been duly elected.

36. However, as to who should be made parties/ respondents to an election petition is stipulated under section 82 and not left to the choice of an election petitioner. Section 82 reads thus:

> "82. Parties to the petition.—A petitioner shall join as respondents to his petition—
>
> (a) where the petitioner, in addition to claiming declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly election, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and
>
> (b) any other candidate against whom allegations of any corrupt practice are made in the petition."

37. It can be seen from section 82 as to who should be made parties to an election petition depends upon two factors.

38. The first factor is the nature of the relief sought by the petitioner. Where a further declaration as contemplated under section 101 is sought, the petitioner is bound to make all the contesting candidates parties respondents to the election petition. Where no such declaration is sought, the section stipulates that it is enough to make all the returned candidates at the election, parties to the election petition. The employment of the expression "all the returned candidates" is obviously meant to cover disputes relating to elections to Rajya Sabha or Legislative Councils where more than one candidate is declared elected at the same election.

39. The second factor is the ground on which declaration of nullity of the election of the returned candidate is sought. It must be remembered that the election of any returned

candidate can be questioned on various grounds specified under section 100(1) of the Act, such as, lack of qualification or disqualification on the part of the candidate, the commission of corrupt practices by the returned candidate or his election agent etc. or the improper rejection of the nomination of any candidate at the election etc.

40. The following propositions emerge from the above analysis. An election to the Parliament or the State Legislature can be called in question only in accordance with the provisions of the Act. Such a question can be raised only before the High Court. The High Court, in an election dispute, can declare the election of the returned candidate to be void. It may also give a further declaration in an appropriate case and subject to compliance with the procedural requirements that either the election petitioner or any other candidate at the questioned election, has been duly elected. The first of the abovementioned declarations can be made only on one or some of the various grounds enumerated under Section 100 of the Act.

41. In the present case, the relief sought by the election petitioner is only the declaration of nullity of the election of the appellant herein on the ground of commission of corrupt practices, but a further declaration contemplated under Section 84 read with Section 101 of the Act is not sought. Therefore, I examine the relevant provisions. Section 100 prescribes that if the High Court is of the opinion that any corrupt practice has been committed by **a returned candidate or his election agent or by any other person with the consent of either the returned candidate or his election agent,** "the High Court shall declare the election of the returned candidate to be void".

> "Section 100. Grounds for declaring election to be void: (1) Subject to the provisions of sub-section (2) if [the High Court] is of opinion -
>
> (a) .....

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent;....."

The said section also stipulates that if it is established before the High Court that a corrupt practice has been committed in the interest of the returned candidate **by an agent other than his election agent,** then, the High Court is also required to form an opinion that "the result of the election, insofar as it concerns returned candidate, has been materially effected", before declaring the election of the returned candidate void.

"Section 100. (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-

(i) .....

(ii) by any corrupt practice committed in the interests of the returned candidate [by an agent other than his election agent],"

[Emphasis supplied]

The clause "by an agent other than his election agent" occurring in Section 100(1)(d)(ii), must be understood in the light of Section 99 (2), which reads as follows:

"In this section and in section 100, the expression "agent" has the same meaning as in Section 123."

And Section 123(8) explanation, which reads as follows:

"In this section the expression "agent" includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate....."

The Act enables the appointment, by every contesting candidate – of an election agent, polling agents and counting agents (Sections 40, 46 and 47• respectively).

42. If the commission of a corrupt practice by a candidate other than the returned candidate or his election agent, etc., indicated above, is wholly immaterial for determining the validity of the election of the returned candidate, I am at a loss to understand as to why would any election petitioner MAKE allegations of the commission of corrupt practices by candidates other than the returned candidate, particularly in an election petition, where further relief contemplated under Section 84 is not sought for, such as the one on hand.

43. Section 83(1)(b) requires that an election petition shall set forth "as full a statement as possible of the names of the parties alleged to have committed such corrupt practice". In my opinion the employment of the expression "Parties" in the abovementioned clause is to compendiously cover the returned candidate, his election agent or any other person committing a corrupt practice with the consent of either the returned candidate or his election agent or any other agent committing a corrupt practice falling within the scope of Section 100(d)(ii).

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40. Election agents.- A candidate at an election may appoint in the prescribed manner any one person other than himself to be his election agent and when any such appointment is made, notice of the appointment shall be given in the prescribed manner to the returning officer.

46. Appointment of polling agents.-A contesting candidate or his election agent may appoint in the prescribed manner such number of agents and relief agents as may be prescribed to act as polling agents of such candidate at each polling station provided under section 25 or at the place fixed under sub-section (1) of section 29 for the poll.

47. Appointment of counter agents:- A contesting candidate or his election may appoint in the prescribed manner one or more persons, but not exceeding such number as may be prescribed, to the present as his counting agent at the counting of votes, and when any such appointment is made notice of the appointment shall be given in the prescribed manner to the returning officer.

44. Section 98 stipulates that at the conclusion of the trial of an election petition, the High Court is obliged to make an order either dismissing the election petition or declaring the election of a returned candidate void apart from giving a declaration that another candidate to have been duly elected in an appropriate case, where such a relief is sought successfully. Section 99 of the Act stipulates that the High Court is also obliged to make an order in an election petition where a charge of corrupt practice is made; (1) whether such a charge is proved or not; (2) the nature of the corrupt practice, i.e., under which one of the Sub-sections of Section 123 of the Act the corrupt practice falls; and (3) the names of all persons, who are proved at the trial to have been guilty of any corrupt practice.

45. The question of proof of the commission of a corrupt practice arises only if there is an appropriate pleading in that regard in the election petition. I have already noticed that Section 83 stipulates that an election petition, which contains allegations of corrupt practice, must contain full particulars of the "names of the parties" alleged to have committed a corrupt practice. I am of the opinion that the Legislature chose to use the expression 'PARTIES' for the reason that there are various categories of persons, who are capable of committing a corrupt practice in connection with the election of a returned candidate - (i) the returned candidate; or (ii) his election agent, or (iii) any other person with the consent of either the returned candidate or his election agent; or (iv) any other agent, as explained earlier. The difference in the language of Section 82 and 83(1)(b), in my opinion, is significant. While Section 82 speaks of candidates, Section 83(1)(b) speaks of parties.

46. I shall now examine the question whether the election petitioner MADE allegations against Vijay Goel in the ELECTION PETITION. To examine the correctness of the submission made by Sri Parasaran in this regard, I must examine the 3 Judgments relied upon by Sri Parasaran.

47. The facts of *Sahodrabai* case are as follows:

48. Ram Singh was declared elected to the Lok Sabha from Sagar constituency of Madhya Pradesh. His election was questioned by Sahodrabai on various grounds including the commission of a corrupt practice falling under Section 123(3) of the Act. According to Sahodrabai, the content of a pamphlet (in Hindi) - a copy of which is annexed to the election petition, allegedly circulated by the returned candidate, constitutes the abovementioned corrupt practice. The content of the said pamphlet was translated into English and incorporated in the election petition itself. A preliminary objection was raised by Ram Singh that the election petition should be dismissed on the ground of contravention of Section 81(3) of the Act because it was alleged by Ram Singh that a copy of the election petition served on him was not accompanied by a copy of the pamphlet referred to above. The High Court found, as a matter of fact, that a copy of the election petition served on Ram Singh was not accompanied by a copy of the pamphlet.

49. Dealing with the question whether such a copy served on Ram Singh was a true copy within the meaning of Section 81(3) of the Act, this Court held as follows:

> "we would say that since the election petition itself reproduced the whole of the pamphlet in a translation in English, it could be said that the averments with regard to the pamphlet were themselves a part of the petition and therefore the pamphlet was served upon the respondents although in a translation and not in a original. Even if this be not the case, we are quite clear that sub-s. (2)of s.83 has reference not to a document which is produced as evidence of the averments of the election petition but to averments of the election petition which are put, not in the election petition but in the accompanying schedules or annexures."

It was further held by this Court:

> "But what we have said here does not apply to documents

which are merely evidence in the case but which for reasons of clarity and to lend force tot eh petition are not kept back but produced or filed with the election petitions. xxx xxx xxx It would be stretching the words of sub-s. (2) of s. 83 too far to think that every document produced as evidence in the election petition becomes a part of the election petition proper."

50. From the above, it can be seen that two propositions of law are settled by this Court. Firstly, when an election petition is accompanied by annexures, whose content is completely described in the election petition, failure to serve a copy of such an annexure along with the copy of the election petition on a respondent to the election petition does not render the copy served on the respondent anything other than a true copy of the election petition. Secondly, even in a case where the content of the annexure is not fully described in the election petition, the non-supply of such annexure along with the copy of the election petition to the respondent does not violate the mandate of Section 81(3) in those cases where annexure is only sought to be used as evidence of some allegation contained in the election petition.

51. In *M. Karunanidhi v. Dr. H.V. Hande & Ors.,* (1983) 2 SCC 473, the facts are as follows:

52. M. Karunanidhi was declared elected to the Legislative Assembly of Tamil Nadu from Anna Nagar Assembly Constituency. Hande filed an election petition challenging the election of Karunanidhi on various grounds. One of them was that Karunanidhi incurred expenditure in connection with the election in excess of the expenditure permitted under Section 77 of the Act. Such contravention by itself is declared to be a corrupt practice under Section 123(6) of the Act. According to Dr. Hande, such excessive expenditure was incurred on account of the erection of about 50 fancy banners throughout the constituency at a cost of Rs.50,000/-. The photograph of one such banner was filed as annexure along with the petition.

Admittedly, a copy of the election petition served on Karunanidhi was not accompanied by a copy of the said photograph. This Court opined that the photograph was not a mere evidence of the allegations contained in the election petition of Dr. Hande and it is an integral part of the election petition as without a copy of the photograph, the election petition would be "incomplete". It is only a case where the principle laid down in Sahodrabai case was applied to the facts.

53. In *Mulayam Singh* case, Mulayam Singh was declared elected to the Lok Sabha from Sambhal Parliamentary Constituency. Dharam Pal Yadav, one of the other candidates, filed an election petition on various grounds. One of the grounds is commission of the corrupt practice of booth capturing falling under Section 123(8) of the Act. There were 15 respondents to the election petition and 25 schedules. Schedule 14 pertains to the allegation of corrupt practice. In the election petition, it was averred that there was booth capturing, arson, violence in large scale which was captured in videograph under the orders of the Election Commission. A copy of the said videograph was averred to had been attached to the election petition as Schedule 14. On the facts, this Court recorded at para 12 and 13 as follows:

"12. xxx xxx xxx

As to booth-capturing, there are particulars contained in the other schedules but even in that regard the later paragraphs of the election petition make reference to Schedule 14 so that even in regard to booth-capturing the particulars shown in the video cassette mentioned and verified in Schedule 14 are relied upon. So far as the allegations of violence and arson are concerned, there are no particulars in the election petition absent the video cassette mentioned and verified in Schedule 14.

13. We are, therefore, satisfied that the video cassette mentioned and verified in Schedule 14 is an integral part

of the election petition and that it should have been filed in court along with copies thereof for service upon the respondents to the election petition. Whereas 15 copies thereof were filed for service upon the respondents, the video cassette itself was not filed. The election petition as filed was, therefore, not complete."

[Emphasis supplied]

and held that in the absence of any particulars in the body of the election petition, the videograph becomes an integral part of the election petition and failure to attach a copy to the election petition is fatal to the election petition. Once again, a case where the principle laid down in Sahodrabai case is applied to the facts.

54. In Sahodrabai case, the specific allegation in the election petition was that circulation of the annexure in issue by the returned candidate tantamounted to the commission of corrupt practice described in Section 123(3) of the Act, because of its content. I must hasten to add whether the content of the said annexure, would fall within the definition of corrupt practice contained under Section 123(3) was not examined by this Court as it was not called upon. This Court assumed the correctness of the allegation for the limited purpose of examining the issue before it. Even in such a case, this Court held since the content, in its entirety, of the annexure was fully described in the body of the election petition, non-supply of such an annexure is not fatal - on the ground, it is violative of Section 81(3) of the Act.

55. The purpose of the stipulation under Section 81(3) is to put the returned candidate on notice of the various allegations made against him in order to enable him to defend himself effectively in the election petition – a stipulation flowing from the requirement of one of the basic postulates of the principles of natural justice. Once the content of the annexure, the whole of which pertains to the commission of the corrupt

practice alleged in the election petition, is described in the body of the election petition with sufficient clarity, the returned candidate cannot complain that he was denied a reasonable opportunity of defending himself or that he was taken by surprise at the trial. Therefore, non-supply of the annexure in such cases was held to be immaterial and the copy of the election petition supplied to the returned candidate sans the annexure would still be a true copy within the meaning of the expression under Section 81(3). It is in this context the Court observed in *Sahodrabai* case that the annexure became part of the election petition.

56. In my opinion, none of the abovementioned three cases laid down as an absolute principle that an annexure to an election petition, whose content is not described in the election petition, would become the **integral part** of the election petition **for all the purposes**. It is only for a limited purpose of deciding the question whether a copy of the election petition, served on the respondent in the election petition, is a true copy of the original filed into the Court within the meaning of Section 81(3) of the Act, annexures are treated as integral part of the election petition, that too, only in the situation, where the content of the annexure is not fully described in the body of the main petition.

57. Now, I shall examine the question whether the allegations of commission of corrupt practice are MADE in the election petition within the meaning of the expression under Section 82(b).

58. Obviously the allegations must be MADE by the election petitioner. In a case like the one on hand where the election petitioner does not make any such allegation in the body of the election petition, but such allegations are found in some document annexed to the election petition – of which the election petitioner is not the author - can it be said that the allegations are MADE in the petition?

59. In my opinion the answer to the question must be in

the negative. Because, firstly, the document annexure is not authored by the election petitioner; secondly, in the entire body of the election petition there is no reference to any corrupt practice committed by Vijay Goel. Making such an allegation against Vijay Goel would in no way help the election petitioner to obtain the relief sought by him in the election petition. Even at the cost of the repetition I must state that the election petition does not seek a further declaration contemplated under Section 84 of the Act. As rightly, argued by Shri Ranjit Kumar, the purpose of the annexure is only to derive support to the allegation of the commission of corrupt practice alleged against the appellant only. Therefore, only that much of the content of the annexure as is relevant to the allegations made in the election petition proper must be considered to have become integral part of the election petition.

60. To stretch the principle laid down in Sahodrabai case, to say, that an annexure becomes an integral part of the election petition for all purposes and, therefore, hold that the allegations made against Vijay Goel in the annexure by somebody other than the election petitioner would become allegations MADE in the election petition, would lead to absurd results; that is what exactly sought to be done by the appellant herein. I reject the submission.

61. In view of my above conclusion, I do not wish to examine the purport and interpretation of Section 82(b). I must also place it on record that we gave our anxious consideration to the four judgments i.e., Murarka Radhey Shyam Ram Kumar case, Satya Narain case, Rajendra Singh case and Chandrakanth Uttam Chodankar case, which dealt with the interpretation of Section 82(b) and I am of the prima facie opinion that those judgments may require reconsideration in an appropriate case. Since, the same is not necessary for the present in view of my conclusion recorded above, I refrain from examining the correctness of the said decisions.

62. In the result, I hold that the election petition cannot be

dismissed on the ground that Vijay Goel is not made a party. But, in so far as the question whether the election petition is required to be dismissed on the ground that the copy served on the appellant is not the true copy of the original within the meaning of Section 81(3), I remit the matter to the High Court for disposal in accordance with law and in the light of this judgement.

ALTAMAS KABIR, CJI. 1. Having had the privilege of going through the draft judgment of my learned Brother, Jasti Chelameswar, J., I am in agreement with the conclusions arrived at by him as also the directions to remit the matter to the High Court for disposal in accordance with law in the light of the views expressed in the judgment. I, however, wish to add a few words in addition to what has been stated by my learned Brother.

2. In dealing with the provisions of Sections 82 and 83 of the Representation of the People Act, 1951, my learned Brother has very dexterously pointed out the differences contained therein. However, the provisions of Sections 82 and 83 of the 1951 Act have to be read harmoniously. While Section 82 relates to who should be made parties in the Election Petition, Section 83 relates to the contents of the Petition. As far as Section 82 is concerned, while Clause (a) provides that when in addition to claiming a declaration that the election of all or any of the returned candidates is void, the Petitioner claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates, other than the Petitioner, and where no such further declaration is claimed, all the returned candidates have to be made parties. Clause (b) in addition requires that any other candidate against whom allegations of corrupt practice are made in the Petition, has to be made a party to the Election Petition. As pointed out by my learned Brother, the emphasis is on the use of the expression “allegations of any corrupt practice are made in the Petition”. In other words, in order for any other candidate to be

made a party to the Election Petition, allegations of corrupt practice would have to be made against him in the Election Petition itself.

3. The question with which we are concerned is whether an annexure to the Petition in which allegations of corrupt practice are made against a candidate, without any allegation being made against him in the Election Petition itself, can be said to be an integral part of the Election Petition.

4. Considering the fact that Section 83(1)(b) requires an Election Petition to contain full particulars of any corrupt practice alleged by the Petitioner, can a document which contains allegations of corrupt practice against a candidate against whom no allegation is made in the Election Petition itself, be deemed to be a part of the Election Petition. In order to apply the decisions of this Court, referred to in my learned Brother's judgment, to the facts of this case, it would be necessary that some allegation of corrupt practice would have to be made in the Election Petition itself against a person against whom allegations of corrupt practice may separately have been made. In my view, in the absence of any such allegation in the Petition, the provisions of clause (b) of Section 82 will not be attracted.

5. Accordingly, while agreeing with my learned Brother that the allegations made against Mr. Vijay Goel, contained in annexure to the Election Petition, can have no bearing on the facts at issue in the Election Petition itself, in my estimation Shri Vijay Goel is not required to be made a party to the Election Petition. As also indicated by my learned Brother, the matter may require further examination in an appropriate case. However, in the facts of this case, the non-impleadment of Shri Vijay Goel against whom there were no allegations in the Election Petition is not fatal to the Election Petition and the matter is required to be re-examined by the High Court, as indicated by my learned Brother.

B.B.B. Appeal disposed of.

THE SECRETARY, MINISTRY OF HEALTH & FAMILY WELFARE, GOVERNMENT OF MAHARASHTRA

v.

S.C. MALTE & ORS.

(Civil Appeal Nos. 9020-9021 of 2012)

DECEMBER 13, 2012

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

Judiciary – Medical facilities for retired High Court Judges and their dependent family members – Statutory power of the State Government – Jurisdiction of the High Court to direct the State Government to frame particular rule regarding medical facilities for the retired High Court Judges – Difference of opinion – Matter referred to larger Bench – High Court Judges (Salaries and Conditions of Service) Act, 1954 – s.23D – Maharashtra Retired High Court Judges (Facilities for Medical Treatment) Rules, 2006 – r.2(a) – Constitution of India, 1950 – Articles 32, 136 and 226.

Some retired Judges of the Bombay High Court moved a representation to the Chief Justice of the Bombay High Court mentioning the difficulties faced by them in getting medical facilities under the Central Government Health Scheme (CGHS) and difficulties in respect of reimbursement of the expenses on medicines. This letter was treated as a suo motu Writ Petition and an order was passed by the High Court directing the Government of Maharashtra to frame rules for medical treatment and reimbursement of retired Judges of the Bombay High Court.

Pursuant to the directions of the Court and in exercise of the powers conferred under Section 23D(2) of the High Court Judges (Salaries and Conditions of

Service) Act, 1954, the State Government of Maharashtra drafted the Maharashtra Retired High Court Judges (Facilities for Medical Treatment) Rules, 2006, and placed the same before the High Court. The amicus curiae appearing for the suo motu writ petitioners (retired Judges), however, suggested a change in the Draft Rules of 2006 that the retired Judges be entitled to the medical facilities and reimbursement provided in the Draft Rules whenever the CGHS Scheme is not "availed of" instead of not "available". The High Court disposed of the writ petition with direction to the State Government to either notify the Draft Rules in the form suggested by the amicus curiae or amend the G.R. for medical benefits to sitting Judges and extend the same benefits also to the retired Judges in exercise of its power under sub-section (2) of Section 24 of the High Court Judges (Salaries and Conditions of Service) Act, 1954.

The Government of Maharashtra (the appellant) then filed Civil Application for review of the order, but the High Court rejected the prayer for review and directed the State Government to comply with the order of the High Court within two months. Aggrieved, the appellant filed this appeal.

Referring the matter to larger Bench, the Court

HELD:

Per Swatanter Kumar, J.

1.1. It cannot be disputed and, in fact, has been noticed in the judgment under appeal before this Court that different States have different rules to provide medical facilities to the former judges of their respective High Courts. Article 221 of the Constitution read with the provisions of the Act is indicative of the fact that the framers of the Constitution envisaged parity of such

facilities in the States. Variation in grant of medical benefits from one High Court to another and one State to another, besides adding inequality also enhances the possibility of a service condition being applied to a former Judge of a High Court adversely. This variation in service conditions to the disadvantage of the Judge concerned, is not permissible in law. [Para 12] [244-E-G; 245-B]

1.2. The conditions of service of judiciary, have to be reasonable and free of arbitrariness. The element of arbitrariness or mercy must be eliminated so as to give judiciary its deserved independence and freedom to work effectively in the public interest and for attainment of the constitutional goals. Any unreasonable restriction would amount to interference with the doctrine of impartiality and fairness applicable to the judiciary in all events. [Para 27] [253-D, F-G]

1.3. There is no reason for the State of Maharashtra to have withdrawn its consent for substitution of the words 'availed of' in place of 'available'. It had ample time at its disposal, as various matters came up before the Court on a number of hearings, particularly prior to such substitution. It is expected of the State to act inaccordance with the accepted canons of governance and not to render the judicial proceedings ineffective and inconclusive. [Para 28] [253-H; 254-A-B]

1.4. Lack of instructions from the Finance Department was pleaded to be the sole ground for seeking review of the judgment of the High Court. However, inter departmental dealing is a matter of internal management of the Government. The Government is represented as a unit before the Courts. How they manage their internal affairs is for them to decide. The High Court rightly held that it was not an error apparent on the face of the record, justifying the review or satisfying the ingredients of Order XLVII Rule 1 of the

Code of Civil Procedure, 1908. Substitution of the word 'available' by 'availed of' does not bring any prejudice in law. On the contrary, it would be in conformity with the constitutional requirements of equal treatment of all Judges. [Para 29] [255-A-C]

1.5. Availability of uniform medical facilities for the former Judges in the entire country can also be substantially justified on another ground that there exists transfer policy of High Court Judges. This policy has been in force since 1994 and, therefore, this requires that the entitlement of former Judges and their dependent family members should not vary from place to place. Uniformity would remove another apprehension in the minds of the Judges as to the Court from which they retire. Presently, there are different benefits in different States and, thus, the medical benefits at the Centre as well as between the States are comparatively and considerably different. This disparity leads to a patent discrimination which should not be permitted. It will be in the interest of all concerned, including the State Governments, that complete uniformity is maintained in relation to availability of medical facilities in terms of Section 23D of the High Court Judges (Salaries and Conditions of Service) Act, 1954 and procedure of reimbursement of medical bills of the former Judges of the High Courts. The Former Judges of the High Courts should be placed at parity with the sitting Judges of the High Courts. Thus, it will be appropriate for the competent authority to frame/amend the rules in accordance with this judgment and the constitutional mandate. [Para 30] [256-A-E]

1.6. In order to ensure the absolute independence of judiciary, in the interest of administration of justice and for the Judges to act free of any apprehensive attitude and to provide complete certainty to the service

conditions of the former Judges of the High Courts, it is directed that Rule 2(a) of the draft rules shall remain in the form as directed by the High Court. The word 'available' shall stand substituted by the words 'availed of'. The State of Maharashtra is hereby directed to notify these rules forthwith. Henceforth, there shall be complete uniformity in the 'grant of medical benefits' to the former Judges of various High Courts. It may not only be desirable but necessary for the Centre and the State Governments to amend and alter the existing rules. If no rules are in force, to frame the rules on such uniform lines. In relation to the medical facilities, the former Judges of the High Courts would be placed at parity with the facilities available to the sitting Judges and their dependent family members. Providing such benefit and bringing uniformity in the rules shall be in the interest of the State administration as well as administration of justice. All the medical bills of the former Judges of various High Courts shall be submitted to the Registrar General of the concerned High Court, who shall, subject to approval of the Chief Justice of that Court and in accordance with the rules in force, pay such bills (upon due scrutiny) to the former Judges. The Union Government and the State Governments are directed to provide such 'head of expenditure', being part of the High Court budget of the respective High Courts for reimbursement of medical bills of the former Judges. In other words, the payment would be directly made by the High Court to the former Judges and it, in turn, would be reimbursed by the State Government. All the former Judges of the High Courts would be entitled to receive medical facilities from the hospitals so empanelled by the Central or the State Governments, as the case may be. Till appropriate rules are framed by the appropriate authority, these directions shall remain in force and shall be abided by the executive. [Para 32] [256-H; 257-A-H; 258-A-C]

S.P. Gupta v. Union of India **(1981) Supp. SCC 87;** *Union of India v. R. Gandhi, President Madras Bar Association* **(2010) 11 SCC 12010 (6) SCR 857;** *Brij Mohan Lal v. Union of India* **(2012) 6 SCC 502;** *Supreme Court Advocates-on-Record Association v, Union of India* **(1993) 4 SCC 441: 1993 (2) Suppl. SCR 659 and** *State of Bihar v. Bal Mukund Sah* **(2000) 4 SCC 640: 2000 (2) SCR 299 – referred to.**

Case Law Reference:

(1981) Supp. SCC 87	**referred to**	**Para 18**
2010 (6) SCR 857	**referred to**	**Para 23**
(2012) 6 SCC 502	**referred to**	**Para 24**
1993 (2) Suppl. SCR 659	**referred to**	**Para 25**
2000 (2) SCR 299	**referred to**	**Para 26**

Per A.K. Patnaik, J. (dissenting)

1. Section 23D of the High Court Judges (Salaries and Conditions of Service) Act, 1954 is titled "Medical facilities for retired Judges". It is clear from language of sub-section (1) of Section 23D of the Act that every retired Judge is entitled for himself and his family, to the same facilities as respects medical treatment and on the same conditions as a retired officer of the Central Civil Services, Class-I and his family, are entitled under any rules and orders of the Central Government for the time being in force. However, under sub-section (2) of Section 23D of the Act, power is vested in the Government of the State to extend facilities for medical treatment to a retired Judge of the High Court for that State and his family different from the facilities provided to a retired officer of the Central Civil Services, Class-I and his family. This statutory power is that of the State Government and cannot be exercised by the High Court under Article 226

of the Constitution. The appellant, therefore, was right in urging a ground in these appeals that the High Court had no jurisdiction to direct the State Government to frame any particular rule regarding medical facilities of the retired Judges of the Bombay High Court. [Paras 4, 5] [260-A-E-F-H; 261-A-B]

2. Neither the High Court in exercise of its power under Article 226 of the Constitution nor this Court under Article 32 or Article 136 of the Constitution can direct the State Government to grant particular medical facilities to a retired High Court Judge when sub-section (2) of Section 23D of the Act vests such power on the State Government to grant medical facilities other than those mentioned in sub-section (1) of Section 23D of the Act. [Para 6] [261-F-H]

3. It was brought to the notice of this Court that some of the State Governments in exercise of their powers under sub-section (2) of Section 23D of the Act are providing the same medical facilities and medical reimbursement to retired Judges and their families as are being provided to sitting Judges of the High Court and their families. In the light of the provisions regarding medical facilities in other States, the Government of Maharashtra must consider extending better medical facilities to the retired Judges of the Bombay High Court, but what exactly should be the provisions for medical facilities can only be decided by the State Government in exercise of its powers under sub-section (2) of Section 23D of the Act. [Para 8] [263-C-D; 264-A-B]

Supreme Court Employees Welfare Association v. Union of India **AIR 1990 SC 334: 1989 (3) SCR 488 and** *Kuldip Singh v. Union of India* **JT 2002 (2) SC 506 – referred to.**

Case Law Reference:

1989 (3) SCR 488	**referred to**	**Para 6**

JT 2002 (2) SC 506 referred to Para 7

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9020-9021 of 2012.

From the Judgment & Order dated 15.01.2007 of the High Court of Judicature of Bombay in Suo Moto Writ Petition No. 6285 of 2005 and dated 22.04.2008 in Civil Application No. 73 of 2008 in Suo Moto Writ Petition No. 6285 of 2005.

Sanjay V. Kharde, Asha Gopalan Nair for the Appellant.

Gaurab Banerji, ASG, R.K. Rathore, Ashok K. Srivastava, Sadhana Sandhu, Arjun Krishan, Sushma Suri, D.S. Mahra, Shridhar Y. Chitale, Saurabh Kapoor, Abhijat P. Medh for the Respondents.

The Judgments & Order of the Court was delivered by

SWATANTER KUMAR J. 1. Leave granted.

2. Some of the former Judges of the Bombay High Court, particularly those who are settled at Aurangabad, moved a representation to the Chief Justice of that High Court explaining the difficulties faced by them in getting medical facilities and difficulties in respect of reimbursement of the expenses on medicines. These former Judges also included Judges who were appointed to the Bombay High Court but were subsequently transferred under the transfer policy to other High Courts. After their tenure, their efforts to resolve these issues obviously did not result in bringing about any fruitful result. In this representation, they also referred to various judgments under which the full reimbursement was provided under different rules as well as disparities that were prevalent in this respect, in different States of the country. This representation came to be treated as a suo motu Writ Petition on the appellate side of the Bombay High Court. In this writ petition, on 13th October, 2005, after hearing the counsel appearing for the parties, the Court noticed that some hospitals had been empanelled by the

Government as approved hospitals under its Scheme. It was noticed in the same order that the provisions under the Central Government Health Scheme ('CGHS', for short) are inadequate and under the scheme only a few hospitals in selected cities are recognized for reimbursement of medical treatment. It was also mentioned in the letter sent to the Chief Justice of the Bombay High Court that government hospitals in Aurangabad did not have the facilities of proper diagnosis and treatment for certain serious ailments and CGHS had not been extended to Aurangabad where all the said former Judges had settled after their retirement.

3. The contention of the learned counsel appearing for the Union of India is that where CGHS has not been extended, there the former Judges can take the treatment from the government hospitals and if any treatment is not available in the government hospitals, then they would be at liberty to go to any hospital to which they are referred to by the doctors of the government hospitals. Having noticed these difficulties and the practical problems which had really become a matter of great concern for the High Courts and the former Judges of the High Courts, the Court passed the following interim order:

> "Meanwhile, the Hon'ble Retired Judges would be permitted to get medical treatment from any of the hospital mentioned in paragraph 4 on being referred by a Doctor of Government Hospital and obviously their bills shall be reimbursed expeditiously."

4. The Court passed another order dated 23rd June, 2006 laying down the procedure that should be adopted for dealing with the medical bills of the former Judges and directed as under:

> "Neither the State Government nor the Central Government have challenged that order so far. This being the position, now the modalities of actual working will have to be set down. In view of this State of affairs, we propose to pass

an order whereby as in the case of the retired Supreme Court Judges as permitted by the Central Government by its office Memorandum dated 06.02.2002, medical bills of the retired High Court judges at Aurangabad will be signed by the Registrar (Administration) and countersigned by the medical officer and then passed by Registrar General. The Officers shall certify the bills whether for indoor treatment or for the purchase of medicines. The bills will be cleared by the State Government to begin with and thereafter the Central Government will reimburse the amount paid by the State Government. We would like the Central Government Counsel and the State Government Counsel to react on this, if at all there are any difficulties in the working of this procedure."

5. The case remained pending before the Court and during the hearing of the petition on 7th July, 2006, it was stated on behalf of the State Government that the Government was in the process of framing Rules in compliance with the directions contained in the orders of the Court dated 13th October, 2005 and 23rd June, 2006.

6. Vide its order dated 17th July, 2006, the High Court directed the State Government to frame Rules within three months and continued the operation of the interim order dated 13th October, 2005. Pursuant to the directions of the Court and in exercise of the powers conferred under Section 23D(2) of The High Court Judges (Salaries and Conditions of Service) Act, 1954 (for short, the 'Act'), the State of Maharashtra framed the Rules titled the Maharashtra Retired High Court Judges (Facilities for Medical Treatment) Rules, 2006 (for short, the 'draft Rules'). These draft Rules were submitted before the High Court. Thereafter, when the writ petition was taken up for hearing, the Amicus Curiae for the petitioners (retired Judges) suggested a change to be made in Rule 2(a) of the draft Rules. Rule 2(a) reads as under :

"2. Medical facilities for retired High Court Judges

and family members dependent on them—

(a) Any person who was appointed and served as a High Court Judge for High Court of Judicature at Bombay and settled in the State of Maharashtra and his family members dependent upon him shall be entitled whenever the Central Government Health Scheme (CGHS) is not available, to receive the reimbursement of medical expenses incurred in any hospital recognized by the State Government to render whole time medical services as such person shall be entitled."

7. Amendment suggested to the above Rule was that the words 'shall be entitled whenever the Central Government Health Scheme (CGHS) is not available' be substituted by the words 'shall be entitled whenever the Central Government Health Scheme (CGHS) is not availed of'. Initially the suggestion was opposed on behalf of the State. The Principal Secretary and RLA, Law and Judicial Department was present in Court, however, the Secretary, Finance Department was not. The matter was then deliberated before the Court. Thereafter, the suggestion made was acceded to and it was said that they would take concurrence of the Finance Department on the suggested change. The Court, thus, directed the change in the draft Rules, as suggested. The High Court vide its judgment dated 15th January, 2007 recorded that the CGHS was available only in three cities of the State of Maharashtra, i.e., Bombay, Nagpur and Pune. The Court, while noticing the agreed amendment to Rule 2(a), recorded its conclusion and relief as under :

"The learned Amicus Curiae has gone through the Rules. It is submitted that these Rules will substantially cover the grievances as raised by the petitioners. Since the power conferred on the State Government is pursuant to Section 23D(2) it will be open to the State Government to either notify the said Rules in the forum which they have now been

presented or it is open to the State Government to amend the G.R. which provides for medical benefits to sitting judges and extend the same benefit also to the retired judge, who are covered by the draft rules as submitted and which is substantially the same. It is made clear that these Rules will apply to the Judges who were appointed as Judges of this Hon'ble Court and have since retired and are settled in the State of Maharashtra and Goa."

8. While making the Rule absolute, the High Court directed the State to notify the Rules or to amend the Government resolution in light thereof. After the pronouncement of the above judgment and lapse of a considerable period of time, on 8th October, 2007 the State Government filed an application stating that the counsel and the officer giving consent for change, by substitution of the words 'availed of' in place of 'available', did not realise the repercussions of the amendment and had not obtained the concurrence of the Finance Department. Therefore, it was contended that the application should be allowed, the change directed by the Court in the draft Rules be deleted and the Rules in the original form be permitted to be notified. This application was dismissed by a detailed order of the High Court dated 22nd July, 2008. The High Court repeatedly noticed that the CGHS was not available and keeping in view the facts and circumstances of the case, recorded that there was no occasion for exercising the review jurisdiction, as the order did not suffer from any apparent error. The matter was adjourned on different dates for the State Government to give response to the contentions raised by the Amicus Curiae. It was also noticed in this order that some State Governments, including those of U.P. and Andhra Pradesh, had extended the facilities of medical treatment to the retired Judges of their respective High Courts. The review application was thus dismissed as being without any merit. Thereupon, the State was directed to comply with the orders of the High Court within two months.

9. Aggrieved from the orders dated 15th January, 2007 and 22nd April, 2008, the State of Maharashtra has preferred the present appeal by way of special leave before this Court. The matter was finally heard at the 'After Notice' stage.

10. Before I delve into the issues arising in the present appeal, it will be appropriate for the court to examine what kind of a right 'medical facilities to the judges and/or the former Judges of the High Court' is. The Judges of the High Courts of the respective States are appointed under Article 217 of the Constitution of India (for short "the Constitution"). Such Judges are appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India and the Governor of the State and they hold office till the age of 62 years subject to the provisions contained in Article 217 of the Constitution. In terms of Article 221 of the Constitution, the Judges of each High Court shall be paid such salaries as may be determined by the Parliament by law and every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as the case may be and as determined from time to time under the law by the Parliament. Proviso to Article 221 of the Constitution categorically states that neither the allowances of a Judge nor his rights in respect of leave of absence shallbe varied to his disadvantage after his appointment.

11. Article 229(3) concerns itself with administrative expenses, including salaries, allowances and pensions payable to or in respect of the officers and servants of the court, which shall be charged upon the Consolidated Fund of the State and any fees or other monies taken by the court shall form part of that fund. These are some constitutional provisions which indicate the constitutional protections in the Page 23 form of legal rights that are available to the judges of the High Court. The Indian Parliament enacted The High Court Judges (Salaries and Conditions of Service) Act, 1954. This Act provided the conditions of service of sitting judges and even that of acting

judges who had been appointed in terms of clause (2) of Article 224 of the Constitution. It dealt with the leave and/or allied subjects thereto such as salaries, pension, family pension, provident fund and other miscellaneous items. The miscellaneous items included travelling allowance, rent free house and medical facilities. It made a specific provision with regard to medical facilities available to the former judges of the High Court. Section 23D dealt with this aspect, while Section 23A dealt with the facilities for medical treatment of the sitting judges. These provisions read as under:-

"23A. (1). Every Judge and the members of his family shall be entitled to such facilities for medical treatment and for accommodation in hospitals as may from time to time, be prescribed.

(2) The conditions of service of a Judge for which no express provision has been made in this Act shall be such as may be determined by rules made under this Act.

(3) This section shall be deemed to have come into force on the 26th January, 1950, and any rule made under this section may be made so as to be retrospective to any date not earlier than the commencement of this section.

xxxxx xxxx xxxxx

23D(1)Every retired Judge shall, with effect from the date on which the High Court Judges (Conditions of Service) Amendment Act, 1976, receives the assent of the President be entitled for himself and his family, to the same facilities as respects medical treatment and on the same conditions as a retired officer of the Central Civil Services, Class-I and his family, are entitled under any rules and orders of the Central Government for the time being in force.

(2) Notwithstanding anything in subsection (1) but subject

to such conditions and restrictions as the Central Government may impose a retired Judge of the High Court for a State may avail, for himself and his family, any facilities for medical treatment which the Government of that State may extend to him."

12. Section 23D of the Act deals with the medical benefits to which the former Judges of the High Court and their family members would be entitled to. This provision states that they would be entitled to similar medical benefits as may be prescribed through appropriate rules by the State and to the retired Class I Civil Services officers. Sub-section (2) of Section 23D, in fact, is an exception to Section 23D(1) of the Act. The non-obstante clause of sub-section (2) makes it clear that the legislature intended to provide the medical benefits to the former Judges in terms of the law framed by the State but with restrictions as may be imposed by the Central Government. It provides that notwithstanding anything contained in sub-Section (1), but subject to conditions and restrictions as the Central Government may impose, a retired judge of the High Court for the State may avail for himself and his family, any facility for medical treatment which the Government of that State may extend to him. It cannot be disputed and, in fact, has been noticed in the judgment under appeal before this Court that different States have different rules to provide medical facilities to the former judges of their respective High Courts. Article 221 of the Constitution read with the provisions of the Act is indicative of the fact that the framers of the Constitution envisaged parity of such facilities in the States. Variation in grant of medical benefits from one High Court to another and one State to another, besides adding inequality also enhances the possibility of a service condition being applied to a former Judge of a High Court adversely. For instance, a Judge of Court 'A', upon his retirement, would be entitled to the medical benefits provided by the State to the former Judges of High Court 'A'. But, if such a Judge is transferred to High Court 'B', he would be entitled to the medical benefits as allowed by the State to

the former Judges of High Court 'B'. There may be disparity between the medical benefits of High Court 'A' and 'B', like the High Court 'A' may be extending the same benefits as that of a sitting Judge while the High Court 'B' may be giving the said benefit to a limited extent of the CGHS or any other scheme formulated by the concerned State. This would result in variation in service conditions to the disadvantage of the Judge concerned, which is not permissible in law.

13. This variation is to the extent that some States/Courts provide for complete reimbursement while others do not. In some States there are rules permitting partial reimbursement, while in some others even the rules have not been framed to provide for adequate medical facilities. The non-availability of CGHS is another major concern and wherever the CGHS is available, availability of its benefits and impediments in its smooth application are obvious from the very ineffective implementation of the Scheme. The CGHS, firstly, is not even available in all the major cities, much less in and around the rural areas and secondly, the procedure specified under the scheme is quite complex and impracticable. The Scheme contemplates prior permission for referral hospitals. In normal course of sickness, it requires the Head of the concerned specialty in the hospital to grant such permission, subject to furnishing of the requisite documents, which itself may frustrate the purpose of reference to an outside hospital. In emergencies, one has to comply with the entire procedure of ex-post facto approval, which appears to be in order.

14. The eligibility criteria and the method in which the CGHS can be availed of on paper appear to be sound, but when it comes to practice, things are quite unsatisfactory. Receiving a medicine, availability of drugs, the rush in the hospitals, payment of bills under the CGHS are some of the practical problems that are faced by everyone, of which the Court can even take a judicial notice. Attempts under the Scheme have been made by introducing different aspects like

medical audit of hospital bills, holding of claim adalats, establishment of local advisory committees, decentralization and delegation of powers etc., but they ultimately do not serve the purpose of effective and readily available medical facilities to the concerned persons.

15. The Court cannot ignore the harsh reality that the rates stipulated under the CGHS and its approved hospitals are much lower than the prevalent rates for providing such treatments in other hospitals. Thus, the State employees and even the former Judges of the Courts have to provide for the difference in rates from their own pockets, if they take treatment from other private hospitals. Of course, an attempt has been made by the Central Government while introducing a specific clause, being clause 15 in the conditions of tender, relating to validity of CGHS rates which requires that for the stipulated period, the empanelled institutions shall not charge more than CGHS rates. But the stated difficulty will still prevail where CGHS is not in force and/or there are no empanelled hospitals. In such a situation, the basic right sought to be protected under the rules would stand violated.

16. The Court is certainly not oblivious to the problems faced by the Central Government in this behalf, but that by itself cannot be reason enough to overlook the practical problems faced by the people and particularly, the former Judges of the High Courts. One aspect that deserves attention is that in the year 1994, the policy in relation to transfer of Judges at the High Court level was introduced and has been, thereafter, applied quite frequently. A Judge may be appointed to one Court, transferred to another and still another, from where he retires. It results in dual problems to the former Judge; firstly, in relation to availability of medical facilities and secondly, with regard to reimbursement of the medical bills. The nature of the right to medical facility is 'statutory'. It, being a condition of service, cannot be altered or changed to the disadvantage of the former Judges. Such is the requirement of law.

17. In normal discharge of his duties, a Judge has to decide a case in favour and against the Government as well. While performing his duties in accordance with law, the courts do pass some orders of severe or serious consequences, against the State Government or an officer in its hierarchy. The Courts also deal with penal proceedings under the Contempt of Courts Act at the level of the higher judiciary. In this process, the courts are likely to pass orders which may not be to the liking of the executive hierarchy of the State. In such circumstances, the possibility of bias against the Judges in the minds of the Executive cannot be entirely ruled out. This may have the impact of, if nothing else, lowering the degree of impartiality and independence of judiciary.

Relevance of Independence of Judiciary

18. Another important facet of this statutory right is relatable to the independence of judiciary. I may refer to some judgments of this Court, which have dealt with the independence of judiciary with reference to the Constitution of India. Referring to the functions of the judiciary, this Court in the case of *S.P. Gupta v. Union of India* [(1981) Supp. SCC 87], held:

> "…what the true function of the judiciary should be in a country like India which is marching along the road to social justice with the banner of democracy and the rule of law, for the principle of independence of the judiciary is not an abstract conception but it is a living faith which must derive its inspiration from the constitutional charter and its nourishment and sustenance from the constitutional values. It is necessary for every Judge to remember constantly and continually that our Constitution is not a non-aligned national charter."

The Court further held:

> "the principle of independence of judiciary is the basic feature of the Constitution. It cannot remain content to act merely as an umpire but it must be functionally involved in the goal of socioeconomic justice. In this judgment, the court also referred to the observations recorded by Justice V. Krishna Iyer in the case of *Union of India v. Sankalchand Himatlal Sheth* (1977) 4 SCC 193: "Independence of the Judiciary is not genuflexion; nor is it opposition to ever proposition of Government. It is neither Judiciary made to Opposition measure nor Government's pleasure."

19. Besides referring to these remarks, the court with great emphasis noticed the views expressed by Dr. Rajendra Prasad that the Constitution undoubtedly made clear provisions for an independent judiciary and observed:

> "We have provided in the Constitution for a judiciary which will be independent. It is difficult to suggest anything more to make the Supreme Court and the High Courts independent of the influence of the executive. There is an attempt made in the Constitution to make even the lower judiciary independent of any outside or extraneous influence. One of our articles makes it easy for the State Governments to introduce separation of executive from judicial functions and placing the magistracy which deals with criminal cases on similar footing as civil courts. I can only express the hope that this long overdue reform will soon be introduced in the States."

20. In *Sankalchand Himatlal Sheth* (supra), the Court also referred to the view of Pt. Jawahar Lal Nehru who said that it was important that the High Court Judges should not only be first- rate but should be of the highest integrity, people, who can stand up against the executive Government and whoever come in their way. According to Dr. Ambedkar, independence of judiciary was of the greatest importance and that there could be no difference of opinion that the judiciary had to be independent of the executive.

21. In this very judgment, the Court, while referring to the form of oath prescribed in clause VIII, Third Schedule of the Constitution, for a Judge or a Chief Justice of the High Court also noticed that it requires him to affirm that he will perform the duties of his office "without fear or favour, affection or ill will". The words "without fear or favour" have some significance. Relevancy of such expressions is traceable to various constitutional provisions. In terms of Article 202(3)(d), the expenditure in respect of the salaries and allowances of High Court Judges is charged on the Consolidated Fund of each State and Article 112(3)(d)(iii) enunciates that pensions payable to the High Court Judges are charged on the Consolidated Fund of India. By virtue of Article 113(1) the pensions are not subject to the vote of the Parliament. The court also noticed: "Now the independence of the judiciary is a fighting faith of our Constitution. Fearless justice is a cardinal creed of our founding document. It is indeed a part of our ancient tradition which has produced great Judges in the past. In England too, from where we have inherited our present system of administration of justice in its broad and essential features, judicial independence is prized as a basic value and so natural and inevitable it has come to be regarded and so ingrained it has become in the life and thought of the people that it is now almost taken for grantedand it would be regarded an act of insanity for anyone to think otherwise."

22. Besides this, the court also noticed that the framers of the Constitution were aware of this constitutional development in England and were conscious of our great tradition of judicial independence and impartiality and they realized that the need for securing the independence of judiciary was even greater under our Constitution than it was in England.

23. At this stage, reference to the judgment of this court in the case of *Union of India v. R. Gandhi, President Madras Bar Association* [(2010) 11 SCC 1], with reference to independence of judiciary would be proper and, in fact,

inevitable. A five-Judge Bench of this Court not only observed but formatively stated:

> "...impartiality, independence, fairness and reasonableness in decision making are the hallmarks of judiciary. If "Impartiality" is the soul of the judiciary, "Independence" is the lifeblood of the judiciary. Without independence, impartiality cannot thrive. Independence is not the freedom for Judges to do what they like. It is the independence of judicial thought. It is the freedom from interference and pressures which provides the judicial atmosphere where he can work with absolute commitment to the cause of justice and constitutional values."
>
> (emphasis supplied)

24. In a recent judgment of this Court in the case of *Brij Mohan Lal v. Union of India* [(2012) 6 SCC 502], the Court held as under:

> "The independence of the Indian judiciary is one of the most significant features of the Constitution. Any policy or decision of the Government which would undermine or destroy the independence of the judiciary would not only be opposed to public policy but would also impinge upon the basic structure of the Constitution. It has to be clearly understood that the State policies should neither defeat nor cause impediment in discharge of judicial functions. To preserve the doctrine of separation of powers, it is necessary that the provisions falling in the domain of judicial field are discharged by the judiciary and that too, effectively."

25. Thus, various Benches of different strength (Seven Judge Bench, Five Judge Bench and Two Judge Bench) of this Court have consistently held that independence of judiciary is a part of the basic structure of the Constitution and cannot be permitted to be adversely impacted by policy-making or even

by legislative power. The constitutional ethos of independent judiciary cannot be permitted to be diluted by acts of implied intervention or undue interference by the executive in the impartial administration of justice, directly or indirectly. This Court in the case of *Supreme Court Advocates-on-Record Association v. Union of India* [(1993) 4SCC 441], in unambiguous terms stated: "Independence of judiciary has always been recognised as a part of the basic structure of the Constitution." It is a known fact that a large part of the litigation in courts is generated from people being aggrieved against the governance, action and inaction of the Government including the executive and/or its instrumentalities. Thus, the courts must be kept free from any influence that the executive may be able to exercise by its actions, purely executive or even by its power of subordinate legislation. Where this court refers to independence, fairness and reasonableness in decisionmaking as the hallmarks of judiciary, there it also states impartiality as one of its essentials. Though, what is most important is the independence of judiciary, its freedom from interference and pressure from other organs of the State. The Courts and Judges, thus, must be provided complete freedom to act, not to do what they like but to do what they are expected to do, legally and constitutionally and what the public at large expects of administration of justice. If the State is able to exercise pressure on the Judges of the High Court by providing arbitrary or unreasonable conditions of service or altering them in an arbitrary manner, it would certainly be an act of impinging upon the independence of judiciary. Of course, what is put forward as part of the basic structure must be justified by reference to the provisions of the Constitution. When one looks into the scheme of our Constitution and the doctrine of separation of powers, there are many Articles, some of which I have already referred to, which clearly show that independence of the judiciary was of utmost concern with the framers of the Constitution. Such intent of the framers is not only ingrained into the ethos of our Constitution but is also explicitly provided for, even in the Directive Principles of the Constitution. Reference

in this regard can usefully be made to Article 50 of the Constitution, which requires the State to separate the judiciary from the executive in public services of the State. This Article, with the passage of time, has turned into a constitutional mandate rather than a mere constitutional directive.

26. For the judiciary to be impartial and independent and to serve the constitutional goals, the Judges must act fairly, reasonably, free of fear and favour. The term 'fear' as explained in various dictionaries, means 'an unpleasant emotion caused by threat of danger, pain or harm; a feeling of anxiety regarding the likelihood of something unwelcome happening'. (Concise Oxford English Dictionary, Eleventh Edition Revised) On the other hand, 'favour' means 'approval or liking; unfair preferential treatment, inclination, prejudice, predilection (Concise Oxford English Dictionary, Eleventh Edition Revised and Black's Law Dictionary, Eighth Edition). The necessity of acting free of fear or favour is to maintain impartiality and independence of the judicial decision-making process. A five-Judge Bench of this court, very affirmatively and to put the matters beyond ambiguity, in the case of *State of Bihar v. Bal Mukund Sah* [(2000) 4 SCC 640], held as under:

> "…We may also usefully refer to the latest decision of the Constitution Bench of this Court in Registrar (Admn.), High Court of Orissa v. Sisir Kanta Satapathy wherein K. Venkataswami, J., speaking for the Constitution Bench, made the following pertinent observations in the very first two paras regarding Articles 233 to 235 of the Constitution of India:
>
> > "An independent Judiciary is one of the basic features of the Constitution of the Republic. Indian Constitution has zealously guarded independence of Judiciary. Independence of Judiciary is doubtless a basic structure of the Constitution but the said concept of independence has to be confined within

the four corners of the Constitution and cannot go beyond the Constitution."

XXX XXX XXX

[T]he mere fact that Article 309 gives power to the Executive and the Legislature to prescribe the service conditions of the Judiciary, does not mean that the Judiciary should have no say in the matter. It would be against the spirit of the Constitution to deny any role to the Judiciary in that behalf, for theoretically it would not be impossible for the Executive or the Legislature to turn and twist the tail of the Judiciary by using the said power. Such a consequence would be against one of the seminal mandates of the Constitution, namely, to maintain the independence of the Judiciary."

27. When I discuss the conditions of service of judiciary, they have to be reasonable and free of arbitrariness. Arbitrariness in the power of the State to make unfair conditions of service for the sitting or the former Judges of the High Court would tantamount to putting a kind of pressure on the judiciary, requiring them to run to the Government for every small sickness or for reimbursement of expenditure incurred on some major ailment. The powers vested in the State, as aforenoticed, are not to cause fear or favour or any pressure in the mind of the judiciary, lest the sitting Judges, after retirement, be dependant upon the kindness of the executive. This element of arbitrariness or mercy must be eliminated so as to give judiciary its deserved independence and freedom to work effectively in the public interest and for attainment of the constitutional goals. Any unreasonable restriction would amount to interference with the doctrine of impartiality and fairness applicable to the judiciary in all events.

28. Having discussed, in some elaboration, the constitutional colour of this statutory right, I must refer to the facts of the present case. I do not see any reason for the State of

Maharashtra to have withdrawn its consent for substitution of the words 'availed of' in place of 'available'. It had ample time at its disposal, as various matters came up before the Court on a number of hearings, particularly prior to such substitution. It is expected of the State to act in accordance with the accepted canons of governance and not to render the judicial proceedings ineffective and inconclusive. The stand of the Government ought to have been in favour of a condition which would bring judicial independence, impartiality and fearlessness to the fore rather than its restriction, which apparently was of unreasonable nature. Is it the fault of the citizens or that of the Government servants that the CGHS Scheme is not available in a large number of cities in India and wherever it is available, it is proving ineffective, as people fail to receive their reimbursement claims for months together, despite instructions issued by the concerned Ministry? It will be unfortunate if a sitting Judge has to be continuously under the fear as to what his medical facilities will be after retirement. His service conditions should be definite and favourable to building the public confidence in the administration of justice rather than bringing unreasonableness and arbitrariness in the State action. The Ministry of Health and Family Welfare has issued a circular dated 14th November, 2011 attempting to streamline various aspects of implementation of the CGHS Scheme which itself shows that the scheme suffers from various infirmities and shortcomings and is not proving to be effective. The impact of the circular would have to be seen over a period, to realize its benefits, if any. Even in the circular issued by the same Ministry dated 27th April, 2011, which opens with the words "keeping in view the difficulties being faced by the pensioner CGHS beneficiaries residing in non-CGHS covered areas" certain clarifications were issued. The basic problem that arises is with regard to the emergency cases, specialized treatments and most concernedly the reimbursement of the bills and the process of verification of such matters. The procedure is so complex and results in such inordinate delays that it becomes

difficult for the beneficiaries to continue their treatment faithfully and as advised.

29. Lack of instructions from the Finance Department was pleaded to be the sole ground for seeking review of the judgment of the High Court. Inter departmental dealing is a matter of internal management of the Government. The Government is represented as a unit before the Courts. How they manage their internal affairs is for them to decide. The High Court rightly held that it was not an error apparent on the face of the record, justifying the review or satisfying the ingredients of Order XLVII Rule 1 of the Code of Civil Procedure, 1908. Substitution of the word 'available' by 'availed of' does not bring any prejudice in law. On the contrary, it would be in conformity with the constitutional requirements of equal treatment of all Judges. It is ultimately a matter relating to medical treatment, which nobody claims out of choice but it always emerges from necessity. Would it not be fair and reasonable on behalf of the State to take a stand which is in consonance with judicial independence and impartiality rather than subjecting a Judge to the pressure of worrying about the availability of medical facilities during the retirement era? It will be in line with the constitutional mandate of separation of powers and independence of judiciary that the medical facilities are permitted to be availed by the Judges/former Judges on the concept of 'availed of' instead of where there are 'available' with reference to the CGHS. Furthermore, the bills of the Judges should be submitted with the Registrar General of the concerned High Court and should be dealt with and paid in accordance with the rules of the High Court. The State Governments should provide a due head of expenditure for this purpose in the budget of their respective High Courts This will help in expeditious payments and also ensure that the Judges would not have to run after the members of the executive for clearance of their dues and the availability of medical facilities for them and their dependent family members would not depend upon the whims of the concerned authority.

30. Availability of uniform medical facilities for the former Judges in the entire country can also be substantially justified on another ground that there exists transfer policy of High Court Judges. This policy has been in force since 1994 and, therefore, this requires that the entitlement of former Judges and their dependent family members should not vary from place to place. Uniformity would remove another apprehension in the minds of the Judges as to the Court from which they retire. Presently, it is clear even from the various documents submitted and placed on record by the learned Additional Solicitor General that there are different benefits in different States and, thus, the medical benefits at the Centre as well as between the States are comparatively and considerably different. This disparity leads to a patent discrimination which should not be permitted. It will be in the interest of all concerned, including the State Governments, that complete uniformity is maintained in relation to availability of medical facilities in terms of Section 23D of the Act and procedure of reimbursement of medical bills of the former Judges of the High Courts. The Former Judges of the High Courts should be placed at parity with the sitting Judges of the High Courts. Thus, it will be appropriate for the competent authority to frame/amend the rules in accordance with this judgment and the constitutional mandate.

31. Keeping in view the doctrine of separation of powers and independence of judiciary, which are the structural ethos of our Constitution, it is expected that the legislative power and more particularly, the subordinate legislative power, ought not to be exercised so as to obtrude these basic fundamental principles. The exercise of subordinate legislative power, which by necessary implication, entrenches upon the independence of judiciary, would have to be decided on the touchstone of it being violative or otherwise, of the basic structure of the Constitution.

32. In order to ensure the absolute independence of judiciary, in the interest of administration of justice and for the

Judges to act free of any apprehensive attitude and to provide complete certainty to the service conditions of the former Judges of the High Courts, I dispose of the above appeals and pass the following order-cum-directions:

a) I do not find any merit in the present appeals.

b) Rule 2(a) of the draft rules shall remain in the form as directed by the High Court. The word 'available' shall stand substituted by the words 'availed of'. The State of Maharashtra is hereby directed to notify these rules forthwith.

c) Henceforth, there shall be complete uniformity in the 'grant of medical benefits' to the former Judges of various High Courts.

d) It may not only be desirable but necessary for the Centre and the State Governments to amend and alter the existing rules. If no rules are in force, to frame the rules on such uniform lines.

e) In relation to the medical facilities, the former Judges of the High Courts would be placed at parity with the facilities available to the sitting Judges and their dependent family members. Providing such benefit and bringing uniformity in the rules shall be in the interest of the State administration as well as administration of justice.

f) All the medical bills of the former Judges of various High Courts shall be submitted to the Registrar General of the concerned High Court, who shall, subject to approval of the Chief Justice of that Court and in accordance with the rules in force, pay such bills (upon due scrutiny) to the former Judges.

g) The Union Government and the State Governments are directed to provide such 'head of expenditure', being part of the High Court budget of the respective High Courts for reimbursement of medical bills of the former Judges. In other words, the payment would be directly made by the High Court to the former Judges and it, in turn, would be reimbursed by the State Government.

h) All the former Judges of the High Courts would be entitled to receive medical facilities from the hospitals so empanelled by the Central or the State Governments, as the case may be.

i) Till appropriate rules are framed by the appropriate authority, these directions shall remain in force and shall be abided by the executive

33. The appeals are disposed of in the above terms. However, there shall be no orders as to costs.

A.K. PATNAIK, J. 1. Leave granted.

2. I have read the judgment of my learned brother Justice Swatanter Kumar but with due respect to his learning I am unable to persuade myself to agree with his conclusion that the appeals have no merit and with the directions in his judgment. In my view, the appeals should be allowed and the impugned orders of the High Court should be set aside for reasons which I shall indicate after setting out the facts.

3. The facts very briefly are that Section 23D of the High Court Judges (Salaries and Conditions of Service) Act, 1954 (for short "the Act") provides for medical facilities for retired Judges. Sub-section (1) of Section 23D provides that every retired Judge shall be entitled for himself and his family to the same facilities as respects medical treatment and on the same conditions as a retired officer of the Central Civil Services, Class-I and his family, are entitled under any rules and orders of the Central Government for the time being in force. A retired

officer of the Central Civil Services, Class-I and his family are entitled to medical facilities under the Central Government Health Scheme (for short "the CHGS Scheme"). Justice S.C. Malte and four other retired Judges who after retirement were residing in Aurangabad, Maharashtra, addressed a letter to the Chief Justice of the Bombay High Court mentioning therein the difficulties of the retired Judges in getting the medical facilities under the CGHS Scheme including the fact that the facilities thereunder were provided at only three cities in Maharashtra, namely, Mumbai, Nagpur and Pune. This letter was treated as suo motu Writ Petition No.6285 of 2005 and an order was passed by the High Court on 17.07.2006 directing the Government of Maharashtra to frame rules for medical treatment and reimbursement of retired Judges of the Bombay High Court. The Government of Maharashtra drafted the Maharashtra Retired High Court Judges (Facilities for Medical Treatment) Rules, 2006, pursuant to the order dated 17.07.2006 of the Bombay High Court and placed the Draft Rules of 2006 before the High Court. The amicus curiae appearing for the suo motu writ petitioners, however, suggested a change in the Draft Rules of 2006 and the change was that the retired Judges shall be entitled to the medical facilities and reimbursement provided in the Draft Rules whenever the CGHS Scheme is not availed of and the High Court disposed of the writ petition by order dated 15.01.2007 with the direction to the State Government to either notify the Draft Rules in the form suggested by the amicus curiae or amend the G.R. for medical benefits to sitting Judges and extend the same benefits also to the retired Judges in exercise of its power under sub-section (2) of Section 24 of the Act. The Government of Maharashtra (the appellant herein) then filed Civil Application No. 73 of 2008 for review of the order dated 15.01.2007, but by order dated 22.04.2008 the High Court rejected the prayer for review and directed the State Government to comply with the order dated 15.01.2007 of the High Court within two months. Aggrieved, the appellant filed this appeal against the order dated 15.01.2007 passed in suo motu

writ petition No.6285 of 2005 and the order dated 22.04.2008 rejecting Civil Application No.73 of 2008.

4. Section 23D of the Act which is titled "Medical facilities for retired Judges" is extracted hereinbelow:

> "23D(1) Every retired Judge, shall, with effect from the date on which the High Court Judges (Conditions of Service) Amendment Act, 1976, receives the assent of the President be entitled for himself and his family, to the same facilities as respects medical treatment and on the same conditions as a retired officer of the Central Civil Services, Class-I and his family, are entitled under any rules and orders of the Central Government for the time being in force.
>
> (2) Notwithstanding anything in sub-section (1) but subject to such conditions and restrictions as the Central Government may impose a retired Judge of the High Court for a State may avail, for himself and his family, any facilities for medical treatment which the Government of that State may extend to him."

5. It will be clear from language of sub-section (1) of Section 23D of the Act quoted above that every retired Judge is entitled for himself and his family, to the same facilities as respects medical treatment and on the same conditions as a retired officer of the Central Civil Services, Class-I and his family, are entitled under any rules and orders of the Central Government for the time being in force. Sub-section (2) of Section 23D of the Act, however, provides that notwithstanding anything in sub-section (1) but subject to such conditions and restrictions as the Central Government may impose a retired Judge of the High Court for a State may avail, for himself and his family, any facilities for medical treatment which the Government of that State may extend to him. Thus, under sub-section (2) of Section 23D of the Act, the power is vested in the Government of the State to extend facilities for medical

treatment to a retired Judge of the High Court for that State and his family different from the facilities provided to a retired officer of the Central Civil Services, Class-I and his family. This statutory power is that of the State Government and cannot be exercised by the High Court under Article 226 of the Constitution. The appellant, therefore, was right in urging a ground in these appeals that the High Court had no jurisdiction to direct the State Government to frame any particular rule regarding medical facilities of the retired Judges of the Bombay High Court.

6. Though, there are several decisions of this Court on the point that the legislative power or the rule making power cannot be exercised by the Court either under Article 226 or under Article 32 of the Constitution, I may only cite the decision of this Court in Supreme Court *Employees Welfare Association v. Union of India* (AIR 1990 SC 334). In this case, writ petitions were filed by the Supreme Court Employees Welfare Association and others seeking higher pay scales and the Attorney General for India appearing for the Union of India contended inter alia that this Court cannot issue a mandate to the President of India to grant approval to the rules framed by the Chief Justice of India relating to salaries, allowances, leave and pensions of the officers and servants of the Supreme Court and this Court held that there can be no doubt that an authority exercising legislative function cannot be directed to do a particular act and the President of India cannot therefore be directed by the Court to grant approval to the proposals made by the Registrar General of the Supreme Court, presumably on the direction of the Chief Justice of India. Hence, neither the High Court in exercise of its power under Article 226 of the Constitution nor this Court under Article 32 or Article 136 of the Constitution can direct the State Government to grant particular medical facilities to a retired High Court Judge when sub-section (2) of Section 23D of the Act vests such power on the State Government to grant medical facilities other than those mentioned in sub-section (1) of Section 23D of the Act.

7. In *Kuldip Singh v. Union of India* [JT 2002 (2) SC 506], the medical facilities for retired Judges of the Supreme Court were in issue. Section 23C of the Supreme Court Judges (Salaries and Conditions of Services) Act, 1958, provides for medical facilities for retired Judges. This Section 23C provides that every retired Judge shall be entitled, for himself and his family, to the same Central Civil Services Class-I and his family, are entitled under any rules and orders of the Central Government for the time being in force. The Central Government had made the Supreme Court Judges Rules, 1959 for sitting Judges of the Supreme Court and Rule 5 of these Rules provides for facilities for medical treatment and accommodation in hospitals and the proviso to Rule 5 stated that the medical expenses shall be reimbursed on prescription of government doctors/hospitals or (registered medical) practitioners/private hospitals by the Registry of the Supreme Court of India. This Rule 5, however, did not apply to retired Judges. Justice Kuldip Singh, a retired Judge of the Supreme Court, filed a writ petition praying for a declaration to the effect that the proviso to Rule 5 of the Supreme Court Judges Rules, 1959, should be made applicable to the retired Judges of this Court and that the provisions of Section 23C of the Supreme Court Judges (Salaries and Conditions of Services) Act, 1958, should be struck down. While the writ petition was pending before this Court, the Central Government issued a memorandum dated 06.02.2002 which stated that it had been decided in consultation with the Ministry of Law, Justice and Company Affairs, Department of Justice, to delegate powers of relaxation of rules for sanctioning medical reimbursement claims, in respect of retired Chief Justices of India and Judges of the Supreme Court holding CGHS pensioner's card to the Registrar General of the Supreme Court who will exercise this power with the prior approval of the Chief Justice of India or his nominee and the reimbursement of medical expenses to the retired Chief Justices of India and Judges of the Supreme Court holding CGHS pensioner's card would also be made by the Supreme Court Registry. In view of the aforesaid memorandum dated

06.02.2002 issued by the Central Government, Justice Kuldip Singh did not press the prayer in the writ petition and the writ petition was disposed of in terms of the said office memorandum. This was thus a case where the Central Government was of the opinion that the same facilities should be made available to the retired Judges of the Supreme Court and their families and had accordingly issued an office memorandum to that effect and this was not a case where this Court in exercise of judicial powers under Article 32 of the Constitution directed the Central Government to grant particular medical facilities to the retired Supreme Court Judges.

8. It has been brought to our notice by the learned Additional Solicitor General Mr. Garuab Banerji that in fact some of the State Governments in exercise of their powers under sub-section (2) of Section 23D of the Act are providing the same medical facilities and medical reimbursement to retired Judges and their families as are being provided to sitting Judges of the High Court and their families. In Jammu & Kashmir, by virtue of the State Government order dated 19.02.2006, retired Judges are entitled to the same benefits as are available to the sitting Judges of Jammu & Kashmir High Court. In Gujarat, the Gujarat Minister's (Medical Attendance and Treatment) Rules 1964 have been extended to retired Judges of the High Court and the powers of the State Government under these Rules with respect to reimbursement have been delegated to the Chief Justice of the Gujarat High Court for sanctioning and reimbursing the expenditure for both sitting and retired Judges and their family members. In Andhra Pradesh, the Government of Andhra Pradesh has extended the medical benefits to the retired Judges of the High Court at par with sitting Judges of the High Court of Andhra Pradesh. In Madhya Pradesh, the Chief Justice of the High Court sanctions the reimbursement of the medical bills of the retired Judges of the High Court pursuant to the orders passed by the State Government. In Uttar Pradesh, the medical facilities to the retired Judges of the Allahabad High Court are the same as

those available to the sitting Judges of the High Court. In the light of these provisions regarding medical facilities in other States, the Government of Maharashtra must consider extending better medical facilities to the retired Judges of the Bombay High Court, but what exactly should be the provisions for medical facilities can only be decided by the State Government in exercise of its powers under sub-section (2) of Section 23D of the Act.

9. In my view, therefore, the impugned orders of the High Court should be set aside and the appeal should be disposed of with the recommendations in this judgment.

O R D E R

Since there has been a difference of opinion between us in these Civil Appeals, the Registry will place these Civil Appeals before My Lord the Chief Justice of India to constitute a larger Bench to hear and decide these Civil Appeals.

B.B.B. Matter referred to Larger Bench.

STATE OF U.P. & ORS.
v.
ASHOK KUMAR NIGAM
(Civil Appeal Nos. 9029 of 2012 etc.)

DECEMBER 13, 2012

[SWATANTER KUMAR AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Legal Rememberancer's Manual (Uttar Pradesh):

Para 7.06 to 7.08 – Renewal of term of District Government Counsel – Declined by State Government – Order set aside by High Court – Held: The right of consideration for renewal for the specified period is a legitimate right vested in an applicant and he can be deprived of such right and be declined renewal where his work is unsatisfactory and is so reported by the specified authorities – It was not permissible for the government to take recourse to Para 7.06 (3) in the manner in which it has done – High Court has held that the request for renewal has been declined by a decision en block, without considering the recommendation of District Judge and District Magistrate – The arbitrary act of the State cannot be excluded from the ambit of judicial review merely on the ground that it is a contractual matter – Besides, the order is a non-speaking order which suffers from non-application of mind – However, High Court should not have directed appointments while regulating the age – There is right of consideration, but none can claim right to appointment – Thus, while declining to interfere with judgment of High Court, it is directed that the government shall consider cases of respondents for renewal in accordance with the procedure prescribed and criteria laid down under Paras 7.06 to 7.08 of the LR Manual expeditiously – Constitution of India, 1950 – Arts. 14 and 16 – Interpretation of statutes – Administrative law – Judicial

review – Non-speaking administrative order.

Words and Phrases:

Expressions, "without assigning any cause" and "without existence of any cause" – Connotation of.

The respondent in C.A. No. 9029 of 2012 was appointed as District Government Council on 17.9.2004. His term was renewed on 3.3.2006 for a period upto 5.3.2007. He made an application for renewal of his term on 19.1.2007. The District Judge and the District Magistrate gave their recommendations for renewal of his term. However, the State Government, by order dated 3.4.2008, declined the renewal resulting in cancellation of engagement of the respondent alongwith several others. He filed a writ petition before the High Court, which set aside the order dated 3.4.2008 and granted further relief to the effect that renewal of the respondent's term be considered in accordance with the relevant provisions of L.R. Manual, if he had not crossed the age of 60 years but if he had attained the age of 60 years and had not reached the age of 62, his case be considered for extension upto the age of 62 years. Aggrieved, the State Government filed the appeal. The other appeals were filed in similar circumstances.

Dismissing the appeals, the Court

HELD: 1.1 Under the provisions of the Legal Remembrancer's Manual, the appointments are to be made and renewal to be considered upon the recommendation of the District Officer and the District Judge [Para 67.6 to 7.8].

The rules also state the factors which are to weigh in the mind of the recommending authority while recommending or declining to recommend renewal of

term of the government pleaders. The rules provide a procedure and even require the State Government to consider the case for renewal of the government counsel whose term is coming to an end. The scheme of para 7.06 of the Manual is that the appointment of a government pleader is to be made for a period of one year and at the end of the period, the District Officer in consultation with the District Judge is required to submit a report on the work and conduct to the Legal Remembrancer together with the work done, in Form 9. It is only when his work or conduct is found to be unsatisfactory that it is so reported to the government for appropriate orders. If the report is satisfactory, the rule requires that he may be furnished with a deed of engagement in form I, for a term not exceeding three years, on his first engagement. Thus, the onus is shifted to the State to show that it had acted in accordance with the prescribed procedure and its action does not suffer from the vice of discrimination and arbitrariness. In terms of para 7.06 (3), the Government reserves the power to terminate the appointment of any District Government Counsel at any time without assigning any cause. One has to examine the entire scheme of para 7.06 (3). It cannot be read in isolation. [para 9 and 13] [275-G; 279-B-E]

1.2 The right of consideration for renewal for the specified period is a legitimate right vested in an applicant and he can be deprived of such right and be declined renewal where his work is unsatisfactory and is so reported by the specified authorities. It was not permissible for the government to take recourse to Para 7.06 (3) in the manner in which it has done. If it is construed that the government has an absolute right to terminate the appointment at any time without specifying any reason, it will be violative of Arts. 14 and 16 of the Constitution of India and such rule shall be arbitrary, thus, not sustainable in law. [para 13-14] [279-F-G; 282-C]

Delhi Transport Corporation v. D.T.C. Mazdoor Congress **1990 (1) Suppl. SCR 142 = 1991 Supp. (1) SCC 600 – relied on.**

1.3 Total non-application of mind and the order being supported by no reason whatsoever would render the order passed as 'arbitrary'. Arbitrariness shall vitiate the administrative order. The arbitrary act of the State cannot be excluded from the ambit of judicial review merely on the ground that it is a contractual matter. The expression 'at any time without assigning any cause', can be divided into two portions, one "at any time", which merely means the termination may be made even during the subsistence of the term of appointment and second, "without assigning any cause" which means without communicating any cause to the appointee whose appointment is terminated. However, "without assigning any cause" is not to be equated with "without existence of any cause". [para 13 and 15] [279-A-B; 282-E-G]

Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing v. Shukla and Brothers **2010 (4) SCR 627 = (2010) 4 SCC 785 - relied on.**

1.4 In the instant case, the High Court in its judgment has noticed that the order dated 3.4.2008 clearly shows that the request for renewal has been rejected without considering the recommendation of the District Judge and District Magistrate; that the records produced did not show proper consideration by the State Government before refusing to grant renewal of the term of the respondent; and that the Government had taken enblock decision that the renewal in the cases of such Government Counsel whose term have come to an end will not be granted. The High Court examined the records and after being satisfied that the record produced did not exhibit proper application of mind or due consideration as per prescribed procedure and the action being

arbitrary, set aside the order dated 3.4.2008. There is nothing on record placed before this Court by the appellant that could demonstrate that such view of the High Court suffered from any infirmity. [para 12] [277-H; 278-A-E]

1.5 The order dated 3.4.2008 is even liable to be quashed as it is a non-speaking order also suffering from the vice of non-application of mind. The government has taken an enblock decision, without recording any reason, not to renew the term of any of the government counsel. That itself shows that there is no application of mind. The order dated 3.4.2008 clearly shows non-application of mind and non-recording of reasons, which leads only to one conclusion, that the said order was an arbitrary exercise of power by the State. This Court finds no fault with the reasoning of the High Court in that behalf. [para 15 and 17] [282-D-E; 284-A-B]

Kumari Shrilekha Vidyarthi and Others v. State of U.P. & Ors. **1990 (1) Suppl. SCR 625 = (1991) 1 SCC 212 – relied on.**

1.6 However, the High Court should not have directed appointments while regulating the age, as has been done by it in operative part of its judgment. There is right of consideration, but none can claim right to appointment. Para 7.06 states that renewal beyond 60 years shall depend upon continuous good work, sound integrity and physical fitness of the counsel. These are the considerations which have to be weighed by the competent authority in the State Government to examine whether renewal/extension beyond 60 years should be granted or not. That does not ipso facto mean that there is a right to appointment upto the age of 60 years irrespective of work, conduct and integrity of the counsel. The rule provides due safeguards as it calls for the report of the District Judge and the District Officer before granting renewal. [para 17] [284-B-E]

1.7 Thus, while declining to interfere in the judgment of the High Court, it is directed that the government shall consider expeditiously the cases of the respondents for renewal in accordance with the procedure prescribed and criteria laid down under Paras7.06 to 7.08 of the LR Manual. [para 18] [284-E-F]

Case Law Reference:

1990 (1) Suppl. SCR 625	**relied on**	**para 7**
1990 (1) Suppl. SCR 142	**relied on**	**para 13**
2010 (4) SCR 627	**relied on**	**para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9029 of 2012.

From the Judgment & Order dated 14.10.2009 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Writ Petition No. 3208 (M/B) of 2008.

WITH

C.A. No. 9044, 9045, 9041, 9046, 9042, 9043, 9030, 9031, 9032, 9033, 9034, 9039, 9038, 9037, 9036, 9035, 9040 of 2012.

S.R. Singh, Ashutosh Sharma, Gaurav Dhingra, Kamlendra Mishra for the Appellants.

Manoj Goel, Shuvodeep Roy, Gopal Verma, Viparna Gaur, Anis Ahmed Khan, Shoaib Ahmad Khan, Vijay Arora, Sudarshan Singh, Rawat, Anoop Kr. Srivastav, Vipin Kr. Saxena, Shakil Ahmed Syed, Renjith. B, for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR J. 1. Leave granted in all the Special Leave Petitions.

2. These appeals are directed against the judgment of the High Court of Judicature at Allahabad, Lucknow Bench. Though

dated differently, the questions of law involved in all these appeals are identical based upon somewhat similar facts. SLP(C) No. 35569 of 2010 was filed against the order dated 24th September, 2008, SLP(C) No. 35568 of 2010 was filed against\ the order dated 29th September, 2008, SLP(C) No. 35565 of 2010 was filed against the order dated 14th September, 2009, SLP(C) No. 35566 of 2010 against the order dated 18th September, 2010, SLP(C) No. 35279 of 2009, SLP(C) No. 24562 of 2010, SLP(C) No. 24564 of 2010 and SLP(C) No. 35567 of 2010 against the order dated 14th October, 2009, SLP(C) No. 12993 of 2010, SLP(C) No. 24563 of 2010 and SLP(C) No. 35561 of 2010 against the order dated 16th November, 2009, SLP(C) No. 11261 of 2010 against the order dated 21st January, 2010, SLP(C) No. 35562 of 2010 against the order dated 9th April, 2010, SLP(C) No. 9156 of 2011 against the order dated 19th January, 2011, SLP(C) No. 20918 of 2011 and SLP(C) No. 13788 of 2011 against the order dated 28th April, 2011, SLP(C) No. 20917 of 2011 against the order dated 29th April, 2011 and SLP(C) No. 18407 of 2011 against the order dated 26th April, 2011.

3. We have taken the case of *Ashok Kumar Nigam* (supra) i.e. Civil Appeal @ SLP(C) No. 35279 of 2009 as the lead case. Before we proceed to notice the facts giving rise to the present appeal in that case, it is necessary for us to notice that SLP (Civil) No. 9156 of 2011 has been directed against an interim order passed by the Division Bench of that High Court in Miscellaneous Bench No. 523 of 2003 titled *"Pramod Sharma v. State of Uttar Pradesh"*. The interim order dated 19.1.2011 had directed that no regular appointment shall be made on the post Government Advocate in place of the appellant. Vide its judgment dated 10th February, 2011, the Division Bench of the High Court finally disposed of the interim application by staying the operation of the orders dated 24th December, 2010 and 28th December, 2010 passed by the respondents. It further directed that the appellant be allowed to continue as the District Government Counsel (Criminal) subject

to any decision being taken afresh in accordance with the directive issued by the judgment of that Court passed in Writ Petition No.10038(MB) of 2009. In other words, the interim order had merged into the order of the High Court dated 10th February, 2011 against which as of now, no petition has been filed. Thus, the special leave petition No. 9156 of 2011 has been rendered infructuous and is accordingly dismissed as such.

SLP(C) No. 35279 of 2009

4. Mr. Ashok Kumar Nigam, respondent herein was appointed as District Government Counsel on 17th September, 2004 vide a notification issued by the State Government. The term of the said respondent was renewed on 3rd March, 2006 for a period of one year and as such his term came to an end on 5th March, 2007. The respondent submitted his application for renewal of his term on 19th January, 2007. The District Judge, Lucknow on 26th February, 2007 gave his report and the District Magistrate also submitted his report on 5th March, 2007 recommending the renewal of the term of the respondent. However, the State Government, appellant herein, vide order dated 3rd April, 2008 refused his renewal which resulted in cancellation of engagement of the said respondent. The order dated 3rd April, 2008 can usefully be reproduced at this stage:-

"From

Acharya Suresh Babu
Deputy Secretary
Government of Uttar Pradesh

To

The District Magistrate
Lucknow

Nyay-Anubhag-3-Appointment Lkw, dated 3.4.2008

Sub: Renewal of Tenure of engagement of District Government Counsels at the District Level

Sir,

With reference to your Letter No. 855/JA(2)/Advocate-Renewal/07 dated 5.3.2007, I have been directed to say that after due consideration, the Hon'ble Governor had kindly ordered not to renew the tenure of engagement of Sh. Ashok Kumar Nigam, as District Government Counsel (Criminal), Lucknow.

Accordingly, in the aforesaid background, the engagement order of Sh. Ashok Kumar Nigam, as District Government Counsel is hereby terminated

Please take necessary action at your end and forward your proposal from the panel of Advocates for being engaged as District Government Counsel against the consequential vacancy."

5. Aggrieved from the above order, the respondent filed writ petition before the High Court of Allahabad, Lucknow Bench. In the writ petition, the stand taken by the respondent was that in terms of the rule, the petitioner has a right to continue and in any case for consideration of renewal of his term, the impugned order does not state any reasons and, in fact, does not take into consideration the recommendations made by the District and Sessions Judge and the District Magistrate, who had recommended renewal of the term of the respondent. The High Court after hearing the counsel appearing for the parties, vide its judgment dated 14th October, 2009, allowed the writ petition, setting aside the order dated 3rd April, 2008 and even granting further relief to the appellant. The operative part of the High Court judgment reads as under:-

"For the reasons stated above, the order impugned dated 03.04.2008 is hereby set aside.

We are informed that no person has yet been appointed or engaged in place of the petitioner, in view of the interim order passed by this Court, we, therefore, further provide that the petitioner shall be allowed to continue to discharge

the functions and duties of the District Government Counsel, till the consideration of the renewal of his term in accordance with law. We may further clarify that the renewal of the petitioner's term shall be considered in accordance with the relevant provisions of L.R. manual (unamended para 7.08 as the amendments made in L.R. Manual are subject matter of challenge in W.P. No. 7851 (M/B) of 2008 wherein the implementation of the amended provisions stand stayed) if he has not crossed the age of 60 years but if he has already attained the age of 60 years, but has not yet reached the age of 62 years then his case will be considered for extension of his term upto the age of 62 years and for that consideration, if any further formalities are to be completed or some certificates are needed, he shall be given an opportunity to furnish the same, so that his case may be considered in accordance with the relevant rules. Writ petition is allowed. Cost easy."

6. Aggrieved from the above judgment of the High Court, the State of Uttar Pradesh (appellant herein) has filed the present appeal before this Court. The challenge to the impugned order is, inter alia, but primarily on the following grounds:-

(A) In terms of the relevant rule, the State Government has discretion to terminate the term of the District Government Counsel (Criminal), and in any case, the term of the respondent had come to an end by efflux of time, and therefore, the High Court has exceeded its jurisdiction in setting aside the order dated 3rd April, 2008.

(B) At best, if allowing the writ petition, the High Court could set aside the impugned order, but could not direct that they be retained or continued till the age of 60 or 62 years as the case may be. The respondent would only have a right of consideration and nothing more, therefore, the judgment of the High Court suffers from apparent errors. The High

Court gave no reasons much less valid reasons for setting aside the order dated 3rd April, 2008.

7. Opposed to the above contentions, it is contended on behalf of the respondents that the order dated 3rd April, 2008 was a non-speaking order and suffered from the vice of nonapplication of mind and was arbitrary and has correctly been set aside by the High Court. Reliance in this regard is placed upon the judgment of this Court in the case of *Kumari Shrilekha Vidyarthi and Others v. State of U.P. & Ors.* [(1991) 1 SCC 212]. Further, that the impugned order dated 3rd April, 2008 is contrary to the rules in force. The order of the High Court under appeal does not call for any interference.

8. Before we examine the merit or otherwise of the contentions, it will be appropriate for this court to notice the relevant rule. Chapter 7 of the Legal Remembrancer's Manual deals with District Government Counsel. In terms of Para 7.01, the District Government Counsel are legal practitioners appointed by the State Government to conduct in any court, other than the High Court, such civil, criminal or revenue cases on behalf of the State Government as assigned to them either generally or specially. Para 7.02 deals with the power of the government to appoint government counsels in the districts. As per this provision, the government was to ordinarily appoint District Government Counsel (Criminal), District Government Counsel (Civil) and District Government Counsel (Revenue) for each district, for which they have to make an application.

9. Under these rules, the appointments are to be made and renewal to be considered upon the recommendation of the District Officer and the District Judge. The rules even state the factors which are to weigh in the mind of the recommending authority while recommending or declining to recommend renewal of term of the government pleaders. Paras 7.6 to 7.8 read as under:-

"7.06. Appointment and renewal – (1) The legal practitioner finally selected by the Government may be

appointed District Government Counsel for one year from the date of his taking over charge.

(2) At the end of the aforesaid period, the District Officer after consulting the District Judge shall submit a report on his work and conduct to the legal Rememberancer together with the statement of work done in Form no. 9. Should his work or conduct be found to be unsatisfactory the matter shall be reported to the Government for orders. If the report in respect of his work and conduct is satisfactory, he may be furnished with a deed of engagement in Form no. 1 for a term no exceeding three years. On his first engagement a copy of Form no. 2 shall be supplied to him and he shall complete and return it to the Legal Remembrancer for record.

(3) The appointment of any legal practitioner as a District Government Counsel is only professional engagement terminable at will on either side and is not appointment to a post under the Government. Accordingly the Government reserves the power to terminate the appointment of any District Government Counsel at any time without assisting any cause.

7.08. Renewal of term – (1) At least three months before the expiry of the term of a District Government Counsel, the District Officer shall after consulting the District Judge and considering his past record of work, conduct and age, report to the Legal Remembrancre, together with the statement of work done by him in Form no. 9 whether in his opinion the term of appointment of such counsel should be renewed or not. A copy of the opinion of the District Judge should also be sent along with the recommendations of the District Officer.

(2) Where recommendation for the extension of the term of a District Government Counsel is made for a specified period only, the reasons thereof shall also be stated by the District Officer.

(3) While forwarding his recommendation for renewal of the term of a District Government Counsel –

(i) The District Judge shall give an estimate of the quality of the Counsel's work from the judicial stand point, keeping in view the different aspects of a lawyer's capacity as it is manifested before him in conducting State cases, and specially his professional conduct;

(ii) The District Officer shall give his report about the suitability of the District Government Counsel from the administrative point of view, his public reputation in general, his character, integrity and professional conduct.

(4) If the Government agrees with the recommendations of the District Officer for the renewal of the term of the Government Counsel, it may pass orders for re-appointing him for a period not exceeding three years.

(5) If the Government decides not to re-appoint a Government Counsel, the Legal Remembrancer may call upon the District officer to forward fresh recommendations in the manner laid down in para 7.03.

(6) The procedure prescribed in this para shall be followed on the expiry of every successive period of renewed appointment of a District Government Counsel."

10. From the above rules, it is clear that the government counsel has to be appointed and/or his term renewed upon recommendation of the District Judge and the District Officer and in accordance with the procedure prescribed under the above rules. It is only when the recommendations based upon stated criteria are unfavourable to the applicant in question that the government could decline renewal of the term. In the present case, we are not concerned with the appointment as such. All the cases in hand are cases of renewal of term.

11. The High Court in its judgment has noticed that the

order dated 3rd April, 2008 clearly shows that the request for renewal has been rejected without considering the recommendation of the District Judge and District Magistrate. The High Court has even noticed in its judgment that in view of this fact it had called for the records and the records produced did not show proper consideration by the State Government before refusing to grant renewal of the term of the respondent. The High Court also noticed that the Government had taken enblock decision that the renewal in the cases of such Government counsel whose term have come to an end will not be granted. It was in pursuance to this decision that the government refused to grant renewal to the respondent as well.

12. The High Court had examined the records and after being satisfied that the record produced did not exhibit proper application of mind or due consideration as per prescribed procedure and the action being arbitrary, had set aside the order dated 3rd April, 2008. There is nothing on record placed before this court by the appellant that could demonstrate that such view of the High Court suffered from any infirmity. The prescribed procedures under para 7.08 of the Manual requires the government to invite to invite opinion of the District Judge and District Officer, three months prior to the expiry of the term of the District Government Counsel. By amendment, proviso was added to para 7.03 to provide that District Magistrate shall always be free to nominate such person who may be found eligible but who had not submitted particulars for being appointed as such. As per the prescribed procedure, the office of Legal Remembrance was expected to consider the past record of work and conduct of the concerned District Government Counsel and then to send a report together with the statement of work done by such applicant. The High Court had clearly stated the principle that where there is conflict between the recommendation of the District Judge and the District Magistrate, primacy shall be given to the report of the District Judge. Thus, in our opinion, the onus is shifted to the State to show that it had acted in accordance with the

prescribed procedure and its action does not suffer from the vice of discrimination and arbitrariness.

13. Total non-application of mind and the order being supported by no reason whatsoever would render the order passed as 'arbitrary'. Arbitrariness shall vitiate the administrative order. The rules provide a procedure and even require the State Government to consider the case for renewal of the government counsel whose term is coming to an end. The scheme of para 7.06 of the Manual is that appointment of a government pleader is to be made for a period of one year and at the end of the period, the District Officer in consultation with the District Judge is required to submit a report on the work and conduct to the legal remembrancer together with the work done in Form 9. It is only when his work or conduct is found to be unsatisfactory that it is so reported to the government for appropriate orders. If the report is satisfactory, the rule requires that he may be furnished with a deed of engagement in form I, for a term not exceeding three years, on his first engagement. In terms of para 7.06 (3), the Government reserves the power to terminate the appointment of any District Government Counsel at any time without assigning any cause. Firstly, one has to examine the entire scheme of para 7.06 (3). It cannot be read in isolation. The right of consideration for renewal for the specified period is a legitimate right vested in an applicant and he can be deprived of such right and be declined renewal where his work is unsatisfactory and is so reported by the specified authorities. It is difficult to comprehend that clause (3) of para 7.06 can be enforced in the manner as suggested. If it is construed, as suggested, that the government has an absolute right to terminate the appointment at any time without specifying any reason, it will be violative of Articles 14 and 16 of the Constitution of India and such rule shall be arbitrary, thus not sustainable in law. In the case of *Delhi Transport Corporation v. D.T.C. Mazdoor Congress* [1991 Supp. (1) SCC 600] while dealing with Regulation 9, which was worded similarly, this Court held as under:-

"202. Thus on a conspectus of the catena of cases decided by this Court the only conclusion that follows is that Regulation 9(b) which confers powers on the authority to terminate the services of a permanent and confirmed employee by issuing a notice terminating the services or by making payment in lieu of notice without assigning any reasons in the order and without giving any opportunity of hearing to the employee before passing the impugned order is wholly arbitrary, uncanalised and unrestricted violating principles of natural justice as well as Article 14 of the Constitution. It has also been held consistently by this Court that the government carries on various trades and business activity through the instrumentality of the State such as Government Company or Public Corporations. Such Government Company or Public Corporation being State instrumentalities are State within the meaning of Article 12 of the Constitution and as such they are subject to the observance of fundamental rights embodied in Part III as well as to conform to the directive principles in Part IV of the Constitution. In other words the Service Regulations or Rules framed by them are to be tested by the touchstone of Article 14 of Constitution. Furthermore, the procedure prescribed by their Rules or Regulations must be reasonable, fair and just and not arbitrary, fanciful and unjust. Regulation 9(b), therefore, confers unbridled, uncanalised and arbitrary power on the authority to terminate the services of a permanent employee without recording any reasons and without conforming to the principles of natural justice. There is no guideline in the Regulations or in the Act, as to when or in which cases and circumstances this power of termination by giving notice or pay in lieu of notice can be exercised. It is now well settled that the 'audi alteram partem' rule which in essence, enforces the equality clause in Article 14 of the Constitution is applicable not only to quasijudicial orders but to administrative orders affecting prejudicially the party-in-question unless the application of the rule has

been expressly excluded by the Act or Regulation or Rule which is not the case here. Rules of natural justice do not supplant but supplement the Rules and Regulations. Moreover, the Rule of Law which permeates our Constitution demands that it has to be observed both substantially and procedurally. Considering from all aspect Regulation 9(b) is illegal and void as it is arbitrary, discriminatory and without any guidelines for exercise of the power. Rule of law posits that the power is to be exercised in a manner which is just, fair and reasonable and not in an unreasonable, capricious or arbitrary manner leaving room for discrimination. Regulation 9(b) does not expressly exclude the application of the 'audi alteram partem' rule and as such the order of termination of service of a permanent employee cannot be passed by simply issuing a month's notice under Regulation 9(b) or pay in lieu thereof without recording any reason in the order and without giving any hearing to the employee to controvert the allegation on the basis of which the purported order is made.

203. It will be profitable to refer in this connection the observations of this Court in the case of *Union of India v. Tulsiram Patel* where the constitutionality of provisions of Article 311 particularly the second Proviso to clause (2) of the said article came up for consideration. This Court referred to the findings in *Roshan Lal Tandon v. Union of India* wherein it was held that though the origin of a government service is contractual yet when once appointed to his post or office, the government servant acquires a status and his rights and obligations are no longer determined by the consent of both the parties, but by statute or statutory rules which may be framed and altered unilaterally by the government. In other words, the legal position of a government servant is more one of status than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public

law and not by mere agreement of the parties. It has been observed that Article 14 does not govern or control Article 311. The Constitution must be read as a whole. Article 311(2) embodies the principles of natural justice including audi alteram partem rule. Once the application of clause (2) is expressly excluded by the Constitution itself, there can be no question of making applicable what has been so excluded of seeking recourse to Article 14 of the Constitution."

14. Thus, in our opinion it was not permissible for the government to take recourse to Para 7.06 (3) in the manner in which it has done and in any case, the said rule can hardly be sustained in law.

15. The order dated 3rd April, 2008 is even liable to be quashed on another ground, that it is a non-speaking order also suffering from the vice of non-application of mind. As already discussed, the government has taken an enblock decision, without recording any reason, not to renew the term of any of the government counsel. That itself shows that there is no application of mind. In the case of *Kumari Shrilekha* (supra), this Court expressed the opinion that it would be alien to the Constitutional Scheme to accept the argument of exclusion of Article 14 in contractual matters. The arbitrary act of the State cannot be excluded from the ambit of judicial review merely on the ground that it is a contractual matter. The expression 'At any time without assigning any cause', can be divided into two portions, one "at any time", which merely means the termination may be made even during the subsistence of the term of appointment and second, "without assigning any cause" which means without communicating any cause to the appointee whose appointment is terminated. However, "without assigning any cause" is not to be equated with "without existence of any cause".

16. Further, this Court in the case of *Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing v. Shukla and Brothers* [(2010) 4 SCC 785],

impressed upon the need for recording of appropriate reasons in orders and held as under:-

> "11. The Supreme Court in *S.N. Mukherjee v. Union of India* while referring to the practice adopted and insistence placed by the courts in United States, emphasised the importance of recording of reasons for decisions by the administrative authorities and tribunals. It said "administrative process will best be vindicated by clarity in its exercise". To enable the courts to exercise the power of review in consonance with settled principles, the authorities are advised of the considerations underlining the action under review. This Court with approval stated: (SCC p. 602, para 11)
>
> > '11. … 'the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained'.'
>
> 12. In exercise of the power of judicial review, the concept of reasoned orders/actions has been enforced equally by the foreign courts as by the courts in India. The administrative authority and tribunals are obliged to give reasons, absence whereof could render the order liable to judicial chastisement. Thus, it will not be far from an absolute principle of law that the courts should record reasons for their conclusions to enable the appellate or higher courts to exercise their jurisdiction appropriately and in accordance with law. It is the reasoning alone, that can enable a higher or an appellate court to appreciate the controversy in issue in its correct perspective and to hold whether the reasoning recorded by the court whose order is impugned, is sustainable in law and whether it has adopted the correct legal approach. To subserve the purpose of justice delivery system, therefore, it is essential that the courts should record reasons for their conclusions, whether disposing of the case at admission stage or after regular hearing."

17. The order dated 3rd April, 2008, which we have reproduced above, clearly shows non-application of mind and non-recording of reasons, which leads only to one conclusion, that the said order was an arbitrary exercise of power by the State. We cannot find any fault with the reasoning of the High Court in that behalf. But we do find some merit in the contention raised on behalf of the appellant State that the High Court should not have directed appointments while regulating the age, as has been done by the High Court in operative part of its judgment. There is right of consideration, but none can claim right to appointment. Para 7.06 states that renewal beyond 60 years shall depend upon continuous good work, sound integrity and physical fitness of the counsel. These are the considerations which have been weighed by the competent authority in the State Government to examine whether renewal/extension beyond 60 years should be granted or not. That does not ipso facto means that there is a right to appointment upto the age of 60 years irrespective of work, conduct and integrity of the counsel. The rule provides due safeguards as it calls for the report of the District Judge and the District Officer granting renewal.

18. Thus, for the above-recorded reasons, while declining to interfere in the judgment of the High Court, we direct that the government shall consider cases of the respondents in these petitions for renewal in accordance with the procedure prescribed and criteria laid down under Paras 7.06 to 7.08 of the LR Manual. The consideration shall be completed as expeditiously as possible and, in any case, not later than three months from today.

19. Subject to the above observations, all the appeals are dismissed without any order as to costs.

R.P. Appeals dismissed.