ISHWARDAS ROHANI
v.
ALOK MISHRA & ORS.
(Civil Appeal No. 4189 of 2012)

MAY 3, 2012

[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]

Election Laws - Election Petition - Pleadings - Allegation in election petition that appellant (the returned candidate) had indulged in corrupt practices falling u/s.123 of the 1951 Act - Appellant filed application challenging the election petition as being defective on various grounds viz. improper cause of action, vague allegations and non-disclosure of material facts and particulars, and thus liable to be rejected - High Court passed directions permitting respondent no.1-election petitioner to cure deficiencies in the election petition and to suitably amend the pleadings alongwith proper verification and affidavit - Directions challenged before Supreme Court - Held [per Kabir, J.] High Court did not commit any error in directing the Election Petitioner to cure defects in the Election Petition - Though the provisions of the 1951 Act have to be strictly construed, but that does not mean that any defect in the Election Petition cannot be allowed to be cured in the public interest - If after an opportunity is given, still no steps are taken by the Election Petitioner to cure the defects which are noticed, then the rigours of the procedure indicated by the 1951 Act, would come into effect with full vigour - Held [per Chelameswar, J. (dissenting)], an election petition is required to contain all the material facts sufficient to constitute the cause of action for setting aside the election of the returned candidate - Though failure to give 'material particulars' has not been held to be fatal, the failure to give 'material facts' has always been held to be fatal to the election petition - Election petition on hand did not state material facts constituting the various corrupt practices mentioned in the election petition -

It was incapable of being read as disclosing any cause of action on the basis of any known cannon of interpretation of documents - Election petition thus not maintainable and liable to be dismissed - In view of difference of opinion, matter referred to larger Bench -Representation of the People Act, 1951 - s.123(1)(A) and (B), (2), (6) and (7).

Respondent no.1 filed Election Petition challenging the election of appellant- the returned candidate, on the ground of corrupt practice, as contemplated in Sub-Sections (1)(A) and (B), (2), (6) and (7) of Section 123 of the Representation of the People Act, 1951. In the pending Election Petition, the appellant filed an I.A. under Order VII Rule 11 read with Order VI Rule 16 of CPC, praying that the Election Petition filed by Respondent No.1 be rejected on ground of various deficiencies such as improper cause of action, vague allegations and non-disclosure of material facts and particulars. The High Court held that although the allegations of corrupt practice had not been properly drafted, the Election petition could not be rejected on the said ground and directed Respondent no.1 to cure defects in the election petition- in light of the objections raised, and amend the pleadings suitably. The High Court further directed that after amending the pleadings, respondent no.1 would also verify the same by furnishing an affidavit under Order VI, Rule 15(4) CPC and further verify the pleadings relating to the corrupt practice by filing a proper affidavit in the prescribed Form No.25, as prescribed under Rule 94-A and appended to the Conduct of the Election Rules, 1961. The directions given by the High Court was challenged in the instant appeal.

HELD:

Per Kabir, J.

1.1. One line of decisions rendered by this Court

suggests that since an Election Petition has serious consequences under Section 8A of the Representation of the People Act, 1951, the provisions of the Act have to be strictly construed and, particularly, in cases where corruption is alleged, any omission in the pleadings to mention such corrupt practice would render the Election Petition not maintainable. On the other hand, another line of decisions suggests that since the issue involved in an Election Petition alleging corrupt practice, is of great public interest, an Election Petition should not be rejected at the threshold, but an opportunity should be given to the Election Petitioner to cure the defects which are curable. It was contended by the counsel for the appellant that in absence of a cause of action or incomplete cause of action for the Election Petition on account of the verification thereto not being in conformity with the provisions of Order VI Rule 15 of the C.P.C. the Election Petition was liable to be dismissed. Such contention is not acceptable in the light of the decisions in Sardar Harcharan Singh Brar's case and also in F.A. Sapa's case, despite the fact that in F.A. Sapa's case it was indicated that if the affidavit of schedule or annexure forms an integral part of the Election Petition itself, strict compliance would be insisted upon. [Para 21] [303-F-H; 304-A-C]

1.2. In F.A. Sapa's case, it had been indicated that a charge of corrupt practice has a two dimensional effect, namely, its impact on the returned candidate has to be viewed from the point of view of the candidate's future political and public life and from the point of view of the electorate to ensure the purity of the election process. Accordingly, there has to be a balance in which the provisions of Section 81(3) of the 1951 Act are duly complied with to safeguard the interest, both of the individual candidate, as well as of the public. In this case, while accepting the case made out by the appellant

regarding the deficiencies in the Election Petition, the High Court did not commit any error in directing the Election Petitioner to cure the defects in the Election Petition, which had been brought out during the hearing of the Election Petition. Though the provisions have to be strictly construed, but that does not mean that any defect in the Election Petition cannot be allowed to be cured in the public interest. If after an opportunity is given, still no steps are taken by the Election Petitioner to cure the defects which are noticed, then the rigours of the procedure indicated by the 1951 Act, come into effect with full vigour. [Paras 22, 23] [304-D-F, H; 305-A-B]

1.3. There is no reason to interfere with the impugned order of the High Court and the appeal is, accordingly, dismissed. [Para 24] [305-B-C]

Sardar Harcharan Singh Brar v. Sukh Darshan Singh **[AIR 2005 SC 22] and** *F.A. Sapa & Ors. v. Singora & Ors.* **[(1991) 3 SCC 375] - relied on.**

Surinder Singh v. Hardial Singh **[(1985) 1 SCC 91];** *Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi* **[(1987) Supp. SCC 93];** *Anil Vasudev Salgaonkar v. Naresh Kushali Shigaonkar* **[(2009) 9 SCC 310];** *R.P. Moidutty v. P.T. Kunju Mohammad* **[(2000) 1 SCC 481];** *V. Narayanaswamy v. C.P. Thirunavukkarasu* **[(2000) 2 SCC 294] and** *Raj Narain v. Smt. Indira Nehru Gandhi* **[(1972) 3 SCC 850] - referred to.**

Per Chelameswar, J. (dissenting)

1.1. The election petition is not only a bad piece of drafting, but also it is difficult to state with precision as to what exactly is the substance of the complaint in the election petition. The absurdity of the election petition can only be understood by reading it, but cannot be explained. Respondent No.1 invited an adjudication that

corrupt practices falling under Section 123(2), (6), (7) and 123(A) and (B) of the R.P. Act, have been committed. There are no Sections numbered 123(A), (B) in the R.P.Act, 1951. The High Court, however, generously construed such reference to Sections 123(A) and (B) occurring in the election petition as references to Section 123(1)(A) and (B). [Paras 4, 5] [307-H; 308-A, F]

1.2. Section 100 of the R.P. Act, 1951, provides the grounds on which an election could be declared void. The election of a returned candidate can be declared void, if the High Court is satisfied; a) that any corrupt practice has been committed either by the returned candidate or his election agent or any other person with the consent of either the candidate or his election agent; and b) that any corrupt practice has been committed by any agent other than the election agent. In the case of the satisfaction of the High Court of the 1st of the abovementioned two contingencies, the High Court can straightaway declare the election of the returned candidate to be void. Whereas in the 2nd of the abovementioned contingencies, the High Court must also be satisfied that such commission of the corrupt practice has materially affected the result of the election because the corrupt practices falling under the later category are committed without the consent of the returned candidate or his election agent. [Para 8] [310-C-D, E; 311-C-E]

1.3. In the instant case, the returned candidate filed his nomination on 03-11-2008. To be guilty of committing a corrupt practice, the returned candidate or his election agent or some other person duly authorised either by the returned candidate or his election agent must have committed some act or omission contemplated under one of the clauses under Section 123 of the R.P. Act, after 03-11-2008, but before completion of the election process. Para 1 of the election petition narrates the incidents that

are alleged to have occurred from 30-10-2008 to 02-11-2008. The returned candidate cannot be legally accused to be guilty of any activity falling within the scope of any one of the corrupt practices enumerated under the sections of the R.P. Act, 1951, as, on 02-11-2008, the returned candidate had not yet filed his nomination. The allegations found in para 3 of the election petition are too omnibus. The alleged irregularities in the preparation of the voters list can never be the subject matter of an election petition. The objection regarding employment of Electronic Voting Machines are vague with which the returned candidate is no way concerned. The allegations in paras 5 and 6 pertaining to distribution of cash, cheques, clothing material and school bags to children, even if assumed to be true and constituting some corrupt practice, pertain to a period prior to the filing of the nomination, i.e., 03-11-2008, by the returned candidate. Para 7 repeats the allegations contained in para 1 of the election petition while Para 8 contains vague allegations regarding erection of "welcome gates" without the permission of the District Election Officer. [Paras 14, 17, 18, 19, 21, 22] [315-A, B-C; 316-B; 318-C-D-E-F; 319-D-E; 320-A, B-D; 321-D-E]

1.4. If a returned candidate is asked to face trial of an election petition, such as the one, which is the subject matter of the instant matter, it would be an absolute travesty of justice and opposed to all the settled principles of law regarding the election disputes. [Para 24] [322-E]

1.5. An election petition is required to contain all the material facts, which, either if proved or went uncontroverted, would be sufficient to constitute the cause of action for setting aside the election of the returned candidate on one or some of the grounds specified under Section 100 of the R.P. Act. There is an

absolute necessity of mentioning all the material facts in an election petition. Though the failure to give the 'material particulars' has not been held to be fatal, the failure to give 'material facts' has always been held to be fatal to the election petition. [Paras 25, 26] [323-C; 325-B, C-D]

1.6. The election petition on hand hopelessly lacks in stating the material facts constituting the various corrupt practices mentioned in the election petition to enable the declarations sought by the election petitioner. The conclusion recorded by the High Court that "it is true that the allegations suffer from lack of certain material particulars particularly as to the consent of the returned candidate or his election agent" is wholly erroneous in law. Consent by the candidate or his election agent is an essential material fact, which is required to be pleaded and proved when the allegation is that somebody other than the candidate or his election agent committed a corrupt practice. The election petition on hand is incapable of being read as disclosing any cause of action on the basis of any known cannon of interpretation of documents - whether a rule of reasonable construction or any other construction. In view of the above conclusion, there is no need to examine the other submissions regarding the legal fact of the non-filing of an affidavit in Form No.25 and absence of proper verification of the pleadings and annexures. [Para 30] [330-F-H; 331-A-B]

1.7. The returned candidate placed a photocopy of an application seeking the amendment of the election petition pursuant to the directions of the High Court. The same appears to have been presented on 02-05-2011. In view of the fact that the results of the election in question were declared on 08-12-2008, the application was filed beyond the period of limitation prescribed under the R.P. Act, to challenge the election. Since the election petition,

as originally presented, did not contain the necessary material facts to constitute the cause of action to challenge the election of the returned candidate, the abovementioned application filed by the election petitioner, even if it contain the necessary material facts, cannot be allowed as it would amount to permitting the amendment of the election petition beyond the period of limitation. [Para 31] [331-C-G]

1.8. The appeal is allowed and the election petition is dismissed. [Para 32] [331-G]

Kunwar Nripendra Bahadur Singh vs. Jai ram Verma and Others **(1977) 4 SCC 153: 1978 (1) SCR 208;** *Mohan Rawale vs. Damodar Tatyaba* **(1994) 2 SCC 392: 1992 (3) Suppl. SCR 850;** *Rahim Khan vs. Khurshid Ahmed and Others* **(1974) 2 SCC 660: 1975 (1) SCR 643;** *Dhartipakar Madan Lal Agarwal vs. Rajiv Gandhi* **1987 Supp SCC 93;** *Anil Vasudev Salgaonkar vs. Naresh Kushali Shigaonkar* **(2009) 9 SCC 310: 2009 (14) SCR 10;** *Samant N. Balakrishna vs. George Fernandez and Others* **(1969) 3 SCC 238: 1969 (3) SCR 603;** *Sardar Harcharan Singh Brar vs. Sukh Darshan Singh and Others* **(2004) 11 SCC 196: 2004 (5) Suppl. SCR 682 and** *Raj Narain vs. Smt. Indira Nehru Gandhi and Another* **(1972) 3 SCR 841 - referred to.**

Case Law Reference:

In the judgment of Kabir, J.

(1985) 1 SCC 91	**referred to**	**Para 8**
(1987) Supp. SCC 93	**referred to**	**Para 8**
(2009) 9 SCC 310	**referred to**	**Para 9**
(2000) 1 SCC 481	**referred to**	**Para 10**
(2000) 2 SCC 294	**referred to**	**Para 11**
AIR 2005 SC 22	**relied on**	**Para 15**

(1972) 3 SCC 850	**referred to**	**Para 15**
(1991) 3 SCC 375	**relied on**	**Para 19**
In the judgment of Chelameswar, J.		
1978 (1) SCR 208	**referred to**	**Para 13**
1992 (3) Suppl. SCR 850	**referred to**	**Para 15**
1975 (1) SCR 643	**referred to**	**Para 24**
1987 Supp SCC 93	**referred to**	**Para 25**
2009 (14) SCR 10	**referred to**	**Para 25**
1969 (3) SCR 603	**referred to**	**Para 25**
2004 (5) Suppl. SCR 682	**referred to**	**Para 27**
(1972) 3 SCR 841	**referred to**	**Para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4189 of 2012.

From the Judgment & Order dated 05.10.2009 of the High Court of Madhya Pradesh at Jabalpur in Election Petition No. 22 of 2009.

Dr. Rajeev Dhawan, Rakesh K. Khanna, Navin Prakash, Anoop Jain, Ashwani Kumar Dubey, Vishal Panwar, Snehasish Mukherjee, Ali Jethmalani, Sunil Murarka, Sandeep K. Mishra, Asit Kumar Roy for the appearing parties.

The Judgments of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. The Respondent No.1 herein, Shri Alok Mishra, contested the 2008 elections to the Madhya Pradesh State Assembly as a candidate of the Indian National Congress Party from Cantt. Legislative Assembly No.99 Constituency, Jabalpur. He was defeated in the elections by the Appellant herein as a

candidate of the Bharatiya Janata Party. The said Respondent filed Election Petition No.22 of 2009, challenging the election of the Appellant on the ground of corrupt practice, as contemplated in Sub-Sections (1)(A) and (B), (2), (6) and (7) of Section 123 of the Representation of the People Act, 1951, hereinafter referred to as the "1951 Act".

3. The grounds relating to corrupt practice, as alleged by the Respondent No.1 herein, inter alia, were to the following effect :

(i) as an Ex-M.L.A. and Ex-Speaker of the Vidhan Sabha and being a close associate of the Chief Minister of the State, the Appellant was able to exert undue influence on the Collector, the District Returning Officer and other authorities for procuring their assistance for the furtherance of his prospects in the elections;

(ii) that on 2nd November, 2008, when the Respondent No.1 was returning to Jabalpur from New Delhi, as the authorized candidate of the Indian National Congress, his supporters, who came to meet him at the railway station, were arrested, whereas the very next day, no action was taken against the supporters of the Appellant herein who had deployed as many as 300 vehicles in the election rally organised on the occasion of the filing of his nomination, although, permission had been given for use of only 27 vehicles. The Appellant was allowed to erect "welcome gates" at various places and used unauthorized vehicles and also put up flags, hoardings and posters on electric poles and even on temples, despite the objections raised by the Respondent No.1 herein;

(iii) during his election campaign, the Appellant distributed school bags reflecting the name of the Appellant, as also his party flag amongst the

children of the voters and huge amounts of money were also paid through cheques under the garb of financial assistance by Garib Sahayata Samiti. Apart from the above, clothes, sweets, blankets, cheques for amounts of Rs.500/- to the female voters and identity and ration cards, were distributed amongst the voters by the supporters of the Appellant, but no action was taken either against the Appellant or his agent for resorting to such corrupt practice. Accordingly, in the election petition the Respondent No.1, inter alia, prayed for a declaration that the election of the Appellant herein, Ishwardas Rohani, be declared as void and he be declared as the returned candidate.

4. In the pending Election Petition No.22 of 2009, an Application, being I.A.No.58 of 2009, was filed on behalf of the Appellant herein, under Order VII Rule 11 read with Order VI Rule 16 of the Code of Civil Procedure, hereinafter referred to as "C.P.C.", praying that the Election Petition filed by the Respondent No.1 be rejected, inter alia, on the ground that except for making vague allegations of corrupt practice, the Respondent No.1 (Election Petitioner) had failed to disclose material facts and particulars in respect thereof. Another ground of challenge was that the Respondent No.1 had failed to comply with the provisions of Section 81(3)(a) and (b), which are mandatory and in the absence whereof no cause of action could be said to have been available to the Election Petitioner to seek any relief thereunder.

5. I.A.No.58 of 2009, which was filed by the Appellant under Order VII Rule 11 read with Order VI Rule 16 C.P.C. for rejection of the Election Petition or for a direction to set out pleadings specified thereunder, was taken up for hearing by the Madhya Pradesh High Court on 16th July, 2009. After considering the facts involved in the Election Petition, as also in the Application filed under Order VII Rule 11 read with Order VI Rule 16 of the C.P.C., the High Court was of the view that

although, the allegations of corrupt practice had not been properly drafted, the Election Petition could not be rejected on the said ground. As far as the Application under Order VI Rule 16 C.P.C. is concerned, the High Court observed that non-revision of the voters list is not a ground set out in Section 100 of the 1951 Act for declaring an election to be void. The High Court also observed that violation of the Model Code of Conduct cannot also be treated as a ground for declaring an election to be void. On the said understanding of the law, the High Court allowed the Appellant's I.A.No.58 in part and directed the Appellant to :

(i) delete the pleadings relating to voters' list and Model Code of Conduct;

(ii) move an appropriate application for amending the pleadings in the light of the objections raised by the Respondent No.1 and the defects as pointed out in paragraph 2, subject to the limits circumscribed by law. The High Court also added that after amending the pleadings suitably, the Appellant would also verify the same by furnishing an affidavit under Order VI Rule 15(4) C.P.C. and further verify the pleadings relating to corrupt practice by filing a proper affidavit in the prescribed Form No.25, as prescribed under Rule 94-A and appended to the Conduct of the Election Rules, 1961.

6. Aggrieved by the directions given by the High Court in I.A. No.58, directing the Respondent No.1 herein to delete the pleadings relating to the voters' list and the Model Code of Conduct and to move an appropriate application for amending the pleadings in the light of the objections raised by the Appellant herein, the said Appellant has filed the Special Leave to Appeal challenging the said directions dated 5th October, 2009, in Election Petition No.22 of 2009.

7. Appearing for the Appellant, Ishwardas Rohani, Dr.

Rajeev Dhawan, learned Senior Advocate, submitted that all the allegations relating to corrupt practice were in respect of periods prior to the date of the notification of the elections, namely, 29th October, 2008, when the Election Petitioner, Shri Alok Mishra, was not yet a candidate, nor was the Appellant herein. Dr. Dhawan pointed out that the elections were notified for the Jabalpur Cantt. Legislative Assembly Constituency No.99 on 29th October, 2008. On 3rd November, 2008, the Election Petitioner, Mr. Alok Mishra, filed his nomination papers and the polling was held on 27th November, 2008. The results of the election were thereafter announced on 8th December, 2008, in which the Appellant was declared to have been elected. Dr. Dhawan termed the period between 29th October, 2008, when the elections were notified, till 8th December, 2008, when the results were declared, as the "active" period, when the conduct of the elected member could be faulted. Dr. Dhawan submitted that the Election Petition had been filed by the Respondent No.1 herein within the period of 45 days, as specified under Section 81 of the 1951 Act. However, the directions given by the High Court to amend the Election Petition were not permissible in law as such amendment would be beyond the period of limitation, as prescribed. Following such directions of the High Court, the Election Petitioner filed an Application under Order VI Rule 17 CPC praying for various amendments for providing material facts.

8. Dr. Dhawan urged that given the consequences of disqualification, allegations of corrupt practice would have to be strictly construed, as was held in the case of *Surinder Singh Vs. Hardial Singh* [(1985) 1 SCC 91], wherein it was, inter alia, observed that for more than 20 years the position had been uniformly accepted that charges of corrupt practice have to be equated with criminal charges and the proof thereof would not be preponderance of probabilities as in civil matters, but proof beyond reasonable doubt as in criminal trials. Reference was also made to the decision in *Dhartipakar Madan Lal Agarwal*

Vs. Rajiv Gandhi [(1987) Supp. SCC 93], wherein it was observed as follows :-

> "Allegations of corrupt practice are in the nature of criminal charges, it is necessary that there should be no vagueness in the allegations so that the returned candidate may know the case he has to meet. If the allegations are vague and general and the particulars of corrupt practice are not stated in the pleadings, the trial of the election petition cannot proceed for want of cause of action. The emphasis of law is to avoid a fishing and roving inquiry. It is therefore necessary for the Court to scrutinise the pleadings relating to corrupt practice in a strict manner."

In this regard, Dr. Dhawan referred to the provisions of Section 8A of the 1951 Act, which sets out the harsh consequences of having been found guilty of corrupt practice by an order under Section 99 of the 1951 Act.

9. Submissions were also advanced by Dr. Dhawan in regard to the distinction between "material facts" and "material particulars", which does not appear to me to be very material for a decision in this case. What is necessary is that the material facts must disclose the plaintiff's cause of action or may be the source for the defence of the defendant. What is relevant is that the facts as set out in the Election Petition must not be vague and must be such as to enable the Respondent to deal with and give a proper response. Dr. Dhawan contended that as has been held by this Court in *Anil Vasudev Salgaonkar Vs. Naresh Kushali Shigaonkar* [(2009) 9 SCC 310], the failure to state even a single material fact will entail dismissal of the Election Petition. Furthermore, it is also essential that any action which is attributed to an elected candidate and goes to constitute an allegation of corrupt practice, must be shown to have been done with the consent of the candidate, which, as was observed in *Surinder Singh's* case (supra), is a lifeline to link up the candidate with the action of the other person which may amount to corrupt practice.

10. Turning to another branch of his submissions, Dr. Dhawan submitted that where corrupt practices are alleged, details supporting such allegations have to be pleaded. Referring to the decision of this Court in *R.P. Moidutty Vs. P.T. Kunju Mohammad* [(2000) 1 SCC 481], Dr. Dhawan referred to paragraph 14 of the judgment, wherein it has been observed as follows :-

> "The legislature has taken extra care to make special provision for pleadings in an election petition alleging corrupt practice. Under Section 83 of the Act ordinarily it would suffice if the election petition contains a concise statement of the material facts relied on by the petitioner, but in the case of corrupt practice the election petition must set forth full particulars thereof including as full a statement as possible of (i) the names of the parties alleged to have committed such corrupt practice, (ii) the date, and (iii) place of the commission of each such practice. An election petition is required to be signed and verified in the same manner as is laid down in the Code of Civil Procedure, 1908 for the verification of pleadings. However, if the petition alleges any corrupt practice then the petition has additionally to be accompanied by an affidavit in Form 25 prescribed by Rule 94-A of the Conduct of Elections Rules, 1961 in support of the allegations of such corrupt practice and the particulars thereof. Thus, an election petition alleging commission of corrupt practice has to satisfy some additional requirements, mandatory in nature, in the matter of raising of the pleadings and verifying the averments at the stage of filing of the election petition and then in the matter of discharging the onus of proof at the stage of the trial."

11. In fact, in this regard, Dr. Dhawan also referred to Section 83(1)(b) of the 1951 Act, which indicates that full particulars of any corrupt practice that the Petitioner alleges and other details regarding such corrupt practice has to be set forth

in the Election Petition and the verification must disclose the exact source of the information. Reference was also made to the decision in *V. Narayanaswamy Vs. C.P. Thirunavukkarasu* [(2000) 2 SCC 294], where similar sentiments have been expressed.

12. Dr. Dhawan urged that having regard to the above, the Election Petition filed by the Respondent No.1 should have been dismissed by the High Court, without giving an opportunity to the Election Petitioner to rectify some of the defects, outside the period of limitation, as prescribed under Section 81 of the 1951 Act.

13. Dr. Dhawan, learned senior counsel, contended that all the alleged instances referred to in the Election Petition regarding alleged corrupt practice on the part of the Appellant were outside the "active period" when the Respondent No.1 was not even a candidate and consequently the same could not be taken into consideration for the determination of the Election Petition in view of Section 81 of the 1951 Act, which stipulates that such a Petition may be presented 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.

14. Replying to Dr. Dhawan's submissions, Mr. Rakesh Khanna, learned Senior Advocate, appearing for the Respondent No.1, pointed out that the allegations relating to corrupt practice made against the Appellant, are contained in paragraph 10 of the Election Petition and despite the observations made by the High Court, the same conveyed the manner in which financial allurements and the distribution of gifts were made, as also the issuance of cheques by the Appellant from the Indus Ind Bank near Shastri Bridge, 124, Napier Town, Jabalpur. Mr. Khanna contended that although Dr. Dhawan had referred to the issuance of cheques as being a fishing expedition, but, in fact, the details relating to the cheques are in the custody of the Indus Ind Bank and are easily available. Mr. Khanna submitted that the details of the cheque books and

the cheque numbers have also been provided in paragraph 9 of the Election Petition which disclosed the strategy adopted by the Appellant for garnering votes in the election.

15. Referring to the decision of this Court in *Sardar Harcharan Singh Brar Vs. Sukh Darshan Singh* [AIR 2005 SC 22], which also involved the provisions of Section 83 of the 1951 Act, Mr. Khanna pointed out that even if all the bundles of information which constitute the cause of action for the Petition were not available in the Election Petition, the same could not be dismissed at the threshold. Mr. Khanna submitted that in *Sardar Harcharan Singh Brar's* case (supra), this Court had occasion to consider the observations made in the decision in the case of *Raj Narain Vs. Smt. Indira Nehru Gandhi* [(1972) 3 SCC 850], which, inter alia, laid down that while a corrupt practice has to be strictly proved, it does not follow that a pleading in the election petition should receive a strict consideration. The charge of corrupt practice in an election petition is a very serious charge and has to be proved. It may or may not be proved. The allegations may be ultimately proved or not proved. But the question for the Courts is whether a petitioner should be refused an opportunity to prove his allegations merely because the petition was drafted clumsily.

16. Mr. Khanna submitted that it was in such context that it was observed that opportunity to prove should not be refused and the Court should be reluctant to stay an action on technical grounds. In the said case it was further recorded that "material facts" as referred to in Section 83 of the 1951 Act show that the grounds of corrupt practice and the facts necessary to formulate a complete cause of action, must be stated, but the Election Petition is not liable to be dismissed in limine because full particulars of the corrupt practices alleged were not set out. If an objection was taken and the Tribunal was of the view that full particulars had not been set out, the Petitioner had to be given an opportunity to amend or amplify the particulars. It is only in the event of non-compliance with such order to supply

the particulars, that the charge, which remained vague, could be struck down. Mr. Khanna pointed out that a note of caution had been sounded to the effect that rules of pleadings are intended as aids for a fair trial and for reaching a just decision. An action at law should not be equated with a game of chess. Provisions of law are not mere formulae to be observed as rituals. Beneath the words of a provision of law, generally speaking, there lies a juristic principle. It is the duty of the Court to ascertain that principle and implement it.

17. Mr. Khanna submitted that in *Sardar Harcharan Singh Brar's* case (supra), it was pointed out that the views expressed in *Raj Narain's* case (supra) had been subsequently reiterated in various other cases set out in paragraph 11 of the judgment.

18. Drawing a parallel with the facts of this case, Mr. Khanna submitted that the High Court had passed the impugned order in complete consonance with the views expressed in *Sardar Harcharan Singh Brar's* case (supra).

19. Mr. Khanna next referred to the decision of a three Judge Bench of this Court in *F.A. Sapa & Ors. Vs. Singora & Ors.* [(1991) 3 SCC 375], wherein the requirements of furnishing material facts and full particulars, within the meaning of Section 83(1) of the 1951 Act, in order to establish corrupt practice, was considered in detail. After considering the various decisions rendered earlier, including that in *Raj Narain's* case (supra), on the question of verification, Their Lordships held that Clause (c) of Sub-Section (1) of Section 83 of the 1951 Act, provides for an Election Petition to be signed by the petitioner and verified in the manner laid down by the Code of Civil Procedure for the verification of the pleadings. It was noted that under Section 83(2) any schedule or annexure to the pleading must be similarly verified. Referring to Order VI Rule 15 of the Code, Their Lordships took note of Sub-Rule (2) which provides that the person verifying has to specify with reference to the numbered paragraphs of the pleading, what he verifies on his own knowledge and what he verifies upon information received

and believed to be true. The verification has to be signed by the person making it and must state the date on and the place at which it was signed. However, Their Lordships also went on to say that the defect in the verification could be of a formal nature and not very substantial, or one which substantially complies with the requirements, or that which is material but capable of being cured. Mr. Khanna submitted that the bottom line of the aforesaid decision was that any defect in the verification was not fatal to the entertainment of the Election Petition at the threshold and as indicated in *Sardar Harcharan Singh Brar's* case (supra), an opportunity ought to be given to the Election Petitioner to cure such defect.

20. Mr. Khanna submitted that the submissions advanced by Dr. Dhawan in, relation to the order passed by the High Court, were contrary to the decisions rendered by this Court in *Sardar Harcharan Singh Brar's* case (supra) and also in *F.A. Sapa's* case (supra), and all that the Court had directed was in keeping with the spirit of the said decisions which contemplated that an Election Petition, where corruption had been alleged, should not be thrown out on a purely technical ground, such as defect in verification of the pleadings, and without giving an opportunity to the Election Petitioner to cure such defect.

21. From the decisions cited by learned counsel for the respective parties, one line of decisions rendered by this Court suggests that since an Election Petition has serious consequences under Section 8A of the 1951 Act, the provisions of the Act have to be strictly construed and, particularly, in cases where corruption is alleged, any omission in the pleadings to mention such corrupt practice would render the Election Petition not maintainable. On the other hand, as indicated immediately hereinbefore, the other line of decisions suggests that since the issue involved in an Election Petition alleging corrupt practice, was of great public interest, an Election Petition should not be rejected at the threshold, but an

opportunity should be given to the Election Petitioner to cure the defects which are curable. In the instant case, what has been contended by Dr. Dhawan is that in the absence of a cause of action or incomplete cause of action for the Election Petition on account of the verification thereto not being in conformity with the provisions of Order VI Rule 15 of the C.P.C. the Election Petition was liable to be dismissed. Such submission is not acceptable to me in the light of the decisions in *Sardar Harcharan Singh Brar's* case (supra) and also in *F.A. Sapa's* case (supra), despite the fact that in F.A. Sapa's case it was indicated that if the affidavit of schedule or annexure forms an integral part of the Election Petition itself, strict compliance would be insisted upon.

22. I am inclined to agree with the trend of thinking in F.A. Sapa's case, where it had been indicated that a charge of corrupt practice has a two dimensional effect, namely, its impact on the returned candidate has to be viewed from the point of view of the candidate's future political and public life and from the point of view of the electorate to ensure the purity of the election process. Accordingly, there has to be a balance in which the provisions of Section 81(3) of the 1951 Act are duly complied with to safeguard the interest, both of the individual candidate, as well as of the public. In this case, while accepting the case made out by the Appellant regarding the deficiencies in the Election Petition, the Division Bench of the High Court, in my view, did not commit any error in directing the Election Petitioner to cure the defects in the Election Petition, which had been brought out during the hearing of the Election Petition.

23. The decisions cited on both sides, lay down the law in regard to Election Petitions and how Election Petitions are to be presented and the procedure to be strictly followed in filing such Election Petitions, in which corruption, in particular, is the allegation made against the returned candidate. There is little doubt that the provisions have to be strictly construed, but that

does not mean that any defect in the Election Petition cannot be allowed to be cured in the public interest. If after an opportunity is given, still no steps are taken by the Election Petitioner to cure the defects which are noticed, then the rigours of the procedure indicated by the 1951 Act, come into effect with full vigour.

24. I, therefore, see no reason to interfere with the order of the High Court appealed against and the appeal is, accordingly, dismissed.

25. There will, however, be no order as to costs.

CHELAMESWAR, J. 1. Both the petitioner (herein after referred to as 'the returned candidate') and the 1st respondent (herein after referred to as 'the election petitioner') contested the General Election to the Legislative Assembly of the State of Madhya Pradesh from the Jabalpur Cantonment Constituency. The returned candidate was the candidate of the Bharatiya Janata Party. The election petitioner was the candidate of the Indian National Congress, who lost the election with a margin of 24731 votes to the returned candidate. The election petitioner questioned the validity of the election of the returned candidate by Election Petition No.22 of 2009 on the file of the High Court of Madhya Pradesh. In the said petition, the election petitioner not only sought a declaration that the election of the petitioner is void, but also sought a further declaration that;

> "the petitioner No.1 as Return candidate and directed to be unseated Respondent No.1."
>
> It is further prayed:
>
> "The Hon'ble High Court further kindly be directed the Respondent to declare the petitioner as Elected candidate."

Certain other reliefs are also prayed for in the election petition,

the details of which are not necessary for our purpose. The said election petition was filed on 20-01-2009, admittedly, within the period of limitation prescribed for the said purpose. On 16-06-2009, I.A.No.58 of 2009 was filed by the petitioner herein (returned candidate) under Order 7 Rule 11 of the Code of Civil Procedure, seeking the dismissal of the election petition on the following grounds:

> (a) The allegations of corrupt practice lacks material facts and particulars, inasmuch as it is not disclosed on what date and time the alleged corrupt practice had been committed;
>
> (b) The mandatory affidavit in Form 25 of the Conduct of Election Rules does not fulfil the mandatory contents as required in law;
>
> (c) Election Petitioner has not filed affidavit as required under the provisions of CPC;
>
> (d) The copy of the petition supplied by the Respondent No.1 to the Petitioner is not identical to the copy of the petition filed and the documents annexed to the election petition have not duly been verified by the Respondent No.1;
>
> (e) The averments contained in a number of paragraphs are frivolous in nature and does not disclose any cause of action against the Petitioner herein."

2. The abovementioned IA was partly allowed by the impugned Judgment on 05-10-2009. The operative portion of the Judgment is as follows:

> "Consequently, the I.A. is allowed in part. In the result, the petitioner is directed to -
>
> (i) delete the pleadings relating to voter list and Model Code of Conduct.

(ii) move an appropriate application for amending the pleadings in the light of the objections raised by the respondent no.1 and the defects as pointed out in Para 2 (above) subject to the limits circumscribed by law."

Hence, the present S.L.P.

3. Before I proceed to examine the correctness of the conclusion reached by the High Court, I deem it necessary to extract para 2 of the Judgment under appeal in toto:

"2. At the outset, it may be remarked that the election petition is not a good piece of drafting. A bare perusal thereof would reveal that not a single paragraph is free from grammatical and typographical errors and omissions. Even provisions of law have not been correctly referred to. For example : sub-section (1)(A) and (B) have been mentioned as sub-section (A) and (B) Section 123. This apart, there is apparent conflict between contents of some of the annexures and the corresponding pleadings. Moreover, some averments are mere mechanical repetitions of the facts already pleaded [See Para 2 (wrongly numbered as 1), 3A and 7]. Further, the petitioner has used certain uncommon words such as Cambal, Chadar & Floor-Sari. It appears that the petitioner is labouring under a misconception that an election petition must be drawn up in English language whereas it is well settled that in Madhya Pradesh, an election petition drafted in Hindi language would be maintainable (*Vijay Laxmi Sadho v. Jagdish* AIR 2001 SC 600 referred to). Although, these defects would not provide any reasonable ground for rejection of the petition in limine yet, the negligent and indifferent manner in which the petition has been drafted and filed without even reading it, deserves to be deprecated."

4. In my view, the election petition is not only a bad piece of drafting, but also it is difficult to state with precision as to

what exactly is the substance of the complaint in the election petition. The absurdity of the election petition can only be understood by reading it, but cannot be explained. There are vague allegations that the returned candidate committed corrupt practices falling under Sections 123 (A) and (B), 123 (2), (6) and (7) of the Representation of the People Act, 1951 (henceforth referred to as 'the R.P. Act'.). To demonstrate the utter chaos of the pleadings, I extract a passage from the election petition:

"……. Since the Respondent No.1 have wrongly and illegally adopted the corrupt practices by distributing the amount in cash as well as through the Cheque, Article, Cloths, Ornaments, Ornament's Jewellery and other article further he has also command on the Respondent Distt. Election Officer and taken the Assistance from police and other authority, so that it is apparent that respondent No.1 Iswardas Rohani has committed milled corrupt practices, which is same under Section 123A, B, 123(2) and also giving threat and other provision of this act have also been violating therefore, his Election is deserve to be declare void."

5. On the basis of such pleadings, of which the above is only a sample, the respondent invites an adjudication that corrupt practices falling under Section 123(2), (6), (7) and 123(A) and (B) of the R.P. Act, have been committed. There are no Sections numbered 123(A), (B) in the R.P.Act, 1951. The High Court, however, generously construed such reference to Sections 123(A) and (B) occurring under para 13 of the election petition as references to Section 123(1)(A) and (B).

6. The substance of the chaotic pleadings in the election petition is culled out by my learned brother as follows:

"The ground relating to corrupt practice, as alleged by the Respondent No.1 herein, inter alia, was to the following effect :

(i) as an ex-M.L.A. and Ex-Speaker of the Vidhan Sabha and being a close associate of the Chief Minister of the State, the Appellant was able to exert undue influence on the Collector, the District Returning Officer and other authorities for procuring their assistance for the furtherance of his prospects in the elections.;

(ii) that on 2nd November, 2008, when the Respondent No.1 was returning to Jabalpur from New Delhi, as the authorised candidate of the Indian National Congress, his supporters, who came to meet him at the railway station, were arrested, whereas the very next day, no action was taken against the supporters of the Appellant herein who had deployed as many as 300 vehicles in the election rally organised on the occasion of the filing of his nomination, although, permission had been given for use of only 27 vehicles. The Appellant was allowed to erect "welcome gates" at various places and used unauthorised vehicles and also put up flags, hoardings and posters on electric poles and even on temples, despite the objections raised by the Respondent No.1 herein;

(iii) during his election compaign, the Appellant distributed school bags reflecting the name of the Respondent No.1, as also his party flag amongst the children of the voters and huge amounts of money were also paid through cheques under the grab of financial assistance by Garib Sahayata Samiti. Apart from the above, clothes, sweets, blankets, cheques for amounts of Rs.500/- to the female voters and identity and ration cards, were distributed amongst the voters by the supporters of the Appellant, but no action was taken either against the Appellant or his agent for resorting to such corrupt practice. Accordingly, in the election petition the Respondent No.1, inter alia, prayed for a declaration that the election of the Appellant herein, Ishwardas Rohani, be declared as void and he be declared as the returned candidate."

7. For the purpose of deciding the present petition, I shall also presume that the election petitioner intended to complain that various corrupt practices, i.e., bribery falling under Section 123 (1)(A) and (B); unduly influencing the voters, falling under Section 123(2); incurring or authorising expenditure in contravention of Section 77 - corrupt practice under Section 123(6) and procuring the assistance from the employees of the State, falling under Section 123(7), were committed.

8. Before examining the correctness of the Judgment under appeal, a brief survey of the Scheme of the relevant provisions of the R.P. Act, 1951, would be useful. Section 100 provides the grounds on which an election could be declared void. The said Section, insofar as it is relevant for our present purpose, reads as under:

"Subject to the provisions of sub-section (2) if the High Court is of the 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;….

(c) ……..

(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.

(iii)……

(iv)……

The High Court shall declare the election of the returned candidate to be void."

It can be seen from the above that the election of a returned candidate can be declared void, if the High Court is satisfied;

(A) that any corrupt practice has been committed either by the returned candidate or his election agent or any other person with the consent of either the candidate or his election agent;

(B) that any corrupt practice has been committed by any agent other than the election agent.

In the case of the satisfaction of the High Court of the 1st of the abovementioned two contingencies, the High Court can straightaway declare the election of the returned candidate to be void. Whereas in the 2nd of the abovementioned contingencies, the High Court must also be satisfied that such commission of the corrupt practice has materially affected the result of the election because the corrupt practices falling under the later category are committed without the consent of the returned candidate or his election agent.

9. The meaning of the expressions "candidate", "election agent" and "agent other than the election agent" is required to be ascertained. Part VI of the R.P. Act deals with disputes regarding elections. Part VII of the R.P. Act deals with corrupt practices and electoral offences. Section 79, with which part VI commences, contains the definitions of various expressions employed in Part VI and Part VII of the R.P. Act. Section 79, insofar as it is relevant for the present purpose, reads as follows:

"In this Part and in Part VII unless the context otherwise requires,-

(a)……

(b) "candidate" means a person who has been or claims to have been duly nominated as a candidate at any election;"

The expression *"election agent"* is not defined therein. But, Section 40 provides for the appointment of *"election agent"*. It stipulates that a candidate at an election can appoint any person, who is not subject to any disqualification stated in Section 41[1], to be his election agent[2]. Therefore, the expression *"election agent"* occurring under Section 100 must be understood to be only an election agent appointed by the candidate under Section 40. The meaning of the phrase *"agent other than the election agent"* requires an examination. Sections 46 and 47 of the Act, provide for the appointment of polling agents[3] and counting agents[4], respectively, by the contesting candidates at an election. I am conscious of the fact that the phrase may take within its sweep other persons also,

1. **41. Disqualification for being an election agent.-**Any person who is for the time being disqualifed under the Constitution or under this Act for being a member of either House of Parliament or the House or either House of the Legislature of a State or for voting at elections, shall, so long as the disqualification subsists, also be disqualified for being an election agent at any election.

2. **40. Election Agents.-** A candidate at an election may appoint in the prescribed manner any one person other 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.

3. **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.

4. **47. Appointment of counting agents.-** A contesting candidate or his election agent 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 or agents at the counter of votes, and when any such appointment is made notice of the appointment shall be given in the prescribed manner to the returning officer.

but for the purpose of the present case, it is not necessary to explore the full contours of the phrase.

10. Section 123 of the R.P. Act deals with corrupt practices. It declares 10 activities to be corrupt practices. They are; (i) bribery; (ii) undue influence; (iii) appeal in the name of religion; (iv) promotion of enmity or hatred between different classes of citizens on grounds of religion, race, caste, community, etc.; (v) propagation or glorification of the practice of sati; (vi) publication of any false statement in relation to the personal character of any candidate, etc. reasonably calculated to prejudice the prospects of that candidate's election; (vii) hiring or procuring vehicles for the free conveyance of any elector to the polling station; (viii) incurring expenditure in contravention of Section 77; (ix) obtaining or procuring any assistance of various categories of persons specified under sub-section (7); and (x) booth capturing.

It must be mentioned that each one of the sub-sections of Section 123, deals with a distinct corrupt practice, which contemplates commission or omission of an act or acts indicated therein either by the candidate or his agent or any other person with the consent of either the candidate or his election agent. The only sub-section, which does not refer to the election agent or any other person is sub-section (6), i.e., the corrupt practice of incurring or authorising the expenditure in contravention of Section 77.

11. It is argued by the learned senior counsel Dr. Rajeev Dhawan appearing for the returned candidate that the allegations of corrupt practice contained in the election petition fall into two categories; (1) corrupt practices attributed to the returned candidate; and (2) corrupt practices attributed to other persons. The learned counsel argued that the returned candidate cannot be subjected to the pain of going through the trial of the election petition on these allegations for the following reasons:

(i) the allegations of commission of corrupt practices either pertain to the period anterior to 03-11-2008; or, (ii) lack in material facts to constitute any corrupt practice satisfying the description of any one of the corrupt practices enumerated under Section 123.

12. Coming to the allegations of corrupt practice said to have been committed by certain named and unnamed persons in the election petition the learned counsel argued that, once again, the allegations are vague, without any reference to the dates on which such acts were committed and do not disclose any cause of action. Further, there is no allegation in the election petition that such named persons, who are alleged to have committed certain corrupt practices, did so with the consent of either the returned candidate or his election agent. Interestingly, the election petition does not even contain any specific allegation against the election agent of the returned candidate. Even the name of the election agent is not mentioned.

13. On the other hand, the learned counsel for the election petitioner submitted that the election petition contained all the material facts required to be pleaded for establishing the commission of corrupt practices. Such pleadings are required to be scrutinized liberally in the larger interests of the purity of election system as was done by the High Court. The learned counsel also submitted that in view of the fact that what is at stake is the purity of the election system, the High Court rightly directed the election petitioner to move an appropriate application for the amendment of the pleadings. I am only reminded of a caution given by this Court in *Kunwar Nripendra Bahadur Singh vs. Jai ram Verma and others,* (1977) 4 SCC 153:

> "21. ....., the provisions of the election law which have got to be construed strictly, must work with indifference to consequences, immediate or mediate....."

14. Admittedly, the returned candidate filed his nomination on 03-11-2008. It is only with effect from that date the petitioner became a candidate for the election in dispute. Goes without saying that an election agent could have been appointed by the returned candidate only after filing his nomination. To be guilty of committing a corrupt practice, the returned candidate or his election agent or some other person duly authorised either by the returned candidate or his election agent must have committed some act or omission contemplated under one of the clauses under Section 123 of the R.P. Act, after the 03-11-2008, but before the completion of the election process.

15. It was so held by this Court in *Mohan Rawale vs. Damodar Tatyaba,* (1994) 2 SCC 392. It was a case where the election of the appellant before this Court was called in question by the respondent therein on the ground that the appellant committed corrupt practices falling under Section 123(2), (3) and (3)(A). The returned candidate raised various preliminary objections regarding the maintainability of the election petition. One of the objections was that the various allegations said to be constituting corrupt practices, pertain to a period long anterior to the date of the nomination of the returned candidate and, therefore, it was argued by the returned candidate that even if these allegations were to be proved, they would not amount to the commission of a corrupt practice by the returned candidate. Such an objection did not find favour with the Bombay High Court. Reversing the conclusion of the Bombay High Court, this Court held at para 6 as follows:

> "……. The view fails to take note of and give effect to the substitution of the definition of the expression "candidate" in Section 79(b). All sub-sections of Section 123 of the Act refer to the acts of a 'candidate' or his election agent or any other person with the consent of the candidate or his election agent. The substituted definition completely excludes the acts by a candidate up to the date he is nominated as a candidate. ……."

16. The allegations in the election petition on hand are required to be examined in the light of the principle of law laid down by this Court.

17. Para 1 of the election petition narrates the incidents that are alleged to have occurred from 30-10-2008 to 02-11-2008 and it reads as follows:

> "That, the context of the situation is that the petitioner was out of City at Jabalpur he was at Delhi for confirmation of his Ticket from Indian National Congress Party, the same was confirmed on 30.10.2008 from his Party on 1.11.2008 the petitioner No.1 was come from Delhi on 2.11.2008, the petitioner come from Delhi to Jabalpur by Mahakohal Express Train, after receiving the information from the petitioner his supporter were reach to the Jabalpur Railway station, where a number of person have received to the petitioner after come-out from the Railway Station there was crowd of the supporter who were reached there by own vehicle or by hire that very day District Returning Officer, Respondent and his observer including the police men and authority an subordinate officer, who have been authorised by the State Election Commission on the instance of Respondent no.1 Speaker of State Legislative Assembly they have wrongly and illegally misused their power and seized the personal vehicle of petitioner supporter and confined to the police station Cantt. And police station Civil Lines with the intention to demoralize and breaking the support with the help of police dispute of that Gathering was not political movement nor any object to moved in the shape of Rally, but all of a sudden it was happen, the Respondent No. 1 winning candidate have declare his Rally for submitting the Election nomination form for this very purpose. The Respondent Nod.1 have arranged as much as 300 Vehicle in that Rally Respondent and his subordinate officer (observer) who ere watching the Gathering and strand of vehicle in the Rally

they have never raised any objection, nor seized any of the vehicle, despite of the permission was obtain for only 27 vehicles for used in the Election, but 10 time's more vehicles were present in the Rally on the date of submitting his nomination form the Respondent his subordinate and police have not acted fairly and Reasonably in the Election of Cantt Constituency and they are working/acting in support of Respondent No.1, who is speaker of State legislative Assembly and having infalance on the Respondent on the Distt. Election Officer including all the Executive Officer, who are working in district Jabalpur including the police Officer, they have exercise the colour of power in favour of Respondent No.1 and against the petitioner, the complaint was made to the Chief Election Commission and State Election Commission, but they have not taken any action against the Respondent No.1."

The gist of this paragraph appears to be (giving some allowance to the bad drafting) that while the returned candidate was permitted to take out a rally with a large number of vehicles without any objection from anybody, the vehicles of the election petitioner's supporters were seized on the 02-11-2008 when they took out a rally from the Jabalpur railway station after the election petitioner's return from Delhi. Assuming all the allegations extracted above to be true and such allegations constitute on 02-11-2008 (I only assume for the limited purpose), the returned candidate had not yet filed his nomination. Even according to the election petitioner the returned candidate filed the nomination on 03-11-2008:

"That on the next day 3.11.2008 the Respondent No.1 had proceeded to fill up the nomination farm / paper. ……."

That apart, from a reading of the above-extracted portion, the allegation appears to be that the vehicles of the election petitioner and his supporters were seized by the State Election Commission and its officers, but not the returned candidate:

"that very day District Returning Officer, Respondent and his observer including the police men and authority an subordinate officer, who have been authorised by the State Election Commission on the instance of Respondent No.1 Speaker of State Legislative Assembly they have wrongly and illegally misused their power and seized the personal vehicle of petitioner supporter and confined to the police station Cantt. And police station Civil Lines with the intention to demoralize and breaking the support with the help of police ……."

Therefore, looked at either way, the returned candidate cannot be legally accused to be guilty of any activity falling within the scope of any one of the corrupt practices enumerated under the sections of the R.P. Act, 1951, as, on 02-11-2008, the returned candidate had not yet filed his nomination.

18. Coming to the allegation that the returned candidate being a Member of the Legislative Assembly and also the Speaker at the relevant point of time, was able to exert undue influence on the Collector, who was the District Returning Officer, and other authorities for procuring their assistance for the furtherance of his prospects in the elections-allegations are too omnibus. Such allegations are to be found in para 3 of the election petition. The vagueness of the pleading is better extracted than explained:

"PROCURING ASSISTANCE FROM GAZETTED OFFICER:

It is respectfully submit that the Bhartiya Jana Party is the Rulling Party in the State and also have its influence to all the Executive Officer, who are serving in the State of Madhya Pradesh. They are directly or indirectly having relation with the Respondent No.1 who is Speaker of State Legislative Assembly and during last five year the Govt. of Bhartiya Janta Party was dealing their power and handling the same with the help of all the Gazetted Officer including

the Collector of the District including the Police Officer Shri Shivraj Singh Chouhan is the Chief Minister of Madhya Pradesh and has got hold over the Administrative Machinery during the Election period they have directly or indirectly supported to the Respondent No.1 who is Speaker of State Assembly the 'lure' work in a Better way than the command to the Administrative Officer and there subordinate to them with the Aid an Assistance of Chief Minister Shivraj Singh Chouhan, the Respondent No.1 having very thick Relationship with the Respondent. So that the District Election Officer, Jabalpur was regularly oblige to the Respondent No.1 by way of supporting the act of Respondent No.1 and objecting the same act by illegal manner, the Respondent have performed several act to oblige the Respondent No.1 the same are as under;"

Further, there are five sub-paras (A) to (E) in para 3. Sub-para (C) deals with some alleged irregularities in the preparation of the voters list, which can never be the subject matter of an election petition and the High Court rightly[5] directed the deletion of those allegations. Sub-para (D) deals with the objection of the petitioner regarding employment of Electronic Voting Machines. These too are the vague allegations with which the

5. see Kunwar Nripendra Bahadur Singh vs. Jai Ram Verma and Others = (1977) 4 SCC 153:

25. Thus in a catena of cases this Court has consistently taken the view that the finality of the electoral roll cannot be challenged in an election even if certain irregularities had taken palce in the preparation of the electoral roll or if subsequent disqualification had taken place and the electoral roll had on that score not been corrected before the last hour of making nominations. After that dead-line the electoral roll of a constituency cannot be interfered with and no one can go behind the entries except for the purpose of considering disqualification under Sectin 16 of the 1950 Act.

26. The electin could be set aside only on the grounds mentiond in Section 100 of the 1951 Act. In this case reliance was palced under Section 100(1)(d)(iii) for invalidating the election on the ground of reception of void votes. We have already shown that the electoral roll containing the particular names of voters was valid and there is, therefore, no question of reception of any vote which was void. There is, thus, no substance in that ground for challenging the election.

returned candidate is no way concerned. Sub-paras (A) and (B), once again, repeat the allegations contained in para 1 of the election petition, i.e., allegations regarding the seizure of the vehicles of the election petitioner and his supporters, etc. Para 4 of the election petition, once again, exclusively deals with the complaint regarding the preparation of the voters list.

19. Paras 5 and 6 contain the allegations of distribution of cash, cheques, clothing material and school bags to the children. The allegations in para 5 pertain to the distribution of "cloths" on 17-10-2008 and cash to 200 persons on 21-10-2008 and a cheque drawn on the IndusInd Bank, Shastribridge, Jabalpur, for an amount of Rs.500/- in favour of Shiv Durga Utsava Sammittee on 08-10-2008. Assuming for the sake of arguments that all the abovementioned allegations are true and constitute some corrupt practice, all these allegations pertain to a period prior to the filing of the nomination, i.e., 03-11-2008, by the returned candidate.

20. Para 6, once again, contains allegations of the returned candidate issuing cheques, the numbers of which are given without disclosing in whose favour such cheques were given, but it is relevant to notice that even according to the election petitioner, such cheques were given some time prior to 30-10-2008, because it is alleged in para 6 that the election petitioner lodged a complaint dated 30-10-2008, marked as Annexure P-12 to the petition, with regard to the issuance of the cheques. Obviously, the cheques must have been issued prior to that date. At the cost of repetition it must be stated that by 30-10-2008, the returned candidate had not filed his nomination:

"That the Respondent No.1 have issued the Cheque to the several other person. Even after notification issued by the Election Commission and prior to the date, he has given the cheque to the several other person from the month of Sept. 2008, Oct. 2008, Nov. 2008 and Dec. 2008 continuously cheque of IndusInd Bank was issued the same was encashed by the person the Cheque No.

mentioned in list submitted the Cheque No.348127 to 348150 and 716616 to 716894 approximately 200 cheque were given to get vote from the Voter the list of the Cheque is filed with the complaint dated 30.10.2008, marked as ANNEXURE P-12 with the petition. The petitioner have also submitted the facts. The Respondent No.1 with the help of their reliable Ward member, Punch and Surpanch through the worker the amount was distributed on 29.10.200, even in the Eve of Depawali. The Respondent No.1 have distributed the amount in the Box of Sweet with Sweet also the petitioner have submitted the Complaint before the Respondent, Distt. Election Officer, but no action was taken by the Distt. Election Officer, Respondent, even they are supporting to the Respondent No.1 this Complaint dated 30.10.2008 is already filed as Annexure P-12, but no action was taken."

21. Para 7, once again, repeats the allegations contained in para 1 of the election petition.

22. Para 8 contains vague allegations regarding the erection of welcome gates. Assuming for the sake of arguments that the so-called "welcome gates" were erected without the permission of the District Election Officer, as alleged by the election petitioner, I simply fail to understand, under what Head of corrupt practice such an activity could be brought.

23. Para 9, once again, contains some vague allegations regarding distribution of clothing material, etc. Just to demonstrate the vagueness of the pleading, I extract the paragraph:

"……., further the Respondent No.1 have alsogiven the number of Article to the Women of the Cantt. Constituency in which he had distributed the Payal, Long, Bichhiya, Clothes, Cambal and other thing the complaint. The Respondent No.1 have also distributed the Cash amount to the several person or Sammittee the petitioner have

made the complaint in time to time before the district Election officer and State Election Commission and Superior Authority, by they have not acted upon nor taken any action against the Respondent No.1 nor made any inquiry on the Complaint submitted by the petitioner and his Party supporter or agent the complaint dated 17.10.2008, 21.10.2008, 23.10.2008, 30.10.2008, 31.10.2008, 13.11.2008 and 14.11.2008. Even the Respondent have distributed the amount by Cheque during the Course of Election from 1.9.2008 to upto December 2008, from two cheque book as Cheque No.716886 of this series and Cheque book No 348130 upto 100 and more cheque from the Series was distributed by the Respondent No.1 in favour of Voter or there benefited person. So in this way the Respondent No.1 have adopted the corrupt practices during the Election or before the notification he was trying to gain Vote from the Voter a any cost."

24. In my opinion, if a returned candidate is asked to face trial of an election petition, such as the one, which is the subject matter of the instant S.L.P., it would be an absolute travesty of justice and opposed to all the settled principles of law regarding the election disputes. It was held in *Rahim Khan vs. Khurshid Ahmed and Others,* (1974) 2 SCC 660, as follows:

"9. ……. An election once held is not be treated in a lighthearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate. An election is a politically sacred public act, not of one person or of one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony

compelling the Court to uphold the corrupt practice alleged against the returned candidate is adduced. Indeed election petitions where corrupt practices are imputed must be regarded as proceedings of a quasi-criminal nature wherein strict proof is necessary. The burden is therefore heavy on him who assails an election which has been concluded."

25. Coming to the pleadings in an election petition, an election petition is required to contain all the material facts, which, either if proved or went uncontraverted, would be sufficient to constitute the cause of action for setting aside the election of the returned candidate on one or some of the grounds specified under Section 100 of the R.P. Act. It is held repeatedly by this Court that allegations of corrupt practice are in the nature of criminal charges. In *Dhartipakar Madan Lal Agarwal vs. Rajiv Gandhi,* 987 Supp SCC 93, this Court examined the nature of the allegations of corrupt practice and the effect of the vagueness of the pleading in an election petition and held as follows at para 108:

"Allegations of corrupt practice are in the nature of criminal charges, it is necessary that there should be no vagueness in the allegations so that the returned candidate may know the case he has to meet. **If the allegations are vague and general and the particulars of corrupt practice are not stated in the pleadings, the trial of the election petition cannot proceed for want of cause of action.** The emphasis of law is to avoid a fishing and roving inquiry. It is therefore necessary for the Court to scrutinise the pleadings relating to corrupt practice in a strict manner."

Emphasis Supplied

Again, in *Anil Vasudev Salgaonkar vs. Naresh Kushali Shigaonkar,* (2009) 9 SCC 310, it was held as follows:

"57. It is settled legal position that all "material facts" must be pleaded by the party in support of the case set up by him within the period of limitation. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. **Failure to state even a single material fact will entail dismissal of the election petition. The election petition must contain a concise statement of "material facts"** on which the petitioner relies."

Emphasis Supplied

The distinction between 'material facts' and 'material particulars' fell for the consideration of this Court repeatedly. In *Samant N. Balakrishna vs. George Fernandez and Others,* (1969) 3 SCC 238, this Court held as follows:

"29. ……. What is the difference between material facts and particulars? The word 'material' shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. ……."

In *Anil Vasudev Salgaonkar* (supra), this Court reiterated the difference between the material facts and particulars:

"58. There is no definition of "material facts" either in the Representation of the People Act, 1951 nor in the Code of Civil Procedure. In a series of judgments, this Court has laid down that all facts necessary to formulate a complete cause of action should be termed as "material facts". All basic and primary facts which must be proved by a party

to establish the existence of cause of action or defence are material facts. "Material facts" in other words mean the entire bundle of facts which would constitute a complete cause of action. ……."

The absolute necessity of mentioning all the material facts in an election petition is reiterated:

"48. …….. It is, however, absolutely essential that all basic and primary facts which must be proved at the trial by the party to establish the existence of a cause of action or defence are material facts and must be stated in the pleading by the party."

26. Though the failure to give the 'material particulars' has not been held to be fatal, the failure to give 'material facts' has always been held to be fatal to the election petition.

27. The Judgment under appeal recorded a finding that the election petition contained all material facts. At para 12 of the Judgment, the learned Judge recorded as follows:

"12. Keeping in view the criteria for distinguishing material facts from material particulars, it can safely be concluded that the election petition contains material facts in respect of other corrupt practices alleged to have been committed by the respondent no.1. It is true that the allegations suffer from lack of certain material particulars particularly as to the consent of the returned candidate or his election agent but, as explained in *Rai Naraian's* case (supra), this Court may allow the deficient particulars to be amended or elaborated."

Emphasis Supplied

And opined that it is permissible to allow amendment of the election petition to enable the election petitioner to supply the particulars. Such a conclusion, according to the High Court, is warranted on the basis of a Judgment of this Court in *Sardar Harcharan Singh Brar vs. Sukh Darshan Singh and Others,*

(2004) 11 SCC 196. It was a case where the appellants before the Court filed election petition challenging the election of the respondent to the Panjab Legislative Assembly. One of the grounds in the said election petition is that the respondent obtained the assistance of a public officer, thereby committing a corrupt practice under Section 123 (7) of the R.P. Act. One of the issues framed was whether the election petition lacked material facts and, therefore, did not disclose any cause of action. The High Court found the said issue against the election petitioner. On appeal, this Court reversed the conclusion of the High Court, holding as follows:

"13. Having gone through the contents of the election petition, we are satisfied that the High Court has not been right in directing the petition to be dismissed at the threshold by forming an opinion that the averments made in the election petition were deficient in material facts. It is not necessary to burden this judgment with reproduction of the several averments made in the election petition. The High Court has already done it. The test laid down in the several authorities referred to hereinabove and in particular in the case of *Raj Narain* (supra) is fully satisfied. The grounds of corrupt practice and the facts necessary to formulate a complete cause of action have been stated."

While arriving at such a conclusion, this Court relied upon *Raj Narain vs. Smt. Indira Nehru Gandhi and Another,* (1972) 3 SCR 841. At para 9, this Court 'summarised' the principles emanating from Raj Narain (supra) as follows:

"9. Some of the principles elaborated in *Raj Narain v. Smt. Indira Nehru Gandhi and Anr.* [1972] 3 SCR 841 , are relevant for our purpose. Dealing with the corrupt practice, the Court held that :

(i) While a corrupt practice has got to be strictly proved, it does not follow that a pleading in an election proceeding should receive a strict construction. Even a defective charge does not vitiate a criminal trial unless it is proved

that the same has prejudiced the accused. If a pleading on a reasonable construction could sustain the action, the court should accept that construction. The courts are reluctant to frustrate an action on technical grounds.

(ii) The charge of corrupt practice in an election petition is a very serious charge and has to be proved. It may or may not be proved. The allegations may be ultimately proved or not proved. But the question for the courts is whether a petitioner should be refused an opportunity to prove those allegations merely because the petition was drafted clumsily. Opportunity to prove should not be refused.

(iii) If the allegations made in an election petition regarding a corrupt practice do not disclose the constituent parts of the corrupt practice alleged, the same will not be allowed to be proved and those allegations cannot be amended after the period of limitation for filing an election petition, but the court may allow particulars of any corrupt practice alleged in the petition to be amended or amplified.

"Material facts" in Section 83 of the Representation of People Act, 1951 shows that the ground of corrupt practice and the facts necessary to formulate a complete cause of action must be stated. The function of the particulars is to present a full picture of the cause of action so as to make the opposite party understand the case he has to meet. Under Section 86(5) of the Representation of People Act if the corrupt practice is alleged in the petition the particulars of such corrupt practice may be amended or amplified.

(iv) An election petition is not liable to be dismissed in limine because full particulars of corrupt practice alleged were not set out. If an objection was taken and the Tribunal was of the view that full particulars have not been set out, the petitioner : has to be given an opportunity to amend or amplify the particulars. It is only in the event of non-compliance with such order to supply the particulars, that

the charge which remained vague could be struck down."

28. Raj Narain and Indira Gandhi contested from Rae Bareilly constituency in the General Election to the Lok Sabha held in March, 1971. Raj Narain lost the election and challenged the election of Indira Gandhi. After the issues were framed in the election petition, an application was filed by Indira Gandhi to strike out issues No. 1 to 3 therein. Raj Narain filed an application to amend the election petition. His application was rejected and the application of Indira Gandhi was allowed by the High Court on the ground that he was seeking to add material facts beyond the period of limitation for filing the election petition. Raj Narain carried the matter to this Court. This court examining the question whether the High Court was justified in striking out of the first issue, i.e., whether Indira Gandhi obtained the assistance of Yashpal Kapur, a gazetted officer in the service of the Government of India, in furtherance of the prospects of her election, held as follows:

> "10. The appellant's contention is that the respondent after she became a candidate in the election in question obtained the services of Yashpal Kapur when he was still a gazetted officer in the Government of India for the furtherance of the prospects of her election. In order to establish that plea, **he must plead and prove**:
>
> (1) That the respondent obtained the assistance of Yashpal Kapur when he was a gazetted officer;
>
> (2) That the assistance obtained by her was for the furtherance of the prospects of her election and
>
> (3) That she obtained that assistance after she became a candidate."
>
> Emphasis Supplied

And at para 13, this Court recorded that in order to establish his plea, Raj Narain had to establish that the assistance of Yashpal Kapur was obtained when he was still a government

servant and at the time such an assistance was obtained Indira Gandhi had become a candidate. This Court after examining the relevant averments of the election petition, which were extracted in extenso, recorded a finding that the election petition nowhere stated as to when Indira Gandhi had become a candidate. It was, in this context, this Court observed at para 16 as under:

> "…….. But if the petition is read reasonably, as it should be, it is clear that the allegation of the petitioner is that the service of Yashpal Kapur were obtained by the respondent when she had already become a candidate and when she so obtained his assistance, Yashpal Kapur was still a gazetted officer. It is true that one of the ingredients of the corrupt practice alleged i.e. that when the respondent obtained the assistance of Kapur, she was a candidate is not specifically set out in the petition but from the allegations made; it flows as a necessary implication. While a corrupt practice has got to be strictly proved but from that it does not follow that a pleading in an election proceeding should receive a strict construction. This Court has held that even a defective charge does not vitiate a criminal trial unless it is proved that the same has prejudiced the accused. If a pleading on a reasonable construction could sustain the action, the court should accept that construction. The courts are reluctant to frustrate an action on technical grounds. The charge of corrupt practice in an election is a very serious charge. Purity of election is the very essence of real democracy. The charge in question has been denied by the respondent. It has yet to be proved. It may or may not be proved. The allegations made by the appellant may ultimately be proved to be wholly devoid of truth. But the question is whether the appellant should be refused an opportunity to prove his allegations? Should the Court refuse to enquire into those allegations merely because the appellant or someone who prepared his brief did not

> know the language of the law. We have no hesitation in answering those questions in the negative. The implications of the rule of law are manifold."

All that this Court held is that the particulars of a corrupt practice can be supplied by amendment provided that the basic facts constituting the corrupt practice are pleaded. This Court held in *Raj Narain* (supra):

> "It is true that one of the ingredients of the corrupt practice alleged i.e. that when the respondent obtained the assistance of Kapur, she was a candidate is not specifically set out in the petition but from the allegations made; it flows as a necessary implication."

The fact that Indira Gandhi was a candidate at the election in dispute would be a logical implication of the fact that it was her election, which was under challenge. The observations were not meant to dilute the long established principles of pleadings in the election disputes but were limited to the context.

29. This Court in *Sardar Harcharan Singh Brar* (supra), in my opinion, also came to the same conclusion. Principle No.(iii) stated in para 9 of Sardar Harcharan Singh Brar (supra) makes it abundantly clear.

30. In my opinion, the election petition on hand hopelessly lacks in stated the material facts constituting the various corrupt practices mentioned in the election petition to enable the declarations sought by the election petitioner. The conclusion recorded by the High Court (extracted at para 27 supra) that;

> "It is true that the allegations suffer from lack of certain material particulars particularly as to the consent of the returned candidate or his election agent. ……."

In my opinion is wholly erroneous in law. Consent by the candidate or his election agent is an essential material fact, which is required to be pleaded and proved when the allegation is that somebody other than the candidate or his

election agent committed a corrupt practice. The election petition on hand, in my opinion, is incapable of being read as disclosing any cause of action on the basis of any known cannon of interpretation of documents - whether a rule of reasonable construction or any other construction. In view of the conclusion reached above, I do not propose to examine the other submissions regarding the legal fact of the non-filing of an affidavit in Form No.25 and absence of proper verification of the pleadings and annexures.

31. I may also mention here that though the learned counsel for the election petitioner did not bring to our notice (obviously he was not briefed in this regard), Dr. Rajeev Dhawan, learned counsel for the returned candidate placed before us a photocopy of an application seeking the amendment of the election petition pursuant to the directions of the High Court. I do not propose to examine the content of the said application except to take note of the fact that the same appears to have been presented on 02-05-2011. Even otherwise, any such application could, obviously, have been filed only after 05-10-2009, which is the date of Judgment under appeal. In view of the fact that the results of the election in question were declared on 08-12-2008, the application was filed beyond the period of limitation prescribed under the R.P. Act, to challenge the election. In view of my conclusion that the election petition, as originally presented, did not contain the necessary material facts to constitute the cause of action to challenge the election of the returned candidate, the abovementioned application filed by the election petitioner, even if it contain the necessary material facts, cannot be allowed as it would amount to permitting the amendment of the election petition beyond the period of limitation.

32. I, therefore, not only grant leave in the S.L.P., but also allow the appeal and dismiss the election petition.

B.B.B. Matter referred to Larger Bench.

RAM ASHISH DIXIT

v.

CHAIRMAN PURVANCHAL GRAMIN BANK LIMITED AND ANR.

(Civil Appeal No. 6072 of 2012)

AUGUST 22, 2012

[SURINDER SINGH NIJJAR AND H.L. GOKHALE, JJ.]

SERVICE LAW:

Penalty - Effect of as regards promotion - Bank Officer awarded penalty of one increment for three years - Not found suitable for promotion - Held: Promotion from Junior Management Grade-I to Junior Management Grade-II is on the basis of seniority-cum-merit - Clearly, therefore, the fact that appellant has been punished for a misconduct would form part of his record of service and would be taken into consideration whilst adjudging his suitability on the criteria of seniority-cum-merit - If on such assessment of his record of service he is not promoted, it cannot be said to be by way of punishment - It is a non-promotion on account of appellant not reaching a suitable standard to be promoted on the basis of criteria.

Union of India and Ors. vs. K.V. Jankiraman and Ors. **1991 (3) SCR 790 = 1991 (4) SCC 109 - relied on.**

Case Law Reference:

1991 (3) SCR 790 relied on para 7

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6072 of 2012.

From the Judgment & Order dated 15.06.2007 of the High Court of Judicature at Allahabad in CMWP No. 38084 of 1999.

Dhruv Mehta, Fakhruddin, Abhay Singh, Yasmin Zafar, Dr. Vipin Gupta, Rajesh Kumar, Yashraj Singh Deora, Sameer Pradeep Abhyankar, Anupama Dhruv, Sarv Mitter (for Mitter & Mitter Co.), K.T. Anantharam, Vasudevan Raghavan, Gopal Krishna, M.K. Chaudhary, Raj Kishore, S.K. Verma for the appearing parties.

The following order of the Court was delivered by

O R D E R

1. Leave granted.

2. The appellant herein was appointed as an officer in the Gorakhpur Kshetriya Gramin Bank on 21.12.1981. He was confirmed on the post of officer [later on designated as Junior Management Grade Scale I (JMGS-I)] in the year 1983. On 18.12.1991, a charge sheet pertaining to the period from 1984 to 1990 was prepared against him. At that time he was posted as Branch Manager, Gajpur Branch, District Gorakhpur. The charge sheet alleges that while the appellant was posted at Bhatpur Branch and Gajpur Branch as Branch Manager, he had committed a serious irregularity in the acceptance/ disbursement of loan (of a particular account holder). The gist of the charge was that he did not verify the genuineness of the claim made by the account holder for the loan in various small amounts. The loan amount was to be used by the account holder, who was an agriculturist, for improving the agricultural facilities on his farm. On the basis of those imputations it was alleged that the appellant has violated, Rules 17 and 19 of the Gorakhpur Kshetriya Gramin Bank (Employees) Service Regulation, 1980. It is not disputed before us that the charge sheet was served upon the appellant on January, 1982. Thereafter a regular inquiry was held against him. The inquiry officer held that the charge No.3 was proved. Subsequently, the disciplinary authority differed with the finding recorded by the inquiry officer. The charge Nos. 1 and 2 were also held to be proved against the appellant. At the conclusion of the

disciplinary proceedings on 29th August, 1998 the disciplinary authority imposed punishment of stoppage of one increment for three years and 50% recovery of the sanctioned loan amount in case the Bank fails to recover the same from the farmer to whom the loan had been grated. It appears that in a departmental appeal filed by the appellant, by Order dated 15th December, 1998, the appellate authority modified the order of punishment, by reducing the amount of recovery from 50% to Rs.5,000/-. The aforesaid order was communicated to the appellant on 7.1.1999.

3. During the aforesaid interregnum, the appellant became eligible for promotion from the rank of Junior Management Grade-I to Middle Management Grade-II. He was duly considered for promotion by the departmental promotion committee, which was held in the year 1995. It is the pleaded case of the respondent-Bank, in Paragraph 12 of the counter affidavit filed in the High Court (Annexure P-13 in the SLP), that the appellant was duly considered for promotion but he could not succeed on the basis of the criteria of seniority-cum-merit. It appears that another departmental selection committee was constituted on 5th September, 1997 when the appellant was also duly considered but not approved for promotion. This fact is also alluded to by the appellant in his representation dated 1.9.1999 sent to the Chairman of the Gramin Bank. In this representation, he categorically states that in the promotion process held in the years 1995 and 1997 he was duly considered but not promoted.

4. On 28th March, 1998, the Bank issued Circular No. 63 prescribing certain new procedures and penalties for the officers of the Bank. The aforesaid Circular notices the earlier procedure which provided that the officers against whom disciplinary proceedings are pending or contemplated or an officer who has been punished in the recent past years or against whom there are any adverse remarks shall be unfit for promotion. It is further noticed that inspite of the aforesaid

criteria, "at the time of deciding the competency of the candidates, they had been called for interview, not keeping in view the aforesaid facts. As per above, even last year, all officers were called in interview".

5. The Circular further provides that henceforth the departmental promotion committee shall follow the sealed cover procedure which is applicable in the sponsor Bank. It is clarified that "this procedure will be applicable to the earlier sealed cover results and the results to be kept in sealed covers in future." The Circular further provides that where on completion of disciplinary proceedings, an officer is punished with stoppage of increments or promotions, in such cases, officer will not be eligible to be considered for promotion till after the rigor of punishment is over. As noticed earlier, the appellant was duly considered for promotion in the year 1995 and he was not found fit for promotion. In the year 1997, although he was considered for promotion but his result was kept in a sealed cover. In the meantime, the appellant was punished by Order dated 29th August, 1998. Apprehending that the Bank may not consider him for promotion, the appellant submitted a representation on 19th May, 1999. However, it is a matter of record that the appellant was actually considered for promotion in the departmental promotion committee which was held on 31st August, 1999. The sealed cover procedure having been opened and the appellant having been punished on the basis of the charge sheet, the appellant in view of the Circular No. 63 dated 28.3.1998 was not promoted in the year 1999 also. It was at that stage when the appellant filed Civil Misc. Writ Petition No. 38084 of 1999 in the High Court of Judicature at Allahabad against the action taken by the Bank.

6. In the writ petition, the appellant had claimed writ in the nature of certiorari quashing the orders dated 31.8.1999 and 2.9.1999 whereby he was informed that he has not been promoted. The appellant also sought a writ in the nature of Mandamus directing the respondent to open the sealed cover

result adopted in the year 1997. He made an alternative prayer that the petitioner be considered for promotion in the departmental promotion committee which was to be held on 6th September, 1999. The aforesaid prayers, however, have been rejected by the High Court in the impugned judgment and order dated 13th June, 2007.

7. Learned counsel for the appellant submitted that the appellant ought to have been promoted firstly in the year 1995 as at that time, sealed cover procedure was not even followed by the Bank. In any event, the appellant ought to have been promoted in the year 1997 when the Bank kept his result in a sealed cover without any legal justification. Even if the appellant was not to be promoted in the year 1995 or 1997, the name of the petitioner could not have been ignored in the year 1998 as by that time, the Bank had itself decided to impose only minor punishment of "stoppage of one increment" though it was for a period of three years. Having chosen to punish the appellant by imposition of a minor penalty of stoppage of one increment, the stoppage of promotion of the appellant amounts to double punishment. Consequently, the action of the respondents is violative of Article 14/Article 16 of the Constitution of India. Learned counsel further submitted that the petitioner is entitled to promotion from the back date i.e. □1997 when the result of the consideration of the departmental promotion committee was illegally kept in a sealed cover. Mr. Dhruv Mehta, learned senior counsel and Mr. Rajesh Kumar, learned counsel appearing for the respondent Bank have submitted that the appellant was all along facing the departmental proceedings whilst his case for promotion, along with other eligible officers in his category, was being considered for promotion in the years 1995, 1997 and 1999. The appellant having been duly considered in the years 1995 and 1997 can have no legitimate grievance to complain of any departmental action by the respondent Bank. It is further submitted that subsequently, the appellant having been found guilty by the inquiry officer and having been punished, the appellant cannot complain that his

non-promotion would amount to a double punishment. The respondent places reliance on the judgment of this Court in the case of *Union of India and Others versus K.V. Jankiraman and Others* reported in 1991 (4) SCC 109, wherein it is clearly held that non promotion of an officer on the basis of the record, by taking into consideration the punishments imposed for a misconduct, cannot be described/categorized as a second punishment.

8. We have considered the submissions made by the learned counsel.

9. In the facts of this case, it would not be possible to agree with the appellant that the action of the Bank is either arbitrary or without legal sanction. The appellant did not have any right to be promoted automatically on completion of minimum length of service. He had to be declared suitable for promotion on the criteria applicable. At this stage, we may usefully refer to the observations made by this Court in Paragraph 29 of the judgment in *Union of India and others versus K.V. Jankiraman and Others* (supra) wherein it is observed as follows:

> "On principle, for the same reasons, the officer cannot be rewarded by promotion as a matter of course even if the penalty is other than that of the reduction in rank. An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances. To qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interests. An employee found guilty of a misconduct cannot be placed on par with the other employees and his case has to be treated differently. There is, therefore, no discrimination when in the matter of promotion, he is treated differently. The least that is expected of any administration is that it does not reward an employee with

> promotion retrospectively from a date when for his conduct before that date he is penalised in praesenti. When an employee is held guilty and penalised and is, therefore, not promoted at least till the date on which he is penalised, he cannot be said to have been subjected to a further penalty on that account. A denial of promotion in such circumstances is not a penalty but a necessary consequence of his conduct."

In our opinion, the aforesaid observations are fully applicable to the facts and circumstances of this case.

10. The criteria for promotion from Junior Management Grade-I to Middle Management Grade-II is on the basis of the seniority cum-merit. Clearly therefore, the fact that the appellant has been punished for a misconduct, the same would form a part of his record of service which would be taken into consideration whilst adjudging his suitability on the criteria of seniority cum-merit. If on such assessment of his record of service the appellant is not promoted, it cannot be said to be by way of punishment. It is a non-promotion on account of the appellant not reaching a suitable standard to be promoted on the basis of the criteria. In view of the above, we find no merit in the civil appeal. The same is, accordingly, dismissed.

R.P. Appeal dismissed.

JITENDRA NATH SINGH

v.

THE OFFICIAL LIQUIDATOR & ORS.

(Civil Appeal No. 6755 of 2012)

SEPTEMBER 21, 2012

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

Companies Act, 1956 - s. 529 Proviso and s. 529A - Company under liquidation - Right of secured creditors - Over the unsecured assets - Held: The secured creditors of a company under liquidation have a right only over the secured assets and not over all the assets - However, they will have preferential claim even on the unsecured assets, on pari passu basis with the workmen in respect of dues which could not be realized because of statutory charge created in favour of workmen in the first limb of proviso to s. 529(1) and required to be paid alongwith workmen's dues in priority to all other debts u/s.529-A.

Words and Phrases:

'Creditor' and 'Secured Creditor' - Meaning of, in the context of Companies Act, 1956.

The property and assets of the company under liquidation was sold by the Official Liquidator. The secured and the unsecured assets were sold separately and separate accounts were maintained for both. The sale proceeds from the secured creditors was distributed among the secured creditors and the workmen as per s. 529 of the Companies Act, 1956. As regards the sale proceeds of unsecured assets, the claim of the workmen was that their entire remaining claim should be satisfied in preference to all other claimants in terms of s. 529A of

the Companies Act. On the other hand the secured creditors contended that they had pari passu charge even on the sale proceeds of the unsecured assets in terms of the statutory provision and also in view of the fact that they had given up their security in favour of the workmen. The claim of the workmen was rejected by the Company Court. The appeal against the order was dismissed by the High Court. Hence the present appeal.

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

HELD:

PER MAJORITY: [By A.K. Patnaik, J. (For himself and S.H. Kapadia, CJI)]

1. A plain reading of clause (c) of sub-section (1) of Section 529 of Companies Act, 1956 makes it clear that in the winding up of an insolvent company, the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent. This would mean that the respective rights of secured and unsecured creditors of an insolvent company, which is being wound up, will be the same as the respective rights of secured and unsecured creditors with respect to the estates of persons adjudged insolvent as are in force under the law of insolvency. In the State of Jharkhand, the Provincial Insolvency Act, 1920 is in force and accordingly the respective rights of secured and unsecured creditors with respect to the assets of the insolvent company being wound up will be the same as in the Insolvency Act. Companies Act does not define a 'creditor' and a 'secured creditor'. Section 2(1)(a) and Section 2(1)(e) of the Insolvency Act define the words 'creditor' and 'secured creditor'. A secured creditor

means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor. The result is that the expression 'secured creditor' in Section 529(1)(c) would mean a person who holds a mortgage, charge or lien on the property of the company or any part thereof as a security for a debt due to him from the company. Where, therefore, a creditor, such as the bank or the financial institution in this case, does not hold a mortgage, charge or lien on the property of the company or any part thereof as a security for a debt due to it from the company, it is not a secured creditor for the purposes of Sections 529 and 529A of the Companies Act. [Para 5] [390-D-H; C-F]

2. An unsecured creditor is entitled under Section 45 of the Insolvency Act to receive dividends equally with the other creditors, whereas the secured creditor has the right under Section 47 of the Insolvency Act to realize the security and to prove for the balance due to him in case on realization of such security he is not able to recover the entire amount due to him. If, however, the secured creditor does not opt to realize his security but relinquishes it for the general benefit of the creditors, then he may prove for his whole debt. Under the Insolvency Act, therefore, the secured creditor has only a right over the particular property offered to him as security and all the creditors have equal rights over the other properties comprising the estate of the person adjudged insolvent. [Para 6] [392-G-H; 393-A-B]

3. The first limb of the proviso to clause (c) of sub-section (1) of Section 529 of the Companies Act creates a statutory charge over the security of every secured creditor to the extent of the workmen's portion. In other words, every property or asset of an insolvent company, which is being wound up and which has been offered as

a security to a secured creditor is subject statutorily to a pari passu charge in favour of the workmen to the extent of the workmen's portion by virtue of the proviso to sub-section (1) of Section 529 of the Companies Act. Therefore, the first limb of the proviso to sub-section (1) of Section 529 does not create any pari passu charge in favour of secured creditor over property or asset of the company which has not been given as security by the company to the secured creditor. [Para 8] [393-G-H; 394-C]

4. The second limb of the proviso to sub-section (1) of Section 529 of the Companies Act states the consequences which follow where a secured creditor, instead of relinquishing his security and proving his debt, opts to realize his security. These are: (a) the liquidator shall be entitled to represent the workmen and enforce such charge; (b) any amount realized by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues; and (c) so much of the debt due to such secured creditor as could not be realized by him by virtue of the foregoing provisions of this proviso or the amount of the workmen's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of Section 529A of the Companies Act. Thus, clause (c) of this proviso does not create a pari passu charge over properties or assets of the company which have not been offered to the secured creditor as security, but to the extent of the loss of security suffered by a particular secured creditor because of the statutory charge created in favour of the workmen, the secured creditor is ranked pari passu with the workmen for overriding preferential payment under Section 529A of the Companies Act. [Para 9] [394-D-F, H; 395-A-B]

5. Section 529A of the Companies Act states that notwithstanding anything contained in any other

provision of the Companies Act or any other law for the time being in force, in the winding up of a company - (a) workmen's dues; and (b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section 529 of the Companies Act pari passu with such dues, shall be paid in priority to all other debts. The entire object of Section 529A of the Companies Act is to ensure overriding preferential payment of (1) the workmen's dues and (2) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section 529 pari passu with the workmen's dues. The effect of the non-obstante clause in the opening part of Section 529A of the Companies Act, therefore, is that notwithstanding anything in the Companies Act and any other law including the Insolvency Act, workmen's dues and dues of the secured creditor which could not be realized because of the pari passu charge in favour of the workmen under the proviso to sub-section (1) of Section 529 and only to the extent such dues rank pari passu with the dues of the workmen under clause (c) of the said proviso are paid in priority over all other dues. Only where under the second limb of the proviso to clause (c) of sub-section (1) of Section 529 the secured creditor opts to realize the security and is unable to realize a portion of his dues because of the pari passu charge created in favour of the workmen under the first limb of the proviso, he has pari passu charge to the extent indicated in clause (c) of the proviso to sub-section (1) of Section 529 and only such debts due to the secured creditor which rank pari passu with dues of the workmen under clause (c) of the proviso to sub-section (1) of Section 529 have to be paid in priority over all other debts of the company. The High Court has clearly fallen in error by holding that all debts due to secured creditors will rank pari passu with the workmen's dues and have to be paid along with the

workmen's dues in priority to all other debts of the company. [Paras 10 and 15] [395-B-G; 401-C-E]

6. The application filed by the appellant-workman before Company Court praying for satisfaction of their remaining claim from the sale proceeds of unsecured assets of the Company, in preference to all other claimants, including the secured creditors, is set aside and the matter is remitted to Company Court to decide the Application in accordance with the law laid down in the present judgment. [Para 16] [401-F-G]

Allahabad Bank v. Canara Bank and Anr. **(2000) 4 SCC 406: 2000(2) SCR 1102 ;** *Andhra Bank v. Official Liquidator and Anr.* **(2005) 5SCC 75: 2005 (2) SCR 776 - referred to.**

PER MINORITY: [By Swatanter Kumar, J.]

1.1 In the present case, the judgment of the High Court, to the extent it takes the view that the charges of the workmen and secured creditors have to rank pari passu, cannot be faulted with. [Para 32] [383-G]

1.2 By way of the Companies (Amendment) Act, 1985, Section 529A, as well as the proviso to Section 529(1) of the Companies Act, 1956 were inserted. The purpose of these provisions appears to be that the dues of the workmen may be made to rank pari passu with those of the secured creditors and even above the dues of the Government, in the event of winding up of the company. The legislative intent appears to be that the dues of the secured creditors and workmen should be paid in preference to others, however, would remain pari passu to each other. It was not the intention of the framers of law to take away or deprive a secured creditor of its dues or charge of the workmen, unless, it was specifically given up by the secured creditor. [Para 9] [358-D-F]

1.3 The proviso to Section 529 of the Act creates a deeming fiction in law and makes it clear that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen, to the extent of the workman's portion thereunder. This fiction is intended to give the workmen a preferential right to recover their dues. The expression 'workmen's portion' appearing in the proviso to Section 529(1) is explained under clause (c) of Section 529(3) of the Act. The workmen's portion in relation to the security of any secured creditor of a company means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of the amount of the workmen's dues and the amount of the debts due to the secured creditors. The workmen's portion is to be computed in terms thereof with the aid of the illustration given in that provision. Thus, the security of every secured creditor, by fiction of law, is subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion and where the secured creditor, instead of relinquishing his security and proving his debt, opts to realize his security, in that event, so much of the debt due to such secured creditor as could not be realized by him by virtue of the pari passu charge in favour of the workmen or the amount of the workmen's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of Section 529A. Section 529A of the Act opens with non-obstante clause, giving the workmen's dues and secured creditors' dues, as defined under the proviso to Section 529(1), an over-riding effect over the other provisions of the Act as well as any other law in the matter of priority of payment of dues. Application of Section 529A of the Act is not dependent upon any other provision of the Act including Section 529 except to the extent specified in Section 529, proviso (c). So, it is not dependent upon the limitation

imposed by any other law for the time being in force, including Section 47 of the Insolvency Act. The non-obstante opening words of Section 529A are intended to give precedence to the 'overriding preferential payments' in contrast to the 'preferential payments' as contemplated u/s. 530 of the Act. [Paras 12 and 13] [367-F-H; 368-A-F]

1.4 Once the contents of proviso to Section 529 and its clauses (a) to (c) are satisfied, then the secured creditor would be entitled to invoke the provisions and receive the benefits of Section 529A(i), subject to pari passu charge and in terms of the priority stated therein. The workmens' dues, however, have not been singularly placed in the preferential clause. The expression used in Section 529A is 'and' meaning thereby that the dues stated under clauses (a) and (b) of the Section would remain pari passu. But it is not the entire dues of the secured creditors that will get preference over other dues and remain pari passu with the charges payable to the workmen. Their dues are limited only to the extent of the debts which are due to the secured creditors under clause (c) of the proviso to sub-Section (1) of Section 529 which are pari passu with such dues. The term 'such dues' here refers to the dues of the workmen. [Para 14] [368-H; 369-B-D]

1.5 On a plain reading of the language of Sections 529 and 529A, it is clear that it is not the entire or unrealised amount owed to secured creditors which is protected under the provisions of Section 529A and stands pari passu with the workmen's charges, but it is only the portion or amount relinquished under proviso to Section 529(1), whichever is less, that is protected. There is a direct link in the application of both these provisions. In a situation of the present kind, these provisions would have to be applied collectively and that too, upon the correct appreciation of the legislative intent. [Para 14] [369-E-F, G]

1.6 From a cumulative reading of the relevant provisions under the Act as well as under the Insolvency Act, it is clear that neither the legislature intended nor can it be comprehended that where an act is done in complete adherence to the relevant statutory provisions, it can lead to two different results merely because such act is done before different forums/courts. That is to say that if a secured creditor realises his security before a forum other than the Company Court strictly in compliance to the provisions of Section 529 of the Act, then favourable consequences of Section 529A would follow but if he acts in identical terms before the Company Court and without prejudice to his remedy outside the winding up and without putting his sale proceeds in the common hotch potch in the winding up proceedings, he would not be entitled to the benefits of Section 529A. It is more so since even the sale of a security by a secured creditor before such other forum cannot be completed without approval of the Company Court. The Company Court has even been vested with the jurisdiction to transfer such proceedings in exercise of its powers under Section 446 of the Act. Mere pendency of proceeding before a Tribunal would not deprive the secured creditor of the statutory benefits. Of course, the situation will be entirely different where the secured creditor does not follow the scheme of the provisions of Section 47(1) of the Insolvency Act read in conjunction with Sections 529 and 529A of the Act but puts the sale proceeds in the winding up proceedings in a common hotch-potch or even relinquishes the security for general benefit of the creditors at large, then the creditor would not be entitled to the benefit of Section 529A and would stand in line with the unsecured creditors of the company. Further, Where the secured creditor has been unable to fully realize his dues owing to the taking of share from his security towards workmen's portion in terms of the proviso to Section 529(1), then to the extent

specified, the secured creditor is entitled to a charge pari passu with the workmen's dues for the purposes of Section 529A. [Para 15] [370-C-G; 371-A-D]

1.7 Proviso to Section 529(1) has two contents which have to be read conjunctively. First, that creates a pari passu charge by legal fiction on the security of a secured creditor in favour of the workmen and, second, where the secured creditor instead of relinquishing his security and proving his debts opts to realize his security. The expression 'and' used in the proviso has to be read and construed conjunctively and not disjunctively. The word 'and' specifies two specific conditions for the proviso and sub-clauses (a) to (c) to become enforceable. Clauses (a) and (b) to the proviso give right of representation to the liquidator for enforcing the statutory right in favour of the workmen to the extent of the portion of the workmen's dues. Clause (c) of proviso to Section 529(1) provides the mode for recouping the shortfall in the amount which the secured creditor loses upon sale of security and creation of pari passu charge. Such recovery is again pari passu and limited to the extent of the amount of workmen's dues. The realization of the security may be in the proceedings outside the winding up, i.e., before a special forum or otherwise or it may be in the winding up but not for the benefit of the general creditors but strictly in compliance with the provisions of the proviso to Section 529(1) of the Act. In both such situations, the secured creditor would be entitled to the protection and right of preferential payment contemplated under Section 529A(1) of the Act. [Para 16] [371-E-H; 372-A-C]

1.8 As per the scheme and the relevant provisions of the Act, it is clear that a secured creditor can relinquish his security, participate in winding up proceedings and file his claim before the official liquidator, as and when invited. The dues of the secured creditors and of the

workmen would rank pari passu as regards the order of preference of their discharge. This is subject to satisfying the conditions as stated in Sections 529 and 529A of the Act. The proviso to sub-section (1) of Section 529, by a deemed fiction, makes the dues of the workmen pari passu with that of the secured creditors and creates a charge in favour of the workmen upon the amounts realized from the enforcement of such security, to the extent of the workmen's portion therein. The 'workmen's portion' has been explained under sub-section (3)(c) of Section 529 which requires that in relation to the security of any secured creditor of the company, workmen's portion would mean the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of the amount of workmen's dues and the amounts of the debts due to the secured creditors. The illustration to this sub-section provides the mode in which the workmen's portion is to be calculated. Once the workmen's portion is computed, then in terms of Section 529A, again it has to be treated as a charge pari passu to the debts of the secured creditor. In the case of the latter, the charge will be limited to the extent such debt ranks under clause (c) of the proviso to sub-section (1) of Section 529 pari passu with such dues for preferential payment. The dues payable to the workmen and the secured creditors have to be paid in priority to all other debts. But the dues payable to the secured creditor will not be more than the amount that remains unsatisfied after the security is relinquished in favour of the workmen under Section 529 of the Act. [Para 23] [378-A-G]

1.9 The relinquishment of security by a secured creditor certainly requires some conscious act on his part more than the mere filing of a claim in response to a public notice issued by the official liquidator. Once the secured creditor takes such further actions like sale of the secured

assets through the liquidator and subject to the control of the Company Court in that event, he would be part of the scheme of payment as rationalized under Section 529 and 529A of the Act. [Para 24] [378-H; 379-A-B]

1.10 A secured creditor who has a charge over the assets of a company in winding up, merely by instituting an application before the DRT or any other special forum without effectively pursuing that remedy and taking effective steps to realize his security would not stand outside the winding up proceedings. If the sale of secured assets is effected by the Official Liquidator subject to control of the Company Court and such amounts are utilized for discharging the debts of the secured creditor as well as statutory charge of the workmen created under Sections 529 and 529A, then, in effect, the secured creditor would be deemed to have participated in the winding up proceedings and not stood outside the same. It is for the reason that a secured creditor has to take steps by filing petition before any other forum just to protect his legal right and to prevent the claim from getting barred by time. On the contrary, if he realizes his security within the four corners of the company law, i.e., before the Official Liquidator and the Company Court, in that event it would not be possible to hold that such secured creditor has given up his option to participate in the winding up proceedings. However, the matter would be quite different where the secured creditor elects not only to institute a petition before the specialized forum but also takes effective steps to realize his security and pursues the proceedings effectively, in which event, the conclusion has to be that such secured creditor has stood 'outside the winding up' proceedings. [Para 27] [379-H; 380-A-E]

1.11 A secured creditor who, after institution of a claim but without pursuing the remedy outside the

provisions of this Act, files claim before the official liquidator, relinquishes his security and agrees to the distribution of the sale proceeds through the official liquidator, subject to jurisdiction of the Company Court, could always be said to be not 'standing outside the winding up' proceedings. However, where he institutes a petition, proceeds with it and seeks realisation of security before a forum outside the Company Court, then he obviously pursues the remedy beyond mere filing of a claim and would be a person 'standing outside the winding up' proceedings and shall be subject to the rights enforced by the official liquidator in terms of the proviso to Section 529 of the Act. The secured creditor has to take some positive steps to participate in the winding up petition. [Para 28] [380-E-H; 381-A]

1.12 Once the twin requirements stated in the proviso to Section 529(1) are satisfied, the scheme contemplated under clause (c) of the proviso to Section 529 read with Section 529A of the Act would come into play. The Court cannot overlook the reality that intention of the framers of law could not have been that the public funds, for instance, the money of secured creditor (like banks), should be completely ignored for the benefit of the creditors in general, despite there being a definite protection in law, more so, when the security may be sufficient for recovery of dues of such secured creditors to a limited extent, if not in entirety. The scheme of these provisions, thus, has to be understood to make it practicable and in consonance with the accepted commercial principles. The workmen's charges as well as that of the secured creditors have to be paid in preference to all others, but with inter se pari passu charge on the amounts realized from the sale of the security or otherwise. [Para 30] [381-H; 382-A-D]

ICICI Bank Ltd. V. Sidco Leathers Ltd. and Ors. **(2006) 10 SCC452: 2006 (1) Suppl. SCR 528 - relied on.**

Allahabad Bank v. Canara Bank and Anr. **(2000) 4 SCC 406: 2000 (2) SCR 1102 - held inapplicable.**

2.1 The High Court has fallen in error of law in respect of the computation and adjustment of the shares between the workmen, on the one hand and the secured creditors, on the other. Particularly, the Single Judge of the High Court directed the amounts recovered from the secured creditors to be distributed between the workmen and the secured creditors in equal proportion of 50 per cent of their respective admitted claims. This order and calculation is opposed to the very scheme of the above provisions, particularly with respect to determination of the workmen's portion. Another error in the calculation that appears from the record is that though the total sale proceeds from the secured assets were Rs.108.90 crore, the Court directed the payment of only Rs.101 crore which is the aggregate of the amount directed to be paid to the workmen and to the secured creditors. Thus, there has been an error of law in applying the statutory provisions in this regard. The High Court erred in not noticing that the Company Court has not made calculation and computation in accordance with law. The Company Court as well as the Appellate Court should have considered the workmen's portion in terms of proviso to Section 529(1) and Section 529(3)(c) along with the illustration appended thereto and thereafter, its over-riding preferential payment vis-a-vis all other unsecured creditors in terms of Section 529A and 530 of the Act. The amounts, thus, are required to be recalculated in terms of the above provisions and the law stated herein. [Para 32] [383-H; 384-A-E]

2.2 In the present case, the secured creditor has realized its security but without putting the security or the

receipts thereof in the common hotch potch of the winding up proceedings for the general benefit of the creditors. Thus, in terms of Section 47(1) of the Insolvency Act, the secured creditor in the present case is entitled to the balance due to it, deducting the net amounts realized. If the secured creditor would have participated in the winding up proceedings in its entirety with the security being realised and/or relinquished for the general benefit of the creditors and not restricted to the compliance of Section 529 of the Act, it would not be entitled to the benefit of Section 529A of the Act. The amounts, by the consent of the parties, have already been disbursed and utilized by the workmen as well as the secured creditors in terms of Section 529 of the Act which are subject to adjustment as per the orders of the Court. [Para 33] [384-F-H; 385-A-B]

2.3 The High Court should re-compute the amounts payable pari passu between the secured creditors and the workmen in accordance with the principles stated above. Therefore, the matter is remitted to the Company Court to apply the above-stated principles and calculate the amount payable to the respective parties afresh and in accordance with law. [Paras 33 and 34] [385-C-D]

3. To satisfy the essentials of a binding precedent, the Court should directly be concerned with such issue. There should be an issue which should be concluded by appropriate reasoning to give it colour of a binding precedent. [Para 18] [374-D]

Andhra Bank v. Official Liquidator **(2005) 5 SCC 75 : 2005 (2) SCR 776 - relied on.**

UCO Bank v. Official Liquidator, High Court, Bombay and Anr. **(1994) 5 SCC 1: 1994 (1) Suppl. SCR 294** *A.P. Financial Corporation v. Official liquidator* **(2000) 7 SCC 291: 2000 (2) Suppl. SCR 288 - referred to.**

Case Law Reference:

In the Judgment of A.K. Patnaik, J:

2000 (2) SCR 1102	**Referred to**	**Para 13**
2005 (2) SCR 776	**Referred to**	**Para 14**

In the Judgment of Swatanter Kumar, J:

2005 (2) SCR 776	**Relied on**	**Para 14, 15, 19**
2000 (2) SCR 1102	**Held inapplicable**	**Para 17**
1994 (1) Suppl. SCR 294	**Referred to**	**Para 22**
2000 (2) Suppl. SCR 288	**Referred to**	**Para 22**
2006 (1) Suppl. SCR 528	**Relied on**	**Para 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6755 of 2012.

From the Judgment and Order dated 30.09.2010 of the High Court of Jharkhand at Ranchi in Company Appeal No. 10 of 2008.

Shyam Divan, Harish N. Salve, Parag P. Tripathi, Ramji Srinivasan Braj Kishore Mishra, V.K. Jha, Rajiv Goyal, Vikram Patralekh, Siddharth Arya, Aparna Jha, Ujjwal K. Jha, Sweety Sood, P.K. Verma, Jyotika Kalra, Amit Anand Tiwari, Amit Wadhwa, Vivek Paul, Sanjay Bhatt, Rabin Majumdar, Annwesha Deb, Vivek Singh, Ashutosh Jha, Deepak Avasthi, Anuj Bhandari for the Appearing Parties.

The Judgments of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave granted.

2. An important question of law as to the ambit, scope and the legislative scheme of Sections 529, 529A and 530 of the

Companies Act, 1956 (for short, 'the Act') arises in the present case.

3. According to the appellant, on the true construction of these provisions, workmen have a preferential claim over all others including the secured creditors, in the matter of payment of dues out of the funds realized from sale of assets of the company in liquidation. It will particularly hold true when such assets are not mortgaged in favour of secured creditors of the company in liquidation. The secured creditors, therefore, have no charge on such unsecured assets as also no consequential, preferential or even pari passu claim over the sale proceeds derived from these assets of the company. To the contra, the contention on behalf of the respondents is that the debts of the secured creditors would rank pari passu with that of the workmen as regards those dues of the secured creditors as could not be realised from the sale of secured assets, for the reason that they have relinquished their security to the extent of workmen's dues in terms of Section 529(1) of the Act. In support of their respective contentions, the appellant has relied upon the judgment of this Court in the case of *Allahabad Bank v. Canara Bank and Another* [(2000) 4 SCC 406], while the respondents have placed heavy reliance upon the judgment of this Court in the case of *UCO Bank v. Official Liquidator, High Court, Bombay & Anr.* [(1994) 5 SCC 1]; *Andhra Bank v. Official Liquidator* [(2005) 5 SCC 75]; and *ICICI Bank Ltd. V. Sidco Leathers Ltd. and Others* [(2006) 10 SCC 452]. As both the parties to the present lis have relied upon the different decisions of this Court, this Court is now called upon to state the correct exposition of law in view of the divergent views stated in the afore-referred judgments.

4. I may, at the very outset, refer in brief to the facts giving rise to the present appeal. M/s. UMI Special Steels Ltd. (for short, the UMI) is a company incorporated under the provisions of the Act. It possesses assets at different places throughout India. Out of these assets of the UMI, some were mortgaged to

the banks and financial institutions while others were not, particularly the assets located at Chennai, Pune, Faridabad and Kolkata. Towards the end of the year 2001, the company became sick. It, thereafter, approached the Board for Industrial and Financial Reconstruction (for short, 'the BIFR') for being declared a sick unit. BIFR, vide its opinion dated 8th March, 2002, opined that UMI should be wound up. On consideration of the opinion of the BIFR, the High Court, vide its order dated 5th August, 2003 passed an order of winding up of UMI and appointed an official liquidator for conducting and completing the liquidation proceedings. This order of the High Court attained finality. In pursuance of this order, the official liquidator took over all the assets of the company. It is the undisputed position before us that the SASF/IDBI, the main secured creditor of UMI, filed an Original Application before the Debts Recovery Tribunal (DRT) being OA No.72 of 2004 for recovery of its debts aggregating to Rs.63.34 crore as on 31st January, 2004. Upon this application, the DRT issued notice on 5th July, 2004 and since then, the matter is pending before the DRT without any further proceedings.

5. In the meanwhile, the official liquidator invited claims from all the secured creditors and amongst others, the IDBI also filed its claim on 30th July, 2006. The admitted claim of the secured creditors was Rs.1,60,08,43,739/- while that of the workmen was Rs.16,38,44,741.25. It is also not disputed before us that the secured assets of the company were sold separately and a separate account thereof was maintained. Similarly, the unsecured assets were sold separately by the official liquidator, for which again a separate account was maintained. The total sale proceeds from the secured assets were Rs. 108.90 crore, out of which a sum of Rs.93,64,93,586/- was distributed amongst the secured creditors and an amount of Rs.8,19,22,371.12 had been paid to the workmen. The Official Liquidator sold the unsecured properties of the Company for a total sum of Rs.8.51 crores. This included the

assets located at different places, which were not mortgaged to any bank or financial institution. The dispute between the parties primarily relates to distribution of this sum of Rs. 8.51 crores. According to the workmen their entire remaining claim of Rs. 8.19 crores and odd should be satisfied in preference to all other claimants, in terms of Section 529A of the Act. However, it is contended on behalf of the secured creditors that they have a pari passu charge even on the sale proceeds of the unsecured assets in terms of the statutory provisions and more particularly , in view of the fact that they had given up their security in favour of the workmen to the extent of Rs.8,19,22,371.12. It is only upon such satisfaction that the sale proceeds can be distributed amongst other creditors in accordance with law. The notice of the O.A. filed by the secured creditors was also issued to the Official Liquidator.

6. One of the workmen, Jitendra Nath Singh, the appellant in the present appeal, filed an application being I.A. No. 1511/ 2008 in Company Petition No. 2/2002 praying that the sale proceeds from the unsecured assets should first be distributed to the workmen. This IA was rejected by the Company Court vide order dated 28th November, 2008. Against this order, Company Appeal No.10 of 2008 was filed by the workmen before the High Court. Three other workmen also filed an application praying that 50 per cent of their verified claim in respect of wages be paid to them by the official liquidator. The Company Court passed an interim order in Company Appeal No.10 of 2008 dated 24th April, 2009 directing that money be distributed by the official liquidator only after obtaining permission of the Court. In view of this order, the Company Court rejected the claim of the three workmen vide its Order dated 16th April, 2010. Being aggrieved, these three workmen filed Company Appeal No.1 of 2010 before the High Court.

7. Both these appeals were dismissed by the High Court by a common judgment dated 30th September, 2010. Being dissatisfied with the judgment of the High Court, the workman

Jitendra Nath Singh has preferred the present appeal against the decision in respect of Company Appeal No. 10/2008.

8. In light of the above facts, the contention of the appellant in the present appeal is that in respect of unsecured assets, the claim of the workmen ranks higher than those of the secured creditors and should be paid in preference to their claims. The rule of distribution *pro rata* applies only for proceeds from sale of properties bearing a charge of a particular secured creditor. To put it simply, the statutory charge would get priority over any contractual charge.

9. Let us now examine the relevant statutory provisions and their scheme. By way of the Companies (Amendment) Act, 1985, Section 529A, as well as the proviso to Section 529(1) of the Act, were inserted with effect from 24th May, 1985. The purpose of these provisions appears to be that the dues of the workmen may be made to rank *pari passu* with those of the secured creditors and even above the dues of the Government, in the event of winding up of the company. The legislative intent appears to be that the dues of the secured creditors and workmen should be paid in preference to others, however, would remain *pari passu* to each other. It was not the intention of the framers of law to take away or deprive a secured creditor of its dues or charge of the workmen, unless, it was specifically given up by the secured creditor. At this stage, I may refer to the provisions of Sections 529, 529A and 530 of the Act which read as follows :-

> **"529. Application of insolvency rules in winding up of insolvent companies.**--(1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to-
>
> (a) debts provable;
>
> (b) the valuation of annuities and future and contingent liabilities; and

(c) the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent:

Provided that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security,-

(a) the liquidator shall be entitled to represent the workmen and enforce such charge;

(b) any amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues; and

(c) so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso or the amount of the workmen's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of section 529A.

(2) All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up, and make such claims against the company as they respectively are entitled to make by virtue of this section:

Provided that if a secured creditor instead of relinquishing his security and proving for his debt proceeds to realise his security, he shall be liable to 2[pay his portion of the expenses] incurred by the liquidator (including a provisional liquidator, if any) for the preservation of the security before its realization by the secured creditor.

Explanation.-For the purposes of this proviso, the portion of expenses incurred by the liquidator for the preservation of a security which the secured creditor shall be liable to pay shall be the whole of the expenses less an amount which bears to such expenses the same proportion as the workmen's portion in relation to the security bears to the value of the security.

(3) For the purposes of this section, section 529A and section 530,-

(a) "workmen", in relation to a company, means the employees of the company, being workmen within the meaning of the Industrial Disputes Act, 1947 (14 of 1947);

(b) "workmen's dues", in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely:-

(i) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman, in respect of services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947 (14 of 1947);

(ii) all accrued holiday remuneration becoming payable to any workman, or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order or resolution;

(iii) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (8

of 1923) rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any workman of the company;

(iv) all sums due to any workman from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the workmen, maintained by the company;

(c) "workmen's portion", in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of-

(i) the amount of workmen's dues; and

(ii) the amounts of the debts due to the secured creditors.

Illustration

529A. Overriding preferential payment.-
Notwithstanding anything contained in any other provision of this Act, or any other law for the time being in force, in the winding up of a company-

(a) workmen's dues; and

(b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of section 529 pari passu with such dues,

shall be paid in priority to all other debts.

(2) The debts payable under clause (a) and clause (b) of sub-section (1) shall be paid in full, unless the assets are insufficient to meet them in which case they shall abate in equal proportions.

530. Preferential payments. - (1) In a winding up subject to the provisions of section 529A, there shall be paid] in priority to all other debts-

(a) all revenues taxes, cesses and rates due from the company to the Central or a State Government or to a local authority at the relevant date as defined in clause (c) of sub-section (8), and having become due and payable within the twelve months next before that date;

(b) all wages or salary (including wages payable for time or piece work and salary earned wholly or in part by way of commission) of any employee, in respect of services rendered to the company and due for a period not exceeding four months within the twelve months next before the relevant date subject to the limit specified in sub-section (2);

(c) all accrued holiday remuneration becoming payable to any employee, or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order or resolution;

(d) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts due, in respect of contributions payable during the twelve months next before the relevant date, by the company as the employer of any persons, under the Employees' State Insurance Act, 1948 (34 of 1948), or any other law for the time being in force;

(e) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in

section 14 of the Workmen's Compensation Act, 1923 (8 of 1923), rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any employee of the company;

(f) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company; and

(g) the expenses of any investigation held in pursuance of section 235 or 237, in so far as they are payable by the company.

(2) The sum to which priority is to be given under clause (b) of sub-section (1), shall not, in the case of any one claimant, 2[exceed such sum as may be notified by the Central Government in the Official Gazette].

(3) Where any compensation under the Workmen's Compensation Act, 1923 (8 of 1923), is a weekly payment, the amount due in respect thereof shall, for the purposes of clause (e) of sub-section (1), be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the said Act.

(4) Where any payment has been made to any employee of a company,-

(i) on account of wages or salary; or

(ii) to him, or in the case of his death, to any other person in his right, on account of accrued holiday remuneration,

out of money advanced by some person for that purpose, the person by whom the money was advanced shall, in a winding up, have a right of priority in respect of the money

so advanced and paid, up to the amount by which the sum in respect of which the employee or other person in his right would have been entitled to priority in the winding up has been diminished by reason of the payment having been made.

(5) The foregoing debts shall-

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(6) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them, and in the case of the debts to which priority is given by clause (d) of sub-section (1), formal proof thereof shall not be required except in so far as may be otherwise prescribed.

(7) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effect so distrained on, or the proceeds of the sale thereof:

Provided that, in respect of any money paid under any such charge, the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(8) For the purposes of this section-

(a) any remuneration in respect of a period of holiday or of absence from work through sickness or other good cause shall be deemed to be wages in respect of services rendered to the company during that period;

(b) the expression "accrued holiday remuneration" includes, in relation to any person, all sums which, by virtue either of his contract of employment or of any enactment (including any order made or direction given under any enactment), are payable on account of the remuneration which would, in the ordinary course, have become payable to him in respect of a period of holiday, had his employment with the company continued until he became entitled to be allowed the holiday;

(bb) the expression "employees" does not include a workman; and

(c) the expression "the relevant date" means-

(i) in the case of a company ordered to be wound up compulsorily, the date of the appointment (or first appointment) of a provisional liquidator, or if no such appointment was made, the date of the winding up order, unless in either case the company had commenced to be wound up voluntarily before that date; and

(ii) in any case where sub-clause (i) does not apply, the date of the passing of the resolution for the voluntary winding up of the company.

(9) This section shall not apply in the case of a winding up where the date referred to in sub-section (5) of section 230 of the Indian Companies Act, 1913 (7 of 1913), occurred before the commencement of this Act, and in such a case, the provisions relating to preferential payments which would

have applied if this Act had not been passed, shall be deemed to remain in full force."

10. Chapter V of the Act deals with provisions that are applicable to every mode of winding up and in particular, the above provisions deal with the proof and ranking of claims. Section 529 is concerned with the application of insolvency rules to winding up of an insolvent company. The opening language of Section 529 contemplates that in winding up of an insolvent company, the Rules prevalent under the law of insolvency shall be applicable. Thus, the Provincial Insolvency Act, 1920 (for short the "Insolvency Act"), to the extent permissible, would be applicable in regard to the winding up of a company. Section 47 of the Insolvency Act reads as under:

"47. Secured creditors.-

(1) Where a secured creditor realizes his security, he may prove for the balance due to him, after deducting the net amount realized.

(2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.

(3) Where a secured creditor does not either realize or relinquish his security, he shall, before being entitled to have his debt entered in the schedule, state in his proof the particulars of his security, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

(4) Where a security is so valued, the Court may at any time before realization redeem it on payment to the creditor of the assessed value.

(5) Where a creditor, after having valued his security, subsequently realizes it, the net amount realized shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.

(6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend."

11. The above provision gives different options that are available and can be exercised by a secured creditor. It, however, has to be kept in mind that in terms of section 529 the rules of insolvency shall prevail and be observed but only with regard to debts provable, the valuation of annuities and future and contingent liabilities and the respective rights of secured and unsecured creditors. Where a secured creditor realizes his security, he may prove the balance due to him after deducting the net amount realized; or where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for whole of his debt. Still, where a secured creditor does not exercise either of these options, he is entitled to have his debt entered in the schedule and would be entitled to receive the dividend in terms of Section 47(3).

12. It is worthwhile to note that the proviso to Section 529 of the Act creates a deeming fiction in law and makes it clear that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen, to the extent of the workman's portion thereunder. This fiction is intended to give the workmen a preferential right to recover their dues. The expression 'workmen's portion' appearing in the proviso to Section 529(1) is explained under clause (c) of Section 529(3) of the Act. The workmen's portion in relation to the security of any secured creditor of a company means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the

aggregate of the amount of the workmen's dues and the amount of the debts due to the secured creditors. The workmen's portion is to be computed in terms thereof with the aid of the illustration given in that provision. Thus, the security of every secured creditor, by fiction of law, is subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion and where the secured creditor, instead of relinquishing his security and proving his debt, opts to realize his security, in that event, so much of the debt due to such secured creditor as could not be realized by him by virtue of the pari passu charge in favour of the workmen or the amount of the workmen's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of Section 529A.

13. Section 529A of the Act opens with non-obstante clause, giving the workmen's dues and secured creditors' dues, as defined under the proviso to Section 529(1), an over-riding effect over the other provisions of the Act as well as any other law in the matter of priority of payment of dues. Application of Section 529A of the Act is not dependent upon any other provision of the Act including Section 529 except to the extent specified in Section 529, proviso (c). So, it is not dependent upon the limitation imposed by any other law for the time being in force, including Section 47 of the Insolvency Act. The non-obstante opening words of Section 529(A) are intended to give precedence to the 'overriding preferential payments' in contrast to the 'preferential payments' as contemplated under Section 530 of the Act. This non-obstante language attains even greater significance as it, in no uncertain terms, provides that Section 529(A) shall have effect notwithstanding anything contained in any other provision of the Act or any other law for the time being in force. No law, including the insolvency law can undermine the application and effect of Section 529 read with Section 529A of the Act. Thus, the provisions are exceptions to all other laws in force.

14. Once the contents of proviso to Section 529 and its

clauses (a) to (c) are satisfied, then the secured creditor would be entitled to invoke the provisions and receive the benefits of Section 529A(i), subject to pari passu charge and in terms of the priority stated therein. The workmens' dues are to get preference in the winding up of a company under Section 529A of the Act. The workmens' dues, however, have not been singularly placed in the preferential clause. The expression used in Section 529A is 'and' meaning thereby that the dues stated under clauses (a) and (b) of the section would remain pari passu. But it is not the entire dues of the secured creditors that will get preference over other dues and remain pari passu with the charges payable to the workmen. Their dues are limited only to the extent of the debts which are due to the secured creditors under clause (c) of the proviso to sub-Section (1) of Section 529 which are pari passu with such dues. The term 'such dues' here refers to the dues of the workmen. The Andhra Bank case has clearly stated that not only the dues of the workmen would be paid in terms of Section 529A in precedence to all others but are pari passu to the amounts due to the secured creditors in terms of Section 529(1) proviso (c). On a plain reading of the language of these two Sections, i.e., 529 and 529A, it is clear that it is not the entire or unrealised amount owed to secured creditors which is protected under the provisions of Section 529A and stands pari passu with the workmen's charges, but it is only the portion or amount relinquished under proviso to Section 529(1), whichever is less that is protected. In other words, the amount which is due to the secured creditors and remains unpaid due to enforcement of the pari passu charge of the workmen under Section 529(1) is the portion of dues of secured creditors that are protected in terms of Section 529A. There is a direct link in the application of both these provisions. In a situation of the present kind, these provisions would have to be applied collectively and that too, upon the correct appreciation of the legislative intent. As far as Section 530 of the Act is concerned, it simpliciter provides for preferential payments with regard to persons other than those covered under Sections 529 and 529A of the Act. However, in

the present case, we are primarily concerned with the application of Sections 529 and 529A.

15. If one analyses the scheme of the above-stated provisions, it is clear that in a winding up petition of an insolvent company, Rules of insolvency would apply to the stated extent. In terms of the proviso to Section 529(1), there is a deemed fiction created in law on the security of every secured creditor to the extent of the workmen's portion therein. The second part of the proviso states that where the secured creditor instead of relinquishing his security and proving his debts opts to realize his security, there the liquidator is entitled to represent the workmen and enforce the said charge in favour of the workmen to the extent of the workmen's dues. From a cumulative reading of the relevant provisions under the Act as well as under the Insolvency Act, it is clear that neither the legislature intended nor can it be comprehended that where an act is done in complete adherence to the relevant statutory provisions, it can lead to two different results merely because such act is done before different forums/courts. That is to say that if a secured creditor realises his security before a forum other than the Company Court strictly in compliance to the provisions of Section 529 of the Act, then favourable consequences of Section 529A would follow but if he acts in identical terms before the Company Court and without prejudice to his remedy outside the winding up and without putting his sale proceeds in the common hotch potch in the winding up proceedings, he would not be entitled to the benefits of Section 529A. It is more so since even the sale of a security by a secured creditor before such other forum cannot be completed without approval of the Company Court. The Company Court has even been vested with the jurisdiction to transfer such proceedings in exercise of its powers under Section 446 of the Act. At this stage, it will be useful to refer to the dictum of this Court in Andhra Bank (supra) where the Court noticed, "where the matter is not pending before the Tribunal under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("the

RDB Act"), in terms of Section 19(19) thereof, the secured creditors would not get priority per se ……" to show that mere pendency of proceeding before a Tribunal would not deprive the secured creditor of the statutory benefits. Of course, the situation will be entirely different where the secured creditor does not follow the scheme of the provisions of Section 47(1) of the Insolvency Act read in conjunction with Sections 529 and 529A of the Act but puts the sale proceeds in the winding up proceedings in a common hotch-potch or even relinquishes the security for general benefit of the creditors at large, then the creditor would not be entitled to the benefit of Section 529A and would stand in line with the unsecured creditors of the company. Further, where the secured creditor has been unable to fully realize his dues owing to the taking of share from his security towards workmen's portion in terms of the proviso to Section 529(1), then to the extent specified, the secured creditor is entitled to a charge pari passu with the workmen's dues for the purposes of Section 529A.

16. The situation may be different where the secured creditor relinquishes his security in favour of or upon realization submits the proceeds in the common hotch-potch in winding up proceedings and for the benefit of the creditors in general. Proviso to Section 529(1) has a very significant role in this entire process for recovery. It has two contents which have to be read conjunctively. First, that creates a pari passu charge by legal fiction on the security of a secured creditor in favour of the workmen and, second, where the secured creditor instead of relinquishing his security and proving his debts opts to realize his security. The expression 'and' used in the proviso has to be read and construed conjunctively and not disjunctively. The word 'and' specifies two specific conditions aforenoticed for the proviso and sub-clauses (a) to (c) to become enforceable. Clauses (a) and (b) to the proviso give right of representation to the liquidator for enforcing the statutory right in favour of the workmen to the extent of the portion of the workmen's dues. Clause (c) of proviso to Section 529(1) provides the mode for

recouping the shortfall in the amount which the secured creditor loses upon sale of security and creation of pari passu charge. Of course, as already noticed, such recovery is again pari passu and limited to the extent of the amount of workmen's dues. The realization of the security may be in the proceedings outside the winding up, i.e., before a special forum or otherwise or it may be in the winding up but not for the benefit of the general creditors but strictly in compliance with the provisions of the proviso to Section 529(1) of the Act. In both such situations, the secured creditor would be entitled to the protection and right of preferential payment contemplated under Section 529A(1) of the Act.

17. Now, I may refer to the judgments of this Court relied upon by the respective parties. In the case of *Allahabad Bank* (supra) the Allahabad Bank was an unsecured creditor of the company in liquidation in that case and had obtained a simple money decree from the Debts Recovery Tribunal (for short 'the DRT') at Delhi against the debtor-company. The Canara Bank was a secured creditor of the debtor-company but its claim was pending before the same Tribunal. The Allahabad Bank had taken out the sale proceedings before the Recovery Officer under the RDB Act. The Company Court, however, stayed these sale proceedings under Sections 442 and 537 of the Act, in a winding up petition by Ranbaxy Ltd. Dissatisfied, the Allahabad Bank had challenged the order of the Company Court before this Court. This Court in that case was primarily dealing with the question whether the amount directed to be realized by sale of assets of the debtor company by the DRT, at the instance of Allahabad Bank, may straightaway be released in its favour, or whether, keeping in view the provisions of Section 19(19) of the RDB Act read with Section 529A of the Act, the other parties such as secured creditors, would still have a charge over the monies so realized. Thus, the question primarily before the Court in that case was the order of priority of discharging debts between a secured and an unsecured creditor, with respect to funds realized from sale of assets of the debtor

company. While dealing with this question, the Court made an observation that the workmen's dues have priority over all other creditors, secured or unsecured, because of Section 529A(1)(a) of the Act. The following paragraphs of this judgment can usefully be referred to at this stage:

> "62. Secured creditors fall under two categories. Those who desire to go before the Company Court and those who like to stand outside the winding-up.
>
> XXXX XXXX XXXX XXXX
>
> 68. In our opinion, the words "so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso" obviously mean the amount taken away from the private realisation of the secured creditor by the liquidator by way of enforcing the charge for workmen's dues under clause (c) of the proviso to Section 529(1) "rateably" against each secured creditor. To that extent, the secured creditor - who has stood outside the winding-up and who has lost a part of the monies otherwise covered by security - can come before the Tribunal to reimburse himself from out of other monies available in the Tribunal, claiming priority over all creditors, by virtue of Section 529A(1)(b).
>
> XXXX XXXX XXXX XXXX
>
> 76. The next question is whether the amounts realised under the RDB Act at the instance of the appellant can be straight away released in its favour. Now, even if Section 19(19) read with Section 529A of the Companies Act does not help the respondent Canara Bank, the said provisions can still have an impact on the appellant Allahabad Bank which has no doubt a decree in its favour passed by the Tribunal. Its dues are unsecured. The "workmen's dues" have priority over all other creditors, secured and unsecured because of Section 529-A(1)(a).

> There is no material before us to hold that the workmen's dues of the defendant Company have all been paid. In view of the general principles laid down in *National Textile Workers' Union v. P.R. Ramakrishnan* (1983) 1 SCC 228 there is an obligation resting on this Court to see that no secured or unsecured creditors including banks or financial institutions, are paid before the workmen's dues are paid. We are, therefore, unable to release any amounts in favour of the appellant Bank straight away."

18. Firstly, the question now before this Court was not raised on the facts of that case. Secondly, the Court recorded no reasons for making such an observation. It, therefore, was a mere obiter and would not satisfy the essentials of a binding precedent. For it to be a binding precedent, the Court should directly be concerned with such issue. There should be an issue which should be concluded by appropriate reasoning to give it colour of a binding precedent.

19. However, this very question came up for consideration before a three-Judge Bench of this Court in the case of *Andhra Bank* (supra). The facts of that case were that under the scheme of amalgamation the assets and properties of the Tobacco Division of Duncan Agro Industries Ltd. were transferred to its subsidiary New Tobacco Ltd. The subsidiary had been enjoying diverse financial credit facilities from Andhra Bank which was its secured creditor. Andhra Bank had filed a suit for recovery of its dues. A winding up petition was also filed. Finally, the subsidiary company was ordered to be wound up and the assets of the company were ordered to be taken over by the Official Liquidator. Some assets had been sold by Receivers appointed in the said separate suit, but in view of approval of a scheme of revival of the company, the winding up order was stayed. This scheme of revival, however, failed. Thus, the assets and properties of the company were directed to be sold. The Company Court passed an order directing that out of the sale proceeds of the assets of the company, the wages of the

employees and the workmen be paid. Therein, the Andhra Bank was a secured creditor, the dues of the workmen were payable under Sections 529 and 529A of the Act and there were also other creditors of the company. The larger Bench considered various judgments and finally, while commenting upon the observations made by the two-Judge Bench of this Court in the case of *Allahabad Bank* (supra), this Court held as under:

> "26. Such an observation was, thus, neither required to be made keeping in view the fact situation obtaining therein nor does it find support from the clear and unambiguous language contained in Section 529A(1)(a). We have, therefore, no hesitation in holding that finding of this Court in Allahabad Bank to the aforementioned extent does not lay down the correct law.
>
> 27. The Court also wrongly placed reliance on *National Textile Workers' Union v. P.R. Ramakrishnan*. The question which arose therein was only as regards the right of the workers to be heard in the winding-up proceeding. The said decision was, therefore, not applicable.

Determination

28. By reason of the order dated 12-10-1993, the learned Single Judge while issuing various directions, directed:

> "Andhra Bank is directed to pay a sum of Rs 38 lakhs to the Official Liquidator for the purpose of disbursing forthwith the salary to the officers, staff and workers of New Tobacco Co. Ltd., both at Calcutta and Durgapur, before the ensuing Puja. The Official Liquidator will disburse such salary to the officers, staff and workers of New Tobacco Co. Ltd., as aforesaid, before the ensuing Puja."

29. No reason has been assigned in support of the said direction. The contentions of the parties had not been

noticed. What impelled the learned Judge in issuing the said directions is not discernible. The jurisdictional question had also not been addressed.

30. Whether the workmen could be directed to be paid on an ad hoc basis having regard to their claim of past dues vis-à-vis the claim of the appellants had not been deliberated upon. When a matter is not pending before the Tribunal under the RDB Act, in terms of Section 19(19) thereof, the secured creditors would not get priority per se as it is qualified by the words "in accordance with the provisions of Section 529A". The claims of the secured creditors are, thus, required to be considered giving priority over unsecured creditors but their claim would be pari passu with the workmen."

(Emphasis supplied)

20. The principles enunciated by this Court in the case of *Andhra Bank* (supra) clearly establish the fact that out of the dues payable, the workmen have a preferential charge, but the dues of the secured creditors, as protected under Section 529A of the Act, have to rank pari passu with the dues of the workmen, without any preference to the latter.

21. Firstly, this being a Bench of equi-strength, I see no reason for not following the view expressed by this Court in the case of *Andhra Bank* (supra) and secondly, any other interpretation is likely to defeat the legislative balance in the underlying genesis of the amended provisions of Sections 529 and 529A of the Act.

22. It may also be noticed that prior to the pronouncement of the judgment of this Court in the case of *Allahabad Bank* (supra), the settled view of this Court was that the charge of the secured creditors and that of the workmen would rank pari passu within the ambit of Section 529A of the Act. [refer *UCO Bank* (supra)]. Usefully, reference can also be made to the

judgment of this Court in the case of *A.P. Financial Corporation v. Official Liquidator* [(2000) 7 SCC 291] wherein this Court was dealing with the provisions of Section 29 of the State Financial Corporations Act, 1951 and the question as to whether these provisions could be implemented, ignoring the *pari passu* charge of the workmen as contemplated under Sections 529 and 529A of the Act. The High Court, in that case, had imposed certain conditions in regard to sale of the property under Section 29 of the State Financial Corporations Act to protect the *pari passu* charge contemplated under the provisions of Section 529A of the Act. Besides holding that the provisions of the Act shall prevail, this Court held that the pari passu charge has to be maintained and also held as under :

> "We are, therefore, of the opinion that the above proviso to sub-section (1) of Section 529 and Section 529A will control Section 29 of the Act of 1951. In other words the statutory right to sell the property under Section 29 of the Act of 1951 has to be exercised with the rights of pari passu charge to the workmen created by the proviso to Section 529 of the Companies Act. Under the proviso to sub-section (1) of Section 529, the liquidator shall be entitled to represent the workmen and force (sic enforce) the above pari passu charge. Therefore, the Company Court was fully justified in imposing the above conditions to enable the Official Liquidator to discharge his function properly under the supervision of the Company Court as the new Section 529A of the Companies Act confers upon a Company Court the duty to ensure that the workmen's dues are paid in priority to all other debts in accordance with the provisions of the above section. The legislature has amended the Companies Act in 1985 with a social purpose viz. to protect dues of the workmen. If conditions are not imposed to protect the right of the workmen there is every possibility that the secured creditor may frustrate the above pari passu right of the workmen."

23. As per the scheme and the relevant provisions of the Act, it is clear that a secured creditor can relinquish his security, participate in winding up proceedings and file his claim before the official liquidator, as and when invited. In the case of *Andhra Bank* (supra), this Court has clearly stated the principle that the dues of the secured creditors and of the workmen would rank *pari passu* as regards the order of preference of their discharge. This, of course, is subject to satisfying the conditions as stated in Sections 529 and 529A of the Act. The proviso to sub-section (1) of Section 529, by a deemed fiction, makes the dues of the workmen pari passu with that of the secured creditors and creates a charge in favour of the workmen upon the amounts realized from the enforcement of such security, to the extent of the workmen's portion therein. As already noticed, the 'workmen's portion' has been explained under sub-section (3)(c) of Section 529 which requires that in relation to the security of any secured creditor of the company, workmen's portion would mean the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of the amount of workmen's dues and the amounts of the debts due to the secured creditors. The illustration to this sub-section provides the mode in which the workmen's portion is to be calculated. Once the workmen's portion is computed, then in terms of Section 529A, again it has to be treated as a charge pari passu to the debts of the secured creditor. In the case of the latter, the charge will be limited to the extent such debt ranks under clause (c) of the proviso to sub-section (1) of Section 529 pari passu with such dues for preferential payment. The dues payable to the workmen and the secured creditors have to be paid in priority to all other debts. But the dues payable to the secured creditor will not be more than the amount that remains unsatisfied after the security is relinquished in favour of the workmen under Section 529 of the Act.

24. The relinquishment of security by a secured creditor certainly requires some conscious act on his part more than

the mere filing of a claim in response to a public notice issued by the official liquidator. Once the secured creditor takes such further actions like sale of the secured assets through the liquidator and subject to the control of the Company Court in that event, he would be part of the scheme of payment as rationalized under Section 529 and 529A of the Act.

25. In the case of *Andhra Bank* (supra), this Court, after discussing the law in paragraphs 25 and 26, clearly held in paragraph 30 of the judgment that claims of the secured creditors are, thus, to be considered giving priority over the unsecured creditors but their claim would be pari passu with the workmen. In my view, this is the correct exposition of law.

26. The learned counsel appearing for the appellant also raised an issue with regard to the secured creditors having stood outside the winding up and, therefore, not entitled to the benefit of pari passu charge in terms of Section 529A of the Act. According to respondent No.8, they had taken steps for realizing the security without prejudice to the proceedings initiated by them before the Debts Recovery Tribunal and they had never given up their claim. According to this respondent, they have not been able to realize their entire dues as a result of taking out of the workmen's portion out of their security. It is also their contention that once having obtained the benefit under the Proviso to Section 529(1) of the Act, it is not open to the workmen to disregard the rest of the provisions and deny the benefit to respondent No.8 of the provisions of Section 529A. To the contra, as already noticed, the submission of the appellant is that the secured creditors have given up their security and joined the winding up proceedings and are covered under Section 47(2) of the Insolvency Act. Resultantly the provisions of Section 529A(1)(b) are not applicable.

27. A secured creditor who has a charge over the assets of a company in winding up, merely by instituting an application before the DRT or any other special forum without effectively pursuing that remedy and taking effective steps to realize his

security would not stand outside the winding up proceedings. If the sale of secured assets is effected by the Official Liquidator subject to control of the Company Court and such amounts are utilized for discharging the debts of the secured creditor as well as statutory charge of the workmen created under Sections 529 and 529A, then, in effect, the secured creditor would be deemed to have participated in the winding up proceedings and not stood outside the same. It is for the reason that a secured creditor has to take steps by filing petition before any other forum just to protect his legal right and to prevent the claim from getting barred by time. On the contrary, if he realizes his security within the four corners of the company law, i.e., before the Official Liquidator and the Company Court, in that event it would not be possible to hold that such secured creditor has given up his option to participate in the winding up proceedings. However, the matter would be quite different where the secured creditor elects not only to institute a petition before the specialized forum but also takes effective steps to realize his security and pursues the proceedings effectively, in which event, the conclusion has to be that such secured creditor has stood 'outside the winding up' proceedings.

28. Equally, it can be stated that a secured creditor who, after institution of a claim but without pursuing the remedy outside the provisions of this Act, files claim before the official liquidator, relinquishes his security and agrees to the distribution of the sale proceeds through the official liquidator, subject to jurisdiction of the Company Court, could always be said to be not 'standing outside the winding up' proceedings. However, where he institutes a petition, proceeds with it and seeks realisation of security before a forum outside the Company Court, then he obviously pursues the remedy beyond mere filing of a claim and would be a person 'standing outside the winding up' proceedings and shall be subject to the rights enforced by the official liquidator in terms of the proviso to Section 529 of the Act. As it has also been held by this Court in the case of *ICICI Bank* (supra), the secured creditor has to

take some positive steps to participate in the winding up petition.

29. In the case of *ICICI Bank* (supra), this Court had taken the view that filing an affidavit or proof of claim with the official liquidator pursuant to notice issued by him does not amount to the relinquishment of his security by a secured creditor in terms of Section 47(2) of the Insolvency Act. In this very judgment, the Court also stated that 'only because the dues of the workmen and the debts due to the secured creditor are treated pari passu with each other, the same by itself, would not lead to the conclusion that the concept of inter se priorities amongst the secured creditors had thereby been intended to be given a total goby'. The Court also explained that relinquishment has to be by virtue of a specific act and a conscious decision on behalf of the secured creditor. Similarly, merely filing a proceedings before a special forum to save limitation without taking any effective steps to realize the security there, would not necessarily mean that the secured creditor has stood outside the winding up proceedings.

30. From the respective contentions raised by the parties, one fact is clear that respondent No.8 has realized its security without prejudice to the proceedings taken by it before the Debts Recovery Tribunal. Furthermore, the security was realized strictly within the scope of Section 529(1) and its proviso. That has to be protected in terms of Section 529A(1)(b) because the secured creditor has not relinquished its security for the general benefit of the creditors but realized the same in terms of Section 47(1) of the Insolvency Act. The argument raised on behalf of the appellant in this regard is not well-founded. If this contention is accepted in the facts of the present case, then it would run contra to the principles stated by this Court in the case of *Andhra Bank* (supra) and *ICICI Bank* (supra). It has already been noticed that the provisions of Section 529A are not controlled and/or subservient to any other provision of the Act or any other law. Once the twin

requirements stated in the proviso to Section 529(1) are satisfied, the scheme contemplated under clause (c) of the proviso to Section 529 read with Section 529A of the Act would come into play. The Court cannot overlook the reality that intention of the framers of law could not have been that the public funds, for instance, the money of secured creditor (like banks), should be completely ignored for the benefit of the creditors in general, despite there being a definite protection in law, more so, when the security may be sufficient for recovery of dues of such secured creditors to a limited extent, if not in entirety. The scheme of these provisions, thus, has to be understood to make it practicable and in consonance with the accepted commercial principles. It is precisely for these reasons that I am taking the view that the workmen's charges as well as that of the secured creditors have to be paid in preference to all others, but with inter se pari passu charge on the amounts realized from the sale of the security or otherwise.

31. From the above discussion on law and the judgments of this Court, the following principles can be safely deduced :

1. The rules of insolvency or the provisions of the Provincial Insolvency Act, 1920 would apply in the winding up of an insolvent company under the provisions of Section 529 of the Act but it has a limited application as per terms of clauses (a) to (c) of Section 529(1) of the Act.

2. The provisions of the Insolvency Act and even Section 529 of the Act cannot control the scope and application of Section 529A of the Act.

3. Merely submitting of an affidavit or demand by the secured creditor in response to the notice issued by the Official Liquidator inviting claims would not tantamount to effective participation in the winding up proceedings (Ref. *ICICI Bank* (supra)).

4. Mere institution of a petition by a secured creditor before a court or forum of competent jurisdiction per se will not lead to an inference that the secured creditor has stood outside the winding up proceedings unless it takes some effective steps to pursue those proceedings and realizes its security de hors the specific procedure under the Act.

5. The proviso to Section 529(1) has two prescribed contents which have to be satisfied cumulatively. The expression 'and' appearing therein will have to be read as 'conjunctive' and not 'disjunctive'.

The contents are, firstly, that the provision creates a legal fiction of pari passu charge in favour of the workmen on the security of a secured creditor and, secondly, that the secured creditor should realise its security in contradistinction to relinquishment of his security for recovery of its dues in accordance with law.

6. Relinquishment has to be a conscious act on the part of the secured creditor and is incapable of being construed by implication.

7. The secured creditor and dues of the workmen in the proportion calculated in terms of Section 529A are liable to be paid in preference to all other dues but are pari passu inter se. (Ref. *Andhra Bank* (supra)

32. Reverting to the facts of the present case, the judgment of the High Court, to the extent it takes the view that the charges of the workmen and secured creditors have to rank *pari passu*, cannot be faulted with. However, where the learned Single Judge as well as the Division Bench of the High Court have fallen in error of law, is the computation and adjustment of the shares between the workmen, on the one hand and the secured

creditors, on the other. Particularly, the learned Single Judge directed the amounts recovered from the secured creditors to be distributed between the workmen and the secured creditors in equal proportion of 50 per cent of their respective admitted claims. This order and calculation is opposed to the very scheme of the above provisions, particularly with respect to determination of the workmen's portion. Another error in the calculation that appears from the record is that though the total sale proceeds from the secured assets were Rs.108.90 crore, the Court directed the payment of only Rs.101 crore which is the aggregate of the amount directed to be paid to the workmen and to the secured creditors. Thus, there has been an error of law in applying the statutory provisions in this regard. The High Court erred in not noticing that the Company Court has not made calculation and computation in accordance with law. The Company Court as well as the Appellate Court should have considered the workmen's portion in terms of proviso to Section 529(1) and Section 529(3)(c) along with the illustration appended thereto and thereafter, its over-riding preferential payment vis-a-vis all other unsecured creditors in terms of Section 529A and 530 of the Act. Once that is done, the Court could then have settled the payment received by the Official Liquidator from the sale of the unsecured assets of UMI. The amounts, thus, are required to be recalculated in terms of the above provisions and the law stated herein.

33. In the present case, the secured creditor has realized its security but without putting the security or the receipts thereof in the common hotch potch of the winding up proceedings for the general benefit of the creditors. Thus, in terms of Section 47(1) of the Insolvency Act, the secured creditor in the present case is entitled to the balance due to it, deducting the net amounts realized. If the secured creditor would have participated in the winding up proceedings in its entirety with the security being realised and/or relinquished for the general benefit of the creditors and not restricted to the compliance of Section 529 of the Act, it would not be entitled to the benefit of

Section 529A of the Act. As already discussed, it is not the case herein. It may also be noticed that the amounts, by the consent of the parties, have already been disbursed and utilized by the workmen as well as the secured creditors in terms of Section 529 of the Act which obviously, in my view, are subject to adjustment as per the orders of the Court.

34. For the reasons afore-recorded, while reiterating the view expressed in *Andhra Bank* (supra), I am of the considered view that the High Court should re-compute the amounts payable pari passu between the secured creditors and the workmen in accordance with the principles stated above.

35. Therefore, I remand the matter to the Company Court to apply the above-stated principles and calculate the amount payable to the respective parties afresh and in accordance with law.

A.K. PATNAIK, J. 1. Leave granted.

2. We have carefully read the learned opinion of our esteemed brother Swatanter Kumar, J. in this case but with great respect we are unable to persuade ourselves to agree with his interpretation of Sections 529 and 529A of the Companies Act, 1956 (for short 'the Companies Act').

3. Before we give our interpretation of Sections 529 and 529A of the Companies Act, we may very briefly state the relevant facts as stated by the appellant. U.M.I. Special Steel Limited (for short 'the company') is a company registered under the Companies Act. The company became sick and went before the BIFR but the BIFR in its opinion dated 08.03.2002 recommended for winding up of the company. On 05.08.2003, the learned Company Judge of the High Court of Jharkhand passed orders for winding up of the company and appointed the official liquidator as liquidator to conduct the liquidation proceedings in relation to the company and to take over the assets, books and documents of the company. The liquidator then took over the assets of the company and sold some of the

assets of the company and paid Rs.93,64,93,586/- to the secured creditors and Rs.8,19,22,371.12p to the workmen representing 50% of their verified claims towards wages. When the liquidator sold some more assets and received Rs.8,51,01,000/-, the appellant filed I.A. No.1511 of 2008 before the learned Company Judge of the High Court contending that the assets of the company situated at Chennai, Pune, Faridabad and Kolkata which have been sold are not properties over which the banks/financial institutions have any charge and therefore, they cannot be treated as secured creditors in respect of these properties and the sale proceeds from these properties should be kept separately and be paid to the workmen first before disbursing any amount to the banks/financial institutions. The banks/financial institutions, which had given loans and advances to the company, on the other hand, contended before the learned Company Judge that claim of the workmen and secured creditors stand pari passu and the Companies Act does not make any difference between the mortgaged property and other properties of the company and, therefore, the entire sale proceeds obtained from the properties of the company should be distributed among the secured creditors and workers on pro rata basis. The learned Company Judge in his order dated 28.11.2008 held that the workmen and secured creditors have pari passu charge over the properties of the company as would be clear from Sections 529 and 529A of the Companies Act and the decision of this Court in *Andhra Bank v. Official Liquidator & Anr.* [(2005) 5 SCC 75]. Aggrieved, the appellant filed Company Appeal No.10 of 2008 before the Division Bench of the High Court and contended that the secured creditors have pari passu charge with the workmen only on the properties which have been offered by the company to the secured creditors as security. In its order dated 30.09.2010, the Division Bench of the High Court, however, held that the secured creditors have pari passu charge with the workmen over all the properties of the company under sections 529 and 529A and dismissed the appeal. It is this order dated 30.09.2010 of the Division Bench of the High Court of

Jharkhand that is challenged in this appeal by way of special leave under Article 136 of the Constitution.

4. We have heard learned counsel for the appellant and the respondents and we are of the considered opinion that the learned Company Judge and the Division Bench of the High Court have not correctly interpreted the provisions of Sections 529 and 529A of the Companies Act. For easy reference, Sections 529 and 529A of the Companies Act, which have to be read together, are extracted hereinbelow:

"529. Application of insolvency rules in winding up of insolvent companies.- (1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to-

(a) debts provable;

(b) the valuation of annuities and future and contingent liabilities; and

(c) the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent:

Provided that the security of every secured creditor shall be deemed to be subject to a *pari passu* charge in favour of the workmen to the extent of the workmen's portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security,-

(a) the liquidator shall be entitled to represent the workmen and enforce such charge;

(b) any amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues; and

(c) so much of the debt due to such secured creditor

as could not be realised by him by virtue of the foregoing provisions of this proviso or the amount of the workmen's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of section 529A.

(2) All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up, and make such claims against the company as they respectively are entitled to make by virtue of this section:

Provided that if a secured creditor instead of relinquishing his security and proving for his debt proceeds to realise his security, he shall be liable to pay his portion of the expenses incurred by the liquidator (including a provisional liquidator, if any) for the preservation of the security before its realization by the secured creditor.

Explanation.-For the purposes of this proviso, the portion of expenses incurred by the liquidator for the preservation of a security which the secured creditor shall be liable to pay shall be the whole of the expenses less an amount which bears to such expenses the same proportion as the workmen's portion in relation to the security bears to the value of the security.

(3) For the purposes of this section, section 529A and section 530,-

(a) "workmen", in relation to a company, means the employees of the company, being workmen within the meaning of the Industrial Disputes Act, 1947 (14 of 1947);

(b) "workmen's dues", in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely:-

(i) all wages or salary including wages payable for time or piece work and salary earned wholly or in

part by way of commission of any workman, in respect of services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947 (14 of 1947);

(ii) all accrued holiday remuneration becoming payable to any workman, or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order or resolution;

(iii) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (8 of 1923) rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any workman of the company;

(iv) all sums due to any workman from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the workmen, maintained by the company;

(c) "workmen's portion", in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of-

(i) the amount of workmen's dues; and

(ii) the amounts of the debts due to the secured creditors."

"529A. Overriding preferential payment.- Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company-

(a) workmen's dues; and

(b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of section 529 pari passu with such dues,

shall be paid in priority to all other debts.

(2) The debts payable under clause (a) and clause (b) of sub-section (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions."

5. A plain reading of clause (c) of sub-section (1) of Section 529 makes it clear that in the winding up of an insolvent company, the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent. This would mean that the respective rights of secured and unsecured creditors of an insolvent company, which is being wound up, will be the same as the respective rights of secured and unsecured creditors with respect to the estates of persons adjudged insolvent as are in force under the law of insolvency. In the State of Jharkhand, the Provincial Insolvency Act, 1920 (for short 'the Insolvency Act') is in force and accordingly the respective rights of secured and unsecured creditors with respect to the assets of the insolvent company being wound up will be the same as in the Insolvency Act. The Companies Act does not define a "creditor" and a "secured creditor" and hence, we have to refer to the Insolvency Act for the definitions of these two words. Section 2(1)(a) and Section 2(1)(e) of the Insolvency Act define the words 'creditor' and 'unsecured

creditor' and are extracted hereinbelow:

> "2(1)(a) "creditor" includes a decree-holder, "debt" includes a judgment-debt, and "debtor" includes a judgment-debtor."
>
> "2(1)(e) "secured creditor" means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor."

It will be clear from the definition of 'creditor' in Section 2(1)(a) of the Insolvency Act that it is an inclusive and not an exhaustive definition, whereas it will be clear from the definition of 'secured creditor' in Section 2(1)(e) of the Insolvency Act that it is an exhaustive definition and that a secured creditor means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor. The result is that the expression 'secured creditor' in Section 529(1)(c) would mean a person who holds a mortgage, charge or lien on the property of the company or any part thereof as a security for a debt due to him from the company. Where, therefore, a creditor, such as the bank or the financial institution in this case, does not hold a mortgage, charge or lien on the property of the company or any part thereof as a security for a debt due to it from the company, it is not a secured creditor for the purposes of Sections 529 and 529A of the Companies Act.

6. Sections 45 and 47 of the Insolvency Act, which enumerate the rights of unsecured creditors and secured creditors respectively are extracted hereinbelow:

> "45. **Debt payable at a future time.**- A creditor may prove for a debt not payable when the debtor is adjudged an insolvent as if it were payable presently, and may receive dividends equally with the other creditors, deducting therefrom only a rebate of interest at the rate of six per centum per annum computed from the declaration

> of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted."
>
> "47. **Secured creditors.-** (1) Where a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised.
>
> (2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.
>
> (3) Where a secured creditor does not either realise or relinquish his security, he shall, before being entitled to have his debt entered in the schedule, state in his proof the particulars of his security, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.
>
> (4) Where a security is so valued, the Court may at any time before realisation redeem it on payment to the creditor of the assessed value.
>
> (5) Where a creditor, after having valued his security, subsequently realises it, the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.
>
> (6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all shares in any dividend."

On a reading of the two provisions quoted above, we find that an unsecured creditor is entitled under Section 45 of the Insolvency Act to receive dividends equally with the other creditors, whereas the secured creditor has the right under Section 47 of the Insolvency Act to realize the security and to prove for the balance due to him in case on realization of such

security he is not able to recover the entire amount due to him. If, however, the secured creditor does not opt to realize his security but relinquishes it for the general benefit of the creditors, then he may prove for his whole debt. Under the Insolvency Act, therefore, the secured creditor has only a right over the particular property offered to him as security and all the creditors have equal rights over the other properties comprising the estate of the person adjudged insolvent.

7. In our considered opinion, therefore, on a reading of the provisions of clause (c) of sub-section (1) of Section 529 of the Companies Act along with the provisions of the Insolvency Act relating to the respective rights of secured and unsecured creditors, a secured creditor of an insolvent company which is being wound up has only a right over the particular property or asset of the company offered to the secured creditor as a security and the unsecured creditors have rights over all other properties or assets of the insolvent company. We may now examine whether the proviso to sub-section (1) of Section 529 of the Companies Act makes any difference to these rights of secured creditors and unsecured creditors of an insolvent company.

8. The first limb of the proviso to sub-section (1) of Section 529 of the Companies Act states that the security of every secured creditor shall be deemed to be subject to a *pari passu* charge in favour of the workmen to the extent of the workmen's portion therein. Clause (c) of sub-section (3) of Section 529 of the Companies Act states that the "workmen's portion", in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of - (i) the amount of workmen's dues; and (ii) the amounts of the debts due to the secured creditors. Thus, the first limb of the proviso to clause (c) of sub-section (1) of Section 529 of the Companies Act creates a statutory charge over the security of every secured creditor to the extent of the workmen's portion. In other words, every property or asset of

an insolvent company, which is being wound up and which has been offered as a security to a secured creditor is subject statutorily to a pari passu charge in favour of the workmen to the extent of the workmen's portion by virtue of the proviso to sub-section (1) of Section 529 of the Companies Act. Therefore, the first limb of the proviso to sub-section (1) of Section 529 does not create any pari passu charge in favour of secured creditor over property or asset of the company which has not been given as security by the company to the secured creditor. Rather, the language of the first limb of this proviso makes it crystal clear that the security of every secured creditor created dehors the proviso to sub-section (1) of Section 529 of the Companies Act is statutorily subjected to a pari passu charge in favour of the workmen by the first limb of the proviso to sub-section (1) of Section 529 of the Companies Act.

9. The second limb of the proviso to sub-section (1) of Section 529 of the Companies Act states the consequences which follow where a secured creditor, instead of relinquishing his security and proving his debt, opts to realize his security. These are: (a) the liquidator shall be entitled to represent the workmen and enforce such charge; (b) any amount realized by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues; and (c) so much of the debt due to such secured creditor as could not be realized by him by virtue of the foregoing provisions of this proviso or the amount of the workmen's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of Section 529A of the Companies Act. What is relevant in this case is the consequence in clause (c) which provides that the portion of the debt due to the secured creditor as could not be realized because of the statutory charge created in favour of the workmen on the security of the creditor shall to the extent stated therein rank pari passu with the workmen's portion for the purposes of Section 529A of the Companies Act. Hence, clause (c) of this proviso does not create a pari passu charge over properties or assets of the

company which have not been offered to the secured creditor as security, but to the extent of the loss of security suffered by a particular secured creditor because of the statutory charge created in favour of the workmen, the secured creditor is ranked pari passu with the workmen for overriding preferential payment under Section 529A of the Companies Act.

10. Section 529A of the Companies Act states that notwithstanding anything contained in any other provision of the Companies Act or any other law for the time being in force, in the winding up of a company - (a) workmen's dues; and (b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section 529 of the Companies Act pari passu with such dues, shall be paid in priority to all other debts. This would mean that the workmen's dues and only the debts due to the secured creditors to the extent such debts rank pari passu with workmen's dues under clause (c) of the proviso to sub-section (1) of Section 529 will have priority over all other debts of the company. The entire object of Section 529A of the Companies Act is to ensure overriding preferential payment of (a) the workmen's dues and (2) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section 529 pari passu with the workmen's dues. The effect of the non-obstante clause in the opening part of Section 529A of the Companies Act, therefore, is that notwithstanding anything in the Companies Act and any other law including the Insolvency Act, workmen's dues and dues of the secured creditor which could not be realized because of the pari passu charge in favour of the workmen under the proviso to sub-section (1) of Section 529 and only to the extent such dues rank pari passu with the dues of the workmen under clause (c) of the said proviso are paid in priority over all other dues.

11. We may now refer to sub-section (2) of Section 529 of the Companies Act which states that all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the

winding up, and make such claims against the company as they respectively are entitled to make by virtue of Section 529 of the Companies Act. The proviso to sub-section (2), however, states that if a secured creditor instead of relinquishing his security and proving for his debt proceeds to realize his security, he shall be liable to pay his portion of the expenses incurred by the liquidator (including a provisional liquidator, if any) for the preservation of the security before its realization by the secured creditor. This provision in sub-section (2) of Section 529 of the Companies Act makes it amply clear that all creditors, secured and unsecured, of the insolvent company are entitled to prove for and receive dividends out of the assets of the company but so far as secured creditors are concerned, they have the option either to relinquish their security in which case they like any unsecured creditor would only be entitled to prove for and receive the dividends out of the assets of the company or to realize the security instead of relinquishing the security in which case they have to pay to the liquidator only expenses for the preservation of the security until they realize the security by appropriate proceedings other than the winding up proceedings.

12. Our conclusions on interpretation of the provisions of Sections 529 and 529A of the Companies Act, therefore, are:

(i) a secured creditor has only a charge over a particular property or asset of the company. The secured creditor has the option to either realize his security or relinquish his security. If the secured creditor relinquishes his security, like any other unsecured creditor, he is entitled to prove the debt due to him and receive dividends out of the assets of the company in the winding up proceedings. If the secured creditor opts to realize his security, he is entitled to realize his security in a proceeding other than the winding up proceeding but has to pay to the liquidator the costs of preservation of the security till he realizes the security.

(ii) over the security of every secured creditor, a statutory charge has been created in the first limb of the proviso to clause (c) of sub-section (1) of Section 529 of the Companies Act in favour of the workmen in respect of their dues from the company and this charge is pari passu with that of the secured creditor and is to the extent of the workmen's portion in relation to the security of any secured creditor of the company as stated in clause (c) of sub-section (3) of Section 529 of the Companies Act.

(iii) where a secured creditor opts to realize the security then so much of the debt due to such secured creditor as could not be realized by him by virtue of the statutory charge created in favour of the workmen shall to the extent indicated in clause (c) of the proviso to sub-section (1) of Section 529 of the Companies Act rank *pari passu* with the workmen's dues for the purposes of Section 529A of the Companies Act.

(iv) the workmen's dues and where the secured creditor opts to realize his security, the debt to the secured creditor to the extent it ranks pari passu with the workmen's dues under clause (c) of the proviso to sub-section (1) of Section 529 of the Companies Act shall be paid in priority over all other dues of the company.

13. In support of our aforesaid conclusions, we may now cite some authorities. In *Allahabad Bank v. Canara Bank & Anr.* [(2000) 4 SCC 406], a two-Judge Bench of this Court speaking through M. Jagannadha Rao, J. discussed these rights of the secured creditors in paragraphs 62, 63, 64 and 65 of the judgment as reported in the SCC, which are extracted hereinbelow:

"62. Secured creditors fall under two categories. Those who desire to go before the Company Court and those who like to stand outside the winding- up.

63. The first category of secured creditors mentioned above are those who go before the Company Court for dividend by relinquishing their security in accordance with the insolvency rules mentioned in Section 529. The insolvency rules are those contained in Sections 45 to 50 of the Provincial Insolvency Act. Section 47(2) of that Act states that a secured creditor who wishes to come before the official liquidator has to prove his debt and he can prove his debt only if he relinquishes his security for the benefit of the general body of creditors. In that event, he will rank with the unsecured creditors and has to take his dividend as provided in Section 529(2). Till today, Canara Bank has not made it clear whether it wants to come under this category.

64. The second class of secured creditors referred to above are those who come under Section 529-A(1)(b) read with proviso (c) to Section 529(1). These are those who opt to stand outside the winding-up to realise their security. Inasmuch as Section 19(19) permits distribution to secured creditors only in accordance with Section 529-A, the said category is the one consisting of creditors who stand outside the winding up. These secured creditors in certain circumstances can come before the Company Court (here, the Tribunal) and claim priority over all other creditors for release of amounts out of the other monies lying in the Company Court (here, the Tribunal). This limited priority is declared in Section 529-A(1) but it is restricted only to the extent specified in clause (b) of Section 529-A(1). The said provision refers to clause (c) of the proviso to Section 529(1) and it is necessary to understand the scope of the said provision.

65. Under clause (c) of the proviso to Section 529(1), the

priority of the secured creditor who stands outside the winding-up is confined to the "workmen's portion" as defined in Section 529(3)(c). "Workmen's portion" means the amount which bears to the value of the security, the same proportion which the amount of the workmen's dues bears to the aggregate of (a) workmen's dues, and (b) the amounts of the debts due to all the creditors. This is explained in the illustration under the said provision. If the workmen's dues in all are, say, Rs.1 lakh and the debt due to all secured creditors is Rs.3 lakhs, the total amount due to all of them comes to Rs.4 lakhs. Therefore, the workmen's share comes to 25% (Rs 1 lakh out of Rs 4 lakhs). Now if the value of the security of a secured creditor (like Canara Bank) is Rs.1 lakh, the "workmen's portion" will be Rs.25,000 which is the pro-rata amount to be shared by the said secured creditor. By virtue of Section 529-A(1)(b) his priority over all others out of other monies available in the Tribunal is restricted to Rs.25,000 only."

14. In *Andhra Bank v. Official Liquidator & Anr.* (supra), a three-Judge Bench speaking through S.B. Sinha, J. has also discussed in paragraphs 22 and 23 the rights of secured creditors, relevant extracts from which are quoted hereinbelow:

"22. In terms of the aforementioned provisions, the secured creditors have two options (i) they may desire to go before the Company Judge; or (ii) they may stand outside the winding-up proceedings. The secured creditors of the second category, however, would come within the purview of Section 529-A(1)(b) read with proviso (c) appended to Section 529(1). The "workmen's portion" as contained in proviso (c) of sub-section (3) of Section 529 in relation to the security of any secured creditor means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of (a) workmen's due, and (b) the amount of the debts due to all the (sic secured) creditors. ....."

"23. The language of Section 529-A is also clear and unequivocal, in terms whereof the workmen's dues or the debts due to the secured creditors, to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section 529 pari passu with such dues, shall have priority over all other debts. Once the workmen's portion is worked out in terms of proviso (c) of sub-section (1) of Section 529, indisputably the claims of the workmen as also the secured creditors will have to be paid in terms of Section 529-A. ....."

15. In the present case, the learned Company Judge and the Division Bench of the High Court have held that all secured creditors along with the workmen have pari passu charge over all the properties or assets of the company and would be entitled to the dues as secured creditors along with the workmen's dues by way of overriding preferential payments over all other dues under Section 529A of the Companies Act. The learned Company Judge of the High Court has also relied on some observations of this Court in *Andhra Bank v. Official Liquidator & Anr.* (supra) in support of his order. These observations of this Court in *Andhra Bank v. Official Liquidator & Anr.* (supra) were in the context of the observations of this Court in *Allahabad Bank v. Canara Bank & Anr.* (supra) and are quoted as under:

"25. While determining Point (6), however, a stray observation was made to the effect that the "workmen's dues" have priority over all other creditors, secured and unsecured because of Section 529-A(1)(a). Such a question did not arise in the case as Allahabad Bank was indisputably an unsecured creditor.

"26. Such an observation was, thus, neither required to be made keeping in view the fact situation obtaining therein nor does it find support from the clear and unambiguous language contained in Section 529-A(1)(a). We have, therefore, no hesitation in holding that finding of this Court

in Allahabad Bank to the aforementioned extent does not lay down the correct law."

The aforesaid observations of this Court in *Andhra Bank v. Official Liquidator & Anr.* (supra) are, thus, to the effect that workmen will not have priority over the dues of the secured creditor and this is because of the unambiguous language of Section 529A (1) that the workmen's dues and the dues of the secured creditor to the extent such debts rank under clause (c) of sub-section (1) of Section 529 pari passu with such dues will have to be paid in priority to all other debts. But as we have held, only where under the second limb of the proviso to clause (c) of sub-section (1) of Section 529 the secured creditor opts to realize the security and is unable to realize a portion of his dues because of the pari passu charge created in favour of the workmen under the first limb of the proviso, he has pari passu charge to the extent indicated in clause (c) of the proviso to sub-section (1) of Section 529 and only such debts due to the secured creditor which rank pari passu with dues of the workmen under clause (c) of the proviso to sub-section (1) of Section 529 have to be paid in priority over all other debts of the company. The High Court has clearly fallen in error by holding that all debts due to secured creditors will rank pari passu with the workmen's dues and have to be paid along with the workmen's dues in priority to all other debts of the company.

16. In the result, the appeal is allowed. The impugned order of the Division Bench of the High Court and the order dated 28.11.2008 of the learned Company Judge in I.A. No.1511 of 2008 are set aside and the matter is remitted to the learned Company Judge to decide the I.A. in accordance with law as laid down in this judgment. There will be no order as to costs.

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

CHLORO CONTROLS (I) P. LTD.

v.

SEVERN TRENT WATER PURIFICATION INC. AND ORS.

(Civil Appeal No. 7134 of 2012)

SEPTEMBER 28, 2012

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

Arbitration and Conciliation Act, 1996:

s. 45 – Reference to arbitration under – Scope of – International commercial arbitration – Multi-party agreements – Joint venture agreements with different parties – Some of the agreements contained arbitration clause while the others did not – Dispute between parties leading to filing of suit – High Court referred the entire suit (including the non-signatory parties to the arbitration agreement) for arbitration u/s. 45 – Joinder of non-signatory parties to arbitration – Permissibility – Held: Joinder of non-signatory parties to arbitration is permissible – They can be referred to arbitration, provided they satisfy the pre-requisites u/ss. 44 and 45 r/w Schedule I of the Act – The cases of group companies or where various agreements constitute a composite transaction with intrinsically interlinked cause of action, can be referred to arbitration, even if the disputes exist between signatory or even non-signatory parties – However, the discretion of the court has to be exercised in exceptional, limiting, befitting and cases of necessity and very cautiously – Expression 'any person claiming through or under him' used in s. 45, takes within its ambit persons who are in legal relationships via multiple and multi-party agreements, though they may not all be signatories to the arbitration clause – In the present case, the corporate structure of the companies demonstrates a definite legal relationship between the parties to the lis or persons claiming under them – Their contractual relationship

spells out the terms, obligations and roles of the respective parties which they were expected to perform for attaining the object of successful completion of the joint venture agreement – All the other agreements were intrinsically inter-connected with the mother agreement – All the agreements were part of a composite transaction to facilitate implementation of principal agreement – Hence, all the parties to the lis were covered under expression "any person claiming through or under" the principal (mother) agreement – Arbitration clause in the principal agreement was comprehensive enough to include all disputes arising "under and in connection with" principal agreement – Conduct of parties and even subsequent events show that the parties had executed, intended and actually implemented composite transaction contained in principal/mother agreement – Hence, direction to refer the disputes to arbitration –Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) – Article II (3) – ICC Rules – UNCITRAL Model Rules.

s. 45 – Issues under – Determination of – Issue of jurisdiction should be decided at the beginning of the proceedings itself and they should have finality – Determination of fundamental issues as contemplated u/s. 45 at the very first instance is not only appropriate but is also the legislative intent – Jurisdiction.

Code of Civil Procedure, 1908 – s. 9 – Jurisdiction of civil courts – Jurisdiction of the court and the right to a party emerging from s. 9 is not an absolute right, but contains inbuilt restrictions – Civil courts have jurisdiction to try all suits except those which is either expressly or impliedly barred – The provisions of s. 45 of the 1996 Act would prevail over the provisions of CPC – Arbitration and Conciliation Act, 1996 – s. 45.

Doctrines/Principles:

'Group of Companies' Doctrine; Principle of 'incorporation by reference'; Principle of 'composite performance'; Principle of 'agreements within an agreement' and Principle of 'Kompetenz kompetenz' – Discussed.

Precedent – Observations – Precedential value – Held: The observations to be construed and read to support the ratio decidendi – They would not constitute valid precedent as it would be hit by the doctrine of stare decisis – Doctrine – Constitution of India, 1950 – Art. 141.

Words and Phrases:

Expression 'connection' – Meaning of.

The questions which *inter alia* arose for consideration in the present appeals were: (1) What is the ambit and scope of Section 45 of the Arbitration and Conciliation Act, 1996; (2) Whether in a case where multiple agreements were signed between different parties some containing an arbitration clause and others not and where the parties were not identically common in proceedings before the Court (in a suit) and the arbitration agreement, a reference of disputes as a whole or in part could be made to the arbitral tribunal, more particularly, where the parties to an action were claiming under or through a party to the arbitration agreement; and (3) Whether the principles enunciated in the case of ****Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya* **was the correct exposition of law.**

Dismissing the appeals, the Court

HELD: 1.1 Section 45 is a provision falling under Chapter I of Part II of the Arbitration and Conciliation Act, 1996 which is a self-contained Code. The expression 'person claiming through or under' would mean and take within its ambit multiple and multi-party agreements, though in exceptional case. Even non-signatory parties to some of the agreements can pray and be referred to arbitration provided they satisfy the pre-requisites under

Sections 44 and 45 r/w Schedule I. Reference of non-signatory parties is neither unknown to arbitration jurisprudence nor is it impermissible. [Para 167] [515-A-C]

1.2 An arbitration agreement, under Section 45 of the 1996 Act, should be evidenced in writing and in terms of Article II of Schedule 1, an agreement in writing shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams. Thus, the requirement that an arbitration agreement be in writing is an expression incapable of strict construction and requires to be construed liberally, as the words of this Article provide. Even in a given circumstance, it may be possible and permissible to construe the arbitration agreement with the aid and principle of 'incorporation by reference'. Though the New York Convention is silent on this matter, in common practice, the main contractual document may refer to standard terms and conditions or other standard forms and documents which may contain an arbitration clause and, therefore, these terms would become part of the contract between the parties by reference. The solution to such issue should be case-specific. The relevant considerations to determine incorporation would be the status of parties, usages within the specific industry, etc. Cases where the main documents explicitly refer to arbitration clause included in standard terms and conditions would be more easily found in compliance with the formal requirements set out in the Article II of the New York Convention than those cases in which the main contract simply refers to the application of standard forms without any express reference to the arbitration clause. [Para 72] [462-A-F]

M.V. "Baltic Confidence" and Anr. v. State Trading Corporation ofIndia Ltd. and Anr. **(2001) 7 SCC 473: 2001 (1) Suppl. SCR 699;** *Olympus Superstructure Pvt. Ltd. v.*

Meena VijayKhetan and Ors. **(1999) 5 SCC 651: 1999 (3) SCR 490 – relied on.**

1.3 Under the Indian Law, greater obligation is cast upon the Courts to determine whether the agreement is valid, operative and capable of being performed at the threshold itself. Such challenge has to be a serious challenge to the substantive contract or to the agreement, as in the absence of such challenge, it has to be found that the agreement was valid, operative and capable of being performed; the dispute would be referred to arbitration. [Para 78] [468-D-E]

State of Orissa v. Klockner and Company and Ors. **AIR 1996 SC2140: 1996 (1) Suppl. SCR 368 – relied on.**

*Abu Dhabi Gas Liquefaction Co. Ltd. v. Eastern Bechtel Corp.***(1982) 2 Lloyd's Rep. 425, CA – referred to.**

Law and Practice of International Commercial Arbitration **by AlanRedfern and Martin Hunder (Fourth Edition)**

1.4 The legislative intent and essence of the 1996 Act was to bring domestic as well as international commercial arbitration in consonance with the UNCITRAL Model Rules, the New York Convention and the Geneva Convention. The New York Convention was physically before the Legislature and available for its consideration when it enacted the 1996 Act. Article II of the Convention provides that each contracting State shall recognize an agreement and submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not concerning a subject matter capable of settlement by arbitration. Once the agreement is there and the Court is seized of an action in relation to such subject matter, then on the request of one of the parties, it would refer the parties to arbitration unless the agreement is null and void, inoperative or incapable of

performance. Still, the legislature opted to word Section 45 somewhat dissimilarly. Section 8 of the 1996 Act also uses the expression 'parties' simpliciter without any extension. In significant contra-distinction, Section 45 uses the expression 'one of the parties or any person claiming through or under him' and 'refer the parties to arbitration', whereas the rest of the language of Section 45 is similar to that of Article II(3) of the New York Contention. The Court cannot ignore this aspect and has to give due weightage to the legislative intent. It is a settled rule of interpretation that every word used by the Legislature in a provision should be given its due meaning. The Legislature intended to give a liberal meaning to this expression. [Paras 88 and 89] [472-G-H; 473-A-E]

1.5 The language and expressions used in Section 45, 'any person claiming through or under him' including in legal proceedings may seek reference of all parties to arbitration. Once the words used by the Legislature are of wider connotation or the very language of Section is structured with liberal protection then such provision should normally be construed liberally. [Para 90] [473-F-G]

1.6 In view of the legislative object and the intent of the framers of the statute, i.e., the necessity to encourage arbitration, the Court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious cause of action, parties and prayers. [Para 91] [473-H; 474-A-B]

1.7 The scope of concept of 'legal relationship' as incorporated in Article II(1) of the New York Convention vis-à-vis the expression 'any person claiming through or under him' appearing in Section 45 of the 1996 Act has to be examined by reading Article II(1) and (3) in

conjunction with Section 45 of the Act. Both these expressions have to be read in harmony with each other. Once they are so read, it will be evident that the expression "legal relationship" connotes the relationship of the party with the person claiming through or under him. A person may not be signatory to an arbitration agreement, but his cause of action may be directly relatable to that contract and thus, he may be claiming through or under one of those parties. For the purposes of both the New York Convention and the UNCITRAL Model Law, it is sufficient that there should be a defined "legal relationship" between the parties, whether contractual or not. Given the existence of such an agreement, the dispute submitted to arbitration may be governed by the principles of delictual or tortuous liability rather than by the law of contract. [Para 92] [474-C-G]

Roussel - Uclaf v. G.D. Searle and Co. Ltd. and G.D. Searle andCo. **1978 Vol. 1 LLR 225;** *City of London v.* Sancheti **(2009) 1 LloydsLaw Reports 116 – referred to.**

Law and Practice of Commercial Arbitration in England (SecondEdn.) **by Sir Michael J. Mustill – referred to.**

1.8 Heavy onus lies on the non-signatory party to show that in fact and in law, it is claiming under or through a signatory party, as contemplated under Section 45 of the 1996 Act. It occasionally happens that the plaintiff is not himself a party to the arbitration agreement on which the application is founded. This may arise in the following situations: (i) The plaintiff has acquired the rights, which the action is brought to enforce, from someone who is a party to an arbitration agreement with the defendant; (ii) The plaintiff is bringing the action on behalf of someone else, who is a party to an arbitration agreement with the defendant. (iii) When the expression used in the provision, the words 'claiming under plaintiff' relate to substantive right which is being

asserted. [Paras 96 and 97] [476-C, E-G]

The Law and Practice of Commercial Arbitration in England **byMichael J. Mustilll and Stewart C.Boyd – referred to.**

1.9 Joinder of non-signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCA's Guide to the Interpretation of the 1958 New York Convention provides for such situation. Various legal basis may be applied to bind a non-signatory to an arbitration agreement. The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called the "alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law. [Paras 99 and 100] [477-B, D-E]

The City of Prince George v. A.L. Sims and Sons Ltd. **YCA XXIII (1988) 223 – referred to.**

1.10 The question of formal validity of the arbitration agreement is independent of the nature of parties to the agreement, which is a matter that belongs to the merits and is not subject to substantive assessment. Once it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it. Third parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its *ratione personae* scope. [Para 103] [478-B-C]

1.11 Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those

to the action. But this general concept is subject to exceptions which are that when a third party, i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration. [Para 104] [478-E-G]

1.12 A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. [Para 68] [460-C-D]

Anderson Wright Ltd. v. Moran and Company **1955 SCR 862 – relied on.**

Sumitomo Corporation v. CDS Financial Services (Mauritius) Ltd.and Ors, **(2008) 4 SCC 91: 2008 (3) SCR 309 – referred to.**

Turnock v. Sartoris 1888 (43) Chancery Division **1955 SCR 862;** *Taunton-Collins v. Cromie and Anr.* **1964 Vol.1 Weekly Law Reports 633 – Cited.**

2.1 In the cases of group companies or where various agreements constitute a composite transaction like mother agreement and all other agreements being ancillary to and for effective and complete implementation of the Mother Agreement, the court may have to make reference to arbitration even of the disputes existing between signatory or even non-signatory parties.

However, the discretion of the Court has to be exercised in exceptional, limiting, befitting and cases of necessity and very cautiously. [Para 168] [515-D-E]

Bhatia International v. Bulk Trading S.A. and Anr. **(2002) 4 SCC 105: 2002 (2) SCR 411 – distinguished.**

2.2 In the facts of a given case, the Court is always vested with the power to delete the name of the parties who are neither necessary nor proper to the proceedings before the Court. [Para 168] [515-C-D]

2.3 Where origin and end of all the agreements is with the Mother or the Principal Agreement, the fact that a party was non-signatory to one or other agreement may not be of much significance. The performance of any one of such agreements may be quite irrelevant without the performance and fulfillment of the Principal or the Mother Agreement. Besides designing the corporate management to successfully complete the joint ventures, where the parties execute different agreements but all with one primary object in mind, the Court would normally hold the parties to the bargain of arbitration and not encourage its avoidance. In cases involving execution of such multiple agreements, two essential features exist; firstly, all ancillary agreements are relatable to the mother agreement and secondly, performance of one is so intrinsically inter-linked with the other agreements that they are incapable of being beneficially performed without performance of the others or severed from the rest. The intention of the parties to refer all the disputes between all the parties to the arbitral tribunal is one of the determinative factor. [Paras 69] [460-F-H; 461-A-B]

Ruhrgos AG v. Marathon Oil Co. **526 US 574 (1999) – referred to.**

2.4 In the case of composite transactions and multiple agreements, it may again be possible to invoke such

principle in accepting the pleas of non-signatory parties for reference to arbitration. Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically inter-mingled or inter-dependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of 'composite performance' would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other. [Para 71] [461-E-G]

2.5 Where the Court which, on its judicial side, is seized of an action in a matter in respect of which the parties have made an arbitration agreement, once the required ingredients are satisfied, it would refer the parties to arbitration but for the situation where it comes to the conclusion that the agreement is null and void, inoperative or incapable of being performed. These expressions have to be construed somewhat strictly so as to ensure that the Court returns a finding with certainty and on the correct premise of law and fact as it has the effect of depriving the party of its right of reference to arbitration. These are the issues which go to the root of the matter and their determination at the threshold would prevent multiplicity of litigation and would even prevent futile exercise of proceedings before the arbitral tribunal. [Para 76] [467-B-E]

General Electric Co. v. Renusagar Power Co. **(1987) 4 SCC 137: 1987 (3) SCR 858 – relied on.**

2.6 In the present case, the corporate structure of the respondent companies as well as that of the appellant

companies clearly demonstrates a legal relationship which not only is inter-legal relationship but also intra-legal relationship between the parties to the *lis* or persons claiming under them. They have contractual relationship which arises out of the various contracts that spell out the terms, obligations and roles of the respective parties which they were expected to perform for attaining the object of successful completion of the joint venture agreement. This joint venture project was not dependant on any single agreement but was capable of being achieved only upon fulfillment of all these agreements. [Para 105] [478-G-H; 479-A-B]

2.7 In the present case, the companies which executed the various agreements were the companies signatory to the Principal Agreement or their holding companies or the companies belonging to the respondent group in which they had got merged for the purposes of attaining effective designing, manufacturing, import, export and marketing of the agreed chlorinated products. All the subsequent agreements were, therefore, ancillary or incidental agreements to the Principal Agreement. Thus, the joint venture entered between the parties had different facets. Its foundation was provided under the Principal Agreement but all the agreed terms could only be fulfilled by performance of the ancillary agreements. If one segregates the Principal Agreement from the rest, the subsequent agreements would be rendered ineffective. It was one composite transaction for attaining the purpose of business of the joint venture company. All these agreements are so intrinsically connected to each other that it is neither possible nor probable to imagine the execution and implementation of one without the collective performance of all the other agreements. The intention of the parties was clear that all these agreements were being executed as integral parts of a composite transaction. It can safely be covered

under the principle of 'agreements within an agreement'. [Paras 138 and 139] [502-F-H; 503-A, C-E]

2.8 All the six material agreements had been signed by some parties or their holding companies or the companies into which the signatory company had merged. None of these companies is either stranger to the transaction or not an appropriate party. The parties who have signed the agreements could alone give rights or benefits to the joint venture company and they, in turn, were the companies descendants in interest or the subsidiaries of the principal company though all the parties to the *lis* are not signatory to all the agreements in question, but still they would be covered under the expression 'claiming through or under' the parties to the agreement. The interests of these companies are not adverse to the interest of the principal company and/or the joint venture company. On the contrary, they derive their basic interest and enforceability from the Mother Agreement and performance of all the other agreements by respective parties had to fall in line with the contents of the Principal Agreement. Thus, these companies claim their interest and invoke the terms of the agreement or defend the action in the capacity of a 'party claiming through or under' the parties to the agreement. [Paras 142 and 143] [505-G-H; 506-A-D]

2.9 The arbitration clause contained in the Principal Agreement requires that any dispute or difference arising under or in connection with that agreement which could not be settled by friendly negotiation and agreement between the parties, would be finally settled by arbitration conducted in accordance with the Rules of ICC. This clause is comprehensive enough to include the disputes arising 'under and in connection with' the agreement. The word 'connection' has been added by the parties to expand the scope of the disputes under the agreements. The agreement has to be construed and interpreted in

accordance with laws of the Union of India, as consented by the parties. [Para 144] [506-F-H; 507-A]

2.10 The expression 'connection' means a link or relationship between people or things or the people with whom one has contact. The dictionary meaning of this expression is liberally worded. It implies expansion in its operation and effect both. Connection can be direct or remote but it should not be fanciful or marginal. In other words, there should be relevant connection between the dispute and the agreement by specific words or by necessary implication like reference to all other agreements in one (principal) agreement. [Paras 145 and 146] [507-B, C-D]

Concise Oxford Dictionary (Indian Edition); Law Lexicon 2nd Edn. 1997 **– referred to.**

2.11 The expression appearing in the arbitration clause has to be given a meaningful interpretation particularly when the Principal Agreement itself, by specific words or by necessary implication, refers to all other agreements. This would imply that the other agreements originate from the Principal Agreement and hence, its terms and conditions would be applicable to those agreements. [Para 146] [507-D-E]

2.12 All the agreements were executed simultaneously on the same date, which fact fully supports the view that the parties intended to have all these agreements as a composite transaction. Furthermore, when the parties signed the Supplementary Collaboration Agreement by that time all these agreements had not only been signed and understood by the parties but, in fact, had also been acted upon. [Para 147] [508-C-D]

2.13 The conduct of the parties and even the subsequent events leave no doubt that the parties had

executed, intended and actually implemented the composite transaction contained in the Principal Agreement. The Courts have also applied the Group of Companies Doctrine in such cases. In group company cases, that the fact that a party being non-signatory to one or other agreement may not be of much significance, the performance of one may be quite irrelevant with the performance and fulfillment of the principal or the mother agreement. That, in fact, is the situation in the present case. [Paras 149 and 150] [508-G-H; 509-A, C-D]

Olympus Superstructure Pvt. Ltd. v. Meena Vijay Khetan and Ors. **(1999) 5 SCC 651: 1999 (3) SCR 490 – relied on.**

2.14 Two of the agreements did not contain any arbitration clause, but they also did not subject the parties even for litigative jurisdiction. These two agreements had been executed in furtherance to and for compliance of the terms and conditions of the mother agreement which contained the arbitration clause. They were, thus, intrinsically inter-connected with the mother agreement. [Para 153] [510-E-F]

2.15 Where different agreements between the parties provide for alternative remedies, it does not necessarily mean that the other remedy or jurisdiction stands ousted. Where the parties to such composite transaction provide for different alternative forums, including arbitration, it has to be taken that real intention of the parties was to give effect to the purpose of agreement and refer the entire subject matter to arbitration and not to frustrate the remedy in law. It was for the parties to choose either to institute a suit qua the International Distributor Agreement or to invoke the arbitration agreement in terms of clause 30 of the mother agreement. They have chosen the latter remedy. Thus, a composite reference was well within the comprehension of the parties to various agreements which were executed on the same day and for the same

purpose. [Paras 154 and 156] [510-G-H; 511-A-B-E]

2.16 All the disputes that arise in the suit and from the agreement between the parties, are directed to be referred to arbitral tribunal and be decided in accordance with the Rules of ICC. [Para 169] [515-F]

3.1 The issue of jurisdiction normally is a mixed question of law and facts. Occasionally, it may also be a question of law alone. It will be appropriate to decide such questions at the beginning of the proceedings itself and they should have finality. Determination of fundamental issues as contemplated under Section 45 of the 1996 Act at the very first instance by the judicial forum is not only appropriate but is also the legislative intent. Even, the language of Section 45 of the 1996 Act suggests that unless the Court finds that an agreement is null and void, inoperative and incapable of being performed, it shall refer the parties to arbitration. [Para 131] [497-F-G; 498-B-C]

3.2 An application for appointment of arbitral tribunal u/s. 45 would also be governed by the provisions of Section 11(6) of the 1996 Act. Before making a reference, the Court has to dispose of the objections as contemplated under Section 8 or Section 45, as the case may be, and wherever needed upon filing of affidavits. Thus, to an extent, the law laid down by this Court on Section 11 shall be attracted to an international arbitration which takes place in India as well as domestic arbitration. This would be applicable at pre-award stage. Thus, there exists a direct legal link, limited to that extent. [Paras 114 and 128] [483-C; 495-D-E]

SBP and Co. v. Patel Engineering Ltd. and Anr. **(2005) 8 SCC 618:2005 (4) Suppl. SCR 688 – followed.**

Shree Ram Mills Ltd. v. Utility Premises (P) Ltd. **(2007) 4 SCC 599;** *National Insurance Co. Ltd. v. Boghara Polyfab*

(P) Ltd. **(2009) 1 SCC 267: 2008 (13) SCR 638 – relied on.**

*Shin-Etsu Chemcial Co. Ltd. v. M/s. Aksh Optifibre Ltd. and Anr.***(2005) 7 SCC 234: 2005 (2) Suppl. SCR 699 – referred to**.

3.3 The absence of any provision in Chapter I of Part II of the 1996 Act, like Section 16 appearing in Part I of 1996 Act is suggestive of the requirement for the Court to determine the ingredients of Section 45, at the threshold itself. It is expected of the Court to answer the question of validity of the arbitration agreement, if a plea is raised that the agreement containing the arbitration clause or the arbitration clause itself is null and void, inoperative or incapable of being performed. Such determination by the Court in accordance with law would certainly attain finality and would not be open to question by the arbitral tribunal, even as per the principle of prudence. It will prevent multiplicity to litigation and re-agitating of same issues over and over again. The underlining principle of finality in Section 11(7) would be applicable with equal force while dealing with the interpretation of Sections 8 and 45. [Para 130] [496-B-E]

3.4 The principle of 'Kompetenz kompetenz' requires the arbitral tribunal to rule on its own jurisdiction and at the first instance. One school of thought propagates that it has duly the positive effect as it enables the arbitrator to rule on its own jurisdiction as it widely recognized international arbitration. However, the negative effect is equally important, that the Courts are deprived of their jurisdiction. The arbitrators are to be not the sole judge but first judge, of their jurisdiction. In other words, it is to allow them to come to a decision on their own jurisdiction prior to any court or other judicial authority and thereby limit the jurisdiction of the national courts to review the award. The kompetenz kompetenz rule, thus, concerned not only is the positive but also the negative effect of the

arbitration agreement. [Para 129] [495-F-H]

Fouchard Gaillard Goldman on International Commercial Arbitration–**referred to.**

3.5 Another very significant aspect of adjudicating the matters initiated with reference to Section 45 of the 1996 Act, at the threshold of judicial proceedings, is that the finality of the decision in regard to the fundamental issues stated under Section 45 would further the cause of justice and interest of the parties as well. [Para 131] [497-B-C]

4.1 Though in terms of Section 9 CPC, the courts shall have jurisdiction to try all suits of civil nature and this Section also gives a right to a person to institute a suit before the court of competent jurisdiction, but the language of Section 9 itself makes it clear that the civil courts have jurisdiction to try all suits of civil nature except the suits of which taking cognizance is either expressly or impliedly barred. The jurisdiction of the court and the right to a party emerging from Section 9 CPC is not an absolute right, but contains inbuilt restrictions. [Para 156] [511-F-G]

Dhulabhai v. State of M.P. and Anr. **AIR 1969 SC 78: 1968 SCR 662;** *Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corporation* **(2009) 8 SCC 646: 2009 (12) SCR 54 – relied on.**

4.2 The provisions of Section 45 of the 1996 Act are to prevail over the provisions of the CPC and when the Court is satisfied that an agreement is enforceable, operative and is not null and void, it is obligatory upon the court to make a reference to arbitration and pass appropriate orders in relation to the legal proceedings before the court, in exercise of its inherent powers. [Para 157] [512-C-D]

4.3 The arbitration Clause would stand incorporated into the International Distributor Agreement. The terms and conditions of the International Distribution Agreement were an integral part of the Principal Agreement as Appendix II and the Principal Agreement had an arbitration clause which was wide enough to cover disputes in all the ancillary agreements. It is not necessary to examine the choice of forum or legal enforceability of legal system in the present case, as there is no repugnancy even where the main contract is governed by law of some other country and the arbitration clause by Indian law. They both could be invoked, neither party having invoked the former will be no bar for invocation of the latter in view of arbitration clause 30 of the mother agreement. [Paras 159 and 160] [512-G; 513-B-D]

M.R. Engineers and Contractors Pvt. Ltd. v. Som Datt Builders Ltd. **(2009) 7 SCC 696: 2009 (10) SCR 373 – relied on.**

Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar **AIR 2011 SC 1899: 2011 (5) SCR 674 – distinguished.**

5. It is not necessary for the Court to examine the correctness or otherwise of the judgment in the case of ****Sukanya*. It was a judgment in a case arising under Section 8 Part I of the 1996 Act while the present case relates to Section 45 Part II of the Act. As such that case may have no application to the present case. In that case the Court was concerned with the disputes of a partnership concern. In the case in hand, there is a mother agreement and there are other ancillary agreements to the mother agreement. It is a case of composite transaction between the same parties or the parties claiming through or under them falling u/s. 45 of the Act. Thus, the dictum stated in the judgment of**

******Sukanya* **would not apply to the present case. On facts, the judgment in ****Sukanya***'s **case, has no application to the case in hand. [Para 133] [498-F-G; 499-A-B]**

Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya* **(2003) 5 SCC 531: 2003 (3) SCR 558 – held inapplicable.

6. The observations made by the Court have to be construed and read to support the *ratio decidendi* of the judgment. Observations in a judgment which are stared upon by the judgment of a larger bench would not constitute valid precedent as it will be hit by the doctrine of *stare decisis*. [Para 122] [489-E-F]

Case Law Reference:

2002 (2) SCR 411	**Distinguished**	**Para 51**
526 US 574 (1999)	**Referred to**	**Para 70**
2001 (1) Suppl. SCR 699	**Relied on**	**Para 73**
1999 (3) SCR 490	**Relied on**	**Para 74, 149**
1987 (3) SCR 858	**Relied on**	**Para 76**
1996 (1) Suppl. SCR 368	**Relied on**	**Para 78**
(1982) 2 Lloyd's Rep. 425, CA	**Referred to**	**Para 80**
1978 Vol. 1 LLR 225	**Referred to**	**Para 93**
(2009) 1 Lloyds Law Reports116	**Referred to**	**Para 94**
YCA XXIII (1988) 223	**Referred to**	**Para 101**
1955 SCR 862	**Cited**	**Para 108**
1964 Vol.1 Weekly Law Reports 633	**Cited**	**Para 108**
1955 SCR 862	**referred to**	**Para 110**

	Relied on	**Para 131**
2008 (3) SCR 309	**referred to**	**Para 112**
(2007) 4 SCC 599	**relied on**	**Para 115**
2005 (2) Suppl. SCR 699	**Referred to**	**Para 122**
2005 (4) Suppl. SCR 688	**Followed**	**Para 130**
2008 (13) SCR 638	**Relied on**	**Para 130**
2003 (3) SCR 558	**held inapplicable**	**Para 132**
1968 SCR 662	**Relied on**	**Para 156**
2009 (12) SCR 54	**Relied on**	**Para 156**
2009 (10) SCR 373	**Relied on**	**Para 159**
2011 (5) SCR 674	**Distinguished**	**Para 161**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7134 of 2012.

From the Judgment and Order dated 04.03.2010 of the High Court of Judicature at Bombay in Appeal No. 372 of 2004 in Notice of Motion No. 778 of of 2004 in Suit No. 233 of 2004.

WITH

Civil Appeal Nos. 7135-7136 of 2012.

F.S. Nariman, Rohaan Cama, Subhash Sharma, Ravela D'Souza, Ruby Singh Ahuja, Ruchira Gupta, Deepti Sarin, Shruti Katakey (For Karanjawala & Co.) for the Appellant.

H.N. Salve, K.V. Vishwanathan, Ajay Bhargava, Vanita Bhargava, Susmit Pushkar, Anchit Oswal, Ankur Khandelwal, Gayatri Goswami,Chetna Rai, Kripa Pandit, Anadi Chopra, Gayatri Goswami (For Khaitan & Co.), Vikas Mehta, Aditi Bhat, Nar Hari Singh, Christopher D'Souza, Venkatakrishna Kunduru, Santosh Paul, Aarti Singh for the Respondents.

The Judgment and order of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave granted.

2. The expanding need for international arbitration and divergent schools of thought, have provided new dimensions to the arbitration jurisprudence in the international field. The present case is an ideal example of invocation of arbitral reference in multiple, multi-party agreements with intrinsically interlinked causes of action, more so, where performance of ancillary agreements is substantially dependent upon effective execution of the principal agreement. The distinguished learned counsel appearing for the parties have raised critical questions of law relatable to the facts of the present case which in the opinion of the Court are as follows :

(1) What is the ambit and scope of Section 45 of the Arbitration and Conciliation Act, 1996 (for short 'the 1996 Act')?

(2) Whether the principles enunciated in the case of *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya* [(2003) 5 SCC 531], is the correct exposition of law?

(3) Whether in a case where multiple agreements are signed between different parties and where some contain an arbitration clause and others don't and further the parties are not identically common in proceedings before the Court (in a suit) and the arbitration agreement, a reference of disputes as a whole or in part can be made to the arbitral tribunal, more particularly, where the parties to an action are claiming under or through a party to the arbitration agreement?

(4) Whether bifurcation or splitting of parties or causes of action would be permissible, in absence of any specific provision for the same, in the 1996 Act?

3. Chloro Controls (India) Private Ltd., the appellant herein, filed a suit on the original side of the High Court of Bombay being Suit No.233 of 2004, for declaration that the joint venture agreements and supplementary collaboration agreement entered into between some of the parties are valid, subsisting and binding. It also sought a direction that the scope of business of the joint venture company, Respondent No. 5, set up under the said agreements includes the manufacture, sale, distribution and service of the entire range of chlorination equipments including the electro-chlorination equipment and claimed certain other reliefs as well, against the defendants in that suit. The said parties took out two notices of motion, being Notice of Motion No.553 of 2004 prior to and Notice of Motion No.2382 of 2004 subsequent to the amendment of the plaint. In these notices of motion, the principal question that fell for consideration of the learned Single Judge of the High Court was whether the joint venture agreements between the parties related only to gas chlorination equipment or whether they included electro-chlorination equipment as well. The applicant had prayed for an order of restraint, preventing Respondent Nos. 1 and 2, the foreign collaborators, from acting upon their notice dated 23rd January, 2004, indicating termination of the joint venture agreements and the supplementary collaboration agreement. A further prayer was made for grant of injunction against committing breach of contract by directly or indirectly dealing with any person other than the Respondent No.5, in any manner whatsoever, for the manufacture, sale, distribution or services of the chlorination equipment, machinery parts, accessories and related equipments including electro-chlorination equipment, in India and other countries covered by the agreement. The defendants in that suit had taken out another Notice of Motion No.778 of 2004, under Section 8 read with Section 5 of the1996 claiming that arbitration clauses in some of the agreements governed all the joint venture agreements and, therefore, the suit should be referred to an appropriate arbitral tribunal for final disposal and until a final

award was made by an arbitral tribunal, the proceedings in the suit should be stayed. The learned Single Judge, vide order dated 28th December, 2004, allowed Notice of Motion No.553 of 2004 and consequently disposed of Notice of Motion No.2382 of 2004 as not surviving. Against this order, an appeal was preferred, which came to be registered as Appeal No.24 of 2005 and vide a detailed judgment dated 28th July, 2011, a Division Bench of the High Court of Bombay set aside the order of the learned Single Judge and dismissed both the notices of motion taken out by the plaintiff in the suit.

4. Notice of Motion No.778 of 2004 was dismissed by another learned Single Judge of the High Court of Bombay, declining the reference of the suit to an arbitral tribunal vide order dated 8th April, 2004. This order was again assailed in appeal by the defendants in the suit and another Division Bench of the Bombay High Court, vide its judgment dated 4th March, 2010, allowed the Notice of Motion No.778 of 2004 and made reference to arbitration under Section 45 of the 1996 Act.

5. The judgments of the Division Benches, dated 4th March, 2010 and 28th July, 2011, respectively, have been assailed by the respective parties before this Court in the present Special Leave Petitions, being SLP(C) No.8950/2010 and SLP(C) No.26514-15/2011, respectively. Thus, both these appeals shall be disposed of by this common judgment.

6. Before we notice in detail the factual matrix giving rise to the present appeals and the contentions raised, it would be appropriate to illustrate the corporate structure of the companies and the scope of the agreements that were executed between the parties to these proceedings.

Corporate Structure of the Companies who are parties to lis

7. In order to describe the corporate structure with precision we will explain it diagrammatically as follows:

TABLE

8. Severn Trent, U.S., Inc. was a company existing under the laws of the State of Pennsylvania, United States of America (for short, 'U.S.A.'). This name came to be changed, in 1992, to Severn Trent (Delaware) Inc., which is the principal parent company. This company owned a 100 per cent subsidiary, Severn Trent Services (Delaware) Inc., U.S.A. Severn Trent Services (Delaware) Inc. owned Capital Control (Delaware) Co. Inc. which was formed on 21st September, 1994. On or about 14th May, 1990, Severn Trent Services PLC, U.K., an erstwhile state-owned water authority, privatized in 1989, expanded its business into the U.S.A. by acquiring 80 per cent shares in Capital Control Co. Inc. on 15th May 1990 and a further 20 per cent on 31st March 1994. It is in this period that the joint venture agreements with the appellant were negotiated, with the consent of the Severn Trent group, which was, by that time, a majority shareholder in Capital Control Co. Inc. Subsequently, the name of Capital Control Co. Inc., was changed to Severn Trent Water Purification, Inc. (Respondent No.1), with effect from 1st April, 2002. The Severn Trent Water Purification Inc./ Capital Control Co. Inc. then came to be merged with Capital Control (Delaware) Co. Inc. (Respondent No. 2), on 31st March, 2003. As a result thereof, Capital Control (Delaware) Co. Inc. ceased to exist. As per the pleadings of the parties, reference to Capital Control Co. Inc. includes reference to Capital Control Co. Inc. as well as Capital Control (Delaware) Co. Inc.

9. The appellant is a company carrying on business under that name and style for the manufacture of chlorination equipments and incorporated under the Indian laws by Madhusudan Kocha (Respondent No.9 herein) and his group (for short, the "Kocha Group"). This company had been negotiating with Respondent No. 1 for entering into a joint venture agreement, to deal with the manufacture, distribution and sale of gas chlorination equipment and "Hypogen" electro-chlorination equipment Series 3300, etc. This led to the execution of joint venture agreements between the appellant and Respondent No. 1. The joint venture agreements were

signed between these companies for constituting a joint venture company under the name and style of Capital Control (India) Pvt. Ltd., with 1,50,000 equity shares of Rs. 10 each and 50 per cent shareholding with each party. These agreements being prior to the merger of Capital Control (Delaware) Co. Inc. with Capital Control Co. Inc. and also prior to the change of name of Capital Control Co. Inc. to Severn Trent Water Purification Inc., 50 per cent of the shares allotted to the foreign collaborators were to be equally divided between Capital Control (Delaware) Co. Inc. and Capital Control Co. Inc. These joint venture agreements were executed between the parties on 16th November, 1995, as already noticed. However, the joint venture company had been incorporated on 14th November, 1995 itself.

10. In the year 1998, Excel Technologies International Corporation came to be acquired by Severn Trent Services (Delaware) Inc. This company was dealing in the manufacture of "Omnipure" and "Sanilec", distinct brands of chlorination products. Later, Excel Technologies entered into a joint venture agreement with De Nora North America Inc. and floated another joint venture company, Severn Trent De Nora LLC in September, 2001 for dealing in the products "Omnipure", "Sanilec" and "Seaclor Mac". It may be noticed that "Seaclor Mac" was a product dealt with and distributed by Titanor Components Ltd., Respondent no.3, and whose original manufacturer was Groupo De Nora; the latter is the parent company of the De Nora North America Inc. The distribution rights in respect of all these three products were given by the joint venture company Severn Trent De Nora LLC to Hi Point Services Pvt. Ltd., Respondent No. 4, for independent distribution of the products for Severn Trent De Nora LLC, in India.

11. This corporate structure clearly indicates that Severn Trent Services (Del.) Inc. is the holding company of the companies which have entered into the joint venture

agreements, for floating both the companies Capital Controls (India) Pvt. Ltd., as well as "Severn Trent De Nora LLC". The disputes have actually arisen between Chloro Controls (India) Pvt. Ltd. and the Kocha Group on the one hand, and Severn Trent Water Purification Inc., the erstwhile Capital Control (Delaware) Co. Inc. and Capital Control Co. Inc. on the other.

Details of Agreements

S. No	Date of Agreement	Details of Agreement	Parties to the Agreement	Whether contains arbitration clause
1.	16.11.1995	Shareholders Agreement	1.**Capital Controls (Delware) Company, Inc.** (Respondent No.2) 2. **Chloro Controls India Pvt. Ltd.** (Appellant) 3. **Mr. M.B. Kocha** (Respondent No.9)	**Yes**
2.	16.11.1995	International Distributor Agreement	1. **Capital Controls Company Inc.,** (Colmar) now **Severn Trent Water Purification Inc.** (Respondent No.1) 2. **Capital Controls (India) Private Ltd.** (Respondent No.5)	No
3.	16.11.1995	Managing Directors' Agreement	**1. Capital Controls (India) Private Ltd.** (Respondent No.5) 2. **Mr. M.B. Kocha** (Respondent No.9)	No
4.	16.11.1995	Financial & Technical Know-how License Agreement	**1. Capital Controls Company Inc.,** (Colmar) now **Severn Trent Water Purification Inc.** (Respondent No.1) 2. **Capital Controls (India) Private Ltd.** (Respondent No.5)	Yes
5.	16.11.1995	Export Sales Agreement	1. **Capital Controls Company Inc.,** (Colmar) now **Severn Trent Water Purification Inc.** (Respondent No.1)	Yes

			2. **Capital Controls (India) Private Ltd.** (Respondent No.5)	
6.	16.11.1995	Trademark Registered User License Agreement	1. **Capital Controls Company Inc.,** (Colmar) now **Severn Trent Water Purification Inc.** (Respondent No.1) 2. **Capital Controls (India) Private Ltd.** (Respondent No.5)	No
7.	August 1997	Suppleme--ntary Collaboration Agreement	1. **Capital Controls Company Inc.,** (Colmar) now **Severn Trent Water Purification Inc.** (Respondent No.1) 2. **Capital Controls (India) Private Ltd.** (Respondent No.5)	

Facts

12. Prior to the formation of the joint venture company, the Chloro Controls Group carried on the business of manufacture and sale of gas chlorination equipments and from 1980 onwards, it developed and commenced the manufacturing of electro-chlorination equipment also. The business was done in the name of "Chloro Controls Equipments Company", a sole proprietary concern of Respondent No.9, Mr. M.B. Kocha and it was the distributor in India for the products of the Capital Controls group for more than a decade prior to the formation of the joint venture. On 1st December, 1988, a letter of intent and a letter of understanding were executed between Capital Controls Company Inc., Colmar, Pennsylvania, U.S.A (which name was subsequently changed in the year 2002 to 'Severn Trent Water Purification Inc., respondent No.1) and respondent No.9 to form a new, jointly-owned company in India, to be called "Capital Controls (India) Pvt. Ltd.", the respondent No.5 in the present appeals, for the purposes of manufacture, sale and export of chlorination equipments on the terms and conditions as agreed between the parties. The formation of the joint venture company got delayed for some time, because Respondent No.1 informed the appellant that Severn Trent, U.K. and the officers of the Capital Controls Company Inc., Colmar,

Pennsylvania, U.S.A. had acquired all the shares of the Capital Controls Company Inc. and this share acquisition permitted them to support their representatives and distributers with continuity. On 14th November, 1995, the joint venture company, Capital Controls (India) Private Ltd., Respondent No. 5, was incorporated and registered under the Companies Act, 1956 (for short, the 'Companies Act').

13. To examine the factual matrix of the case in its correct perspective, reference to pleadings of the parties would be appropriate.

14. The petitioner is a Private Limited Company and its shares are entirely held by Respondent/Defendant Nos.9 to 11 (Kocha/Chloro Control Group). Respondent No.1-Company was earlier known as "Capital Control Company Inc." and in or about the year 1990 the Capital Controls Group came to be acquired by Severn Trent Services PLC (UK), originally a State owned water authority and following privatization from the UK Government in 1989, it proceeded to build a product and services business from the US beginning with the acquisition of the Capital Controls Group. The name of the first respondent was changed to Severn Trent Water Purification Inc. with effect from 1st April, 2002. Thus, Respondent Nos.1 and 2 became the group companies and were earlier part of "the Capital Controls Group" (hereinafter referred to as the Capital Controls/ Severn Trent Group). Till January 1999, the respondent Nos.1 and 2 developed and sold electro-chlorination equipment under the brand name "Hypogen" and from January 1999 onwards, the said brand was replaced by the brands "Sanilec" and "Omnipure". Respondent Nos.1 and 2 carried on the business of manufacture, supply, sale and distribution of chlorination equipments, including gas and electro-chlorination equipments. Respondent No.3 is a company incorporated under the Companies Act and engaged in the business of manufacture and marketing of electro-chlorination equipment. In or about the year 1989-90, the said Respondent no.3 was floated as a joint venture in technical and financial collaboration with the De Nora

group of Italy which held 51% of the equity share capital of the said respondent. Respondent No.4 is a Private Limited Company incorporated under the Companies Act and carried on business in electro-chlorination equipments. It had a tie-up with an American Company called "Excel Technologies International Inc." which was engaged in the business of electrolytic disinfection equipment.

15. Respondent No.5, i.e., Capital Controls (India) Private Ltd. is a Company incorporated under the Companies Act pursuant to the joint venture agreements dated 16th November, 1995 executed between the appellant and respondent no.9 on the one hand and the respondent nos.1 and 2 on the other. 50 per cent of the share capital of Respondent No.5 is held by the appellant and balance of 50 per cent is held by Respondent No.2. Thus, the appellant and Respondent No.2 are the joint venture partners who have together incorporated the Respondent No.5 - company.

16. Respondent Nos.6 and 8 are the Directors of the Respondent No.5 Company, appointed as such by the Capital Controls Group. Respondent No.7 is the Chairman also appointed by the Capital Controls Group, but has no casting vote. Respondent Nos.9 to 11 are the Directors of the Respondent No.5 company, nominated by the Kocha Group/ Chloro Controls Group and Respondent No.9 is the Managing Director of the said joint venture.

17. It appears that the joint venture company, Respondent No.5, was incorporated on 14th November, 1995. As discussed above, the joint venture agreements were primarily a project between Respondent Nos. 1 and 2 on the one hand and the appellant company along with its proprietor, Respondent No. 9, on the other. The purpose of these joint venture agreements as indicated in the Memorandum of Association of this joint venture company was to design, manufacture, import, export, act as agent, marketing etc. of gas and electro-chlorination equipments. In order to achieve this object, the parties had decided to execute various agreements.

It needs to be emphasized at this stage itself that, as is clear from the above narrated chart, the agreements had been signed between different parties, each agreement containing somewhat different clauses. Therefore, there is a need to examine the content and effect of each of the seven agreements that are stated to have been signed between different parties.

Content, scope and purpose of the agreements subject matter of the present appeals

18. The parties to the proceedings, except respondent Nos. 3 and 4, were parties to one or more of the seven agreements entered into between the parties. This includes the Principal Agreement, i.e., the Shareholders Agreement, the Financial and Technical Know-how License Agreement, the International Distributor Agreement, Exports Sales Agreement, Trademark Registered User License Agreement and Managing Director's Agreement, all dated 16th November, 1995. Lastly, the parties also entered into and executed a Supplementary Collaboration Agreement in August, 1997. We have already noticed that except respondent Nos.3 and 4 who were not signatory to any agreement, all other parties were not parties to all the agreements but had signed one or more agreement(s) keeping in mind the content and purpose of that agreement.

19. Now we shall proceed to discuss each of these agreements.

Share Holders Agreement

20. The Shareholders Agreement dated 16th November, 1995 was entered into and executed between the Capital Control (Delaware) Co. Inc., respondent No. 2, on the one hand and Chloro Controls (India) Private Ltd., the appellant company run by the Kocha/ Capital Controls group and Mr. M.B. Kocha, respondent No. 9, on the other. As is apparent from the pleadings on record, these two groups had negotiated for starting a joint venture company in India and for this purpose they had entered into the Shareholders Agreement. The main object of this agreement was to float a joint venture company

which would be responsible for manufacture, sale and services of the products as defined in the Financial & Technical Know-How License Agreement, in terms of clause 1 of the Agreement. The Agreement was subject to obtaining all necessary approvals, licenses and authorization from the Government of India, as the joint venture company under the name and style of Capital Control India Pvt. Ltd. was to be registered as a company with its office located in India at Bombay and to carry on its business in India. The plant was to be taken on lease. As already noticed, the authorized capital of the company was Rs.5 million, consisting of equity shares of Rs.10 each. In terms of clause 7, Capital Controls, which was the short form for Capital Control (Delaware) Co. Inc., appointed the joint venture company as a distributor in India of the products manufactured by it, subject to the terms and conditions of the International Distributor Agreement attached to that Agreement as Appendix II. Directors to the joint venture company were to be nominated for a period of three years in accordance with clause 8 of the Agreement. Clause 14 made it obligatory for the parties to ensure that the joint venture company entered into the Financial and Technical Know-How License Agreement with Capital Controls, subject to which, as mentioned above, the joint venture company was to have the right and license to manufacture the specified products in India. The Financial and Technical Know-How License Agreement, which was annexed to the Principal Agreement as Appendix IV, was to be executed relating to sale and purchase of chlorination equipment assets. This Agreement had to be construed and interpreted in accordance with the laws of the Union of India in terms of clause 29. Further clause 21 related to termination of this Principal Agreement. In terms of this clause, it was agreed that the Agreement was to continue in force and effect for so long as each party held not less than twenty-six per cent (26%) of the total paid-up equity shares of the company or in the event that the company failed to achieve a cumulative sales volume of Rs.120 million over three years and cumulative profit of fifteen per cent (15%) over three years from signing of the Agreement.

Either party had the option to terminate the agreement and dispose of the shares as provided in the terms thereof. Material breach of the Agreement or a deadlock regarding the management of the Company were, inter alia, the contemplated grounds for termination of the Agreement, whereby the party not in default could terminate the Agreement by giving notice in writing to the other party. The period of notice in the event of a material breach was 90 days from the date of such notice. Clause 21.3 provided that in the event of the termination of the Agreement, the joint venture company would be wound up and all obligations undertaken by Chloro Controls under different agreements would cease with immediate effect. In such an eventuality, even the name of the joint venture company was required to be changed and the word 'Capital', either individually or in combination with other words, was to be removed.

21. Two other very material clauses of this Agreement, which require the attention of this Court, are clauses 4 and 30. In terms of clause 4.5, the Kocha Group and their company Chloro Controls were bound not to engage themselves, directly or indirectly, or even have financial interest in the manufacture, sale or distribution of chlorination equipment which were similar to those manufactured by the joint venture company during the term of the Agreement. In terms of clause 30, all or any disputes or differences arising under or in connection with the Agreement between the parties were liable to be settled by arbitration, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (for short, the 'ICC'), by three arbitrators designated in conformity with those Rules. The arbitration proceedings were to be held in London, England and were to be governed by and subject to English laws.

22. As is clear from the above terms and conditions of this Agreement, it was treated as a principal agreement executed between the parties and other agreements, like the Financial & Technical Know-How License Agreement, Trademark Registered User License Agreement, International Distributor

Agreement, Managing Directors' Agreement and Export Sales Agreements were not the only anticipated agreements to be executed between the parties, but their drafts and necessary details had been annexed as Appendix I to VII of the shareholder agreement. The other Agreements were only required to be signed by the parties who, as per the Shareholders Agreement, were required to sign such agreement. The Arbitration Clause of the Shareholders Agreement reads as under:

> "Any dispute or difference arising under or in connection with this Agreement, or any breach thereof, which cannot be settled by friendly negotiation and agreement between the parties, shall be finally settled by arbitration conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators designated in conformity with those Rules. The arbitration proceedings shall be held in London, England and shall be governed by and subject to English law. Judgment upon the award rendered may be entered in any court of competent jurisdiction."

International Distributor Agreement

23. The International Distributor Agreement has been mentioned as Appendix II to the Shareholders Agreement. The International Distributor Agreement was executed on the same day and entered into between Capital Controls Company Inc., respondent No.1 and the joint venture company Capital Controls India Pvt. Ltd., respondent No.5. Under this Agreement, the joint venture company was appointed as the exclusive distributor of products in the "territory" and for the term provided under clause 10 of that Agreement. The specified territory was India, Afghanistan, Nepal and Bhutan but the agreement also stated that exports to other countries were not permissible except with the specific authorization by respondent No.1. Besides providing the rights and duties of the Distributors, this Agreement also stated the schedule for delivery of products/

orders, the prices payable, commissions and inspection. It also provided for the terms of payment. Distributor's orders of products were subject to acceptance by the seller at its offices and the seller reserved his right, at any time, to cease manufacture as well as offering for sale any product and to change the design of product.

24. This distributorship right was non-assignable and was exclusively between the distributor and the seller. The relationship between the parties was agreed to be that of a seller and purchaser. Clause 11 of the Agreement then clearly postulated that the distributor was an independent contractor and not joint venture or partner with an agent or employee of the seller. Clause 13 provided that the Agreement contained the entire understanding between the parties with respect to that subject matter and superseded all negotiations, discussions, promises or agreements, prior to or contemporaneous with this Agreement.

25. Further, this Agreement contained the confidentiality clause as well as the non-competition clause being clauses 16 and 18, respectively. The latter specified that the distributor shall not, directly or indirectly, sell, manufacture or supply products similar to any of the products or engage, directly or indirectly, in any business the same as or similar to that of seller, except subject to the conditions of the Agreement.

26. In terms of clause 20, the agreement between the parties was to remain confidential and not to be discussed, shown to or filed with any Government agencies without the prior consent of the seller in writing. This Agreement did not contain any arbitration clause, but it did provide a jurisdiction clause i.e. clause 21, which read as under:

> "The construction, interpretation and performance of this Agreement and all transactions under it shall be governed by and interpreted under the laws of the State of Pennsylvania, U.S.A., and the parties hereto agree that each shall be subject to the jurisdiction of, and any litigation hereunder shall be brought in, any federal or state court located in the Eastern District of the Commonwealth of Pennsylvania, and that the resolution of such litigation by such court shall be binding upon the parties."

27. We may notice here that the International Distributor Agreement was not only executed in furtherance to Clause 7 of the Shareholders Agreement but in that clause itself it was also stated to be annexed thereto as Appendix II. The Distributor Agreement was liable to be renewed as long as the Distributor i.e. Capital Controls, held at least twenty-six per cent (26%) of the shares in the joint venture company.

Managing Directors Agreement

28. Clause 8.6 of the Shareholders Agreement had provided for appointment or reappointment of the Managing Director or whole time Director by mutual consent. Subject to the provisions of the Companies Act, it was agreed that Mr. Kocha would be appointed as the first Managing Director of the Company for an initial period of 3 years and on such terms and conditions as were specified in Appendix III, i.e., the Managing Directors Agreement of the same date. In other words, the Managing Directors Agreement had been executed between joint venture company, Capital Control India Pvt. Ltd. and Mr. M.B. Kocha, on terms already agreed to between the parties to the Shareholders' Agreement.

29. The joint venture company, which is stated to have been incorporated on 14th November, 1995, held Board Meeting on 16th November, 1995 and as contemplated under Clause 8.6 of the Shareholders Agreement, appointed Mr. Kocha as the Managing Director of the Company for three years commencing from 1st April, 1996. This Managing Directors Agreement spelt out the powers which the Managing Director could exercise and more specifically, under Clause 3, the powers which the Managing Director could exercise only with the prior approval of the Board of Directors of the Joint Venture Company. For instance, under Clause 3 (k), the

Managing Director was not entitled to undertake any new business or substantially expand the business contemplated thereunder except with the approval of the Board of Directors. Further, clause 6 contained a non-compete clause requiring Mr. Kocha not to run any similar business for two years after the date of termination of the Agreement.

30. This Agreement also did not contain any arbitration agreement and provided no terms which were not within the contemplation of clause 8.7 of the Shareholders Agreement.

Export Sales Agreement

31. Export Sales Agreement was again singed between the Chloro Control India Pvt. Ltd. and Capital Control Co. Inc., the foreign partner to the joint venture. This Agreement, on its bare reading, presupposes the existence and working of the joint venture company. The products required to be manufactured by the joint venture company under the Shareholders Agreement as well as those stated in Exhibit 1 of this Agreement were to be exported to different countries by Capital Control Company Inc. which was required to export those goods and execute such orders as per the terms and conditions of this Agreement, except in countries specified in Exhibit 2 to the Agreement. It is noteworthy that the export could be effected to all countries covered under the 'Territory' excluding the countries specified in Ext. 2 of the agreement which was completely in consonance with the execution and performance of Shareholder Agreement and the International Distributor Agreement executed between the parties. This Agreement stipulated distinct terms and conditions which had to be adhered to by the parties while the Capital Control Company Inc. was to act as sole and exclusive agent for sale of the products. The products under the Agreement meant design, supply, installation commissioning and after-sale services of chlorination systems and equipment related products manufactured by the Joint Venture Company. The services under the Agreement could be performed by Capital

control Co. Inc. itself or through its affiliated corporation or duly appointed sales agents and distributors. In terms of Clause 17 of the Agreement, it was to be construed and interpreted in accordance with the laws in the State of Pennsylvania, U.S.A. It specifically contained an arbitration clause (clause 18) that read as under:

> "Any dispute of difference arising under or in connection with this Agreement, or any breach thereof, which cannot be settled by friendly negotiation and agreement between the parties shall be finally settled by arbitration conducted in accordance with the Rules of American Arbitration Association. The arbitration proceedings shall be held in Pennsylvania, U.S.A. Judgment upon the award rendered may be rendered may be entered in any court of competent jurisdiction."

Financial and Technical Know-how License Agreement and Trademark Registered User Agreement

32. Now, we shall deal with both these agreements together as both these agreements are inter-dependent and one finds elaborate reference to one in the other. Furthermore, both these agreements have been entered into and executed between Capital Control Co. Inc. on the one hand and the joint venture company on the other.

33. Under clause 14 of the Shareholders Agreement, it was required of the parties to cause the joint venture company to enter into the Financial and Technical Know-How License Agreement with the Capital Controls under which the latter was to grant the joint venture company the right and license to manufacture the products in India in accordance with the Technical Know-How and other technical information possessed by Capital Controls. Clause 18 of the Principal Agreement also referred to this agreement and postulated that if the Government of India did not grant permission for the terms of foreign collaboration contained in this agreement, even the Principal Agreement, i.e. the Shareholder's Agreement would be liable

to be terminated without giving rise to any claim for damages. Both these clauses provided that this Agreement was attached to the Principal Agreement itself and had been referred to as the 'License Agreement', for short.

34. We may refer to certain terms of this agreement which would indicate that the terms and conditions of the Principal Agreement were to be implemented through this Agreement. Besides providing the obligations of the Capital Controls (respondent no.5), it also stipulated that the licensee, i.e. the joint venture company would be free to manufacture the products under the said patent even after the expiry of the Agreement. Under clauses 9 and 10 of the Agreement, obligations of the licensee were stated and it required the licensee to maintain quality comparable to corresponding products made by Capital Controls in USA and to allow free access and information to Capital Controls. The products manufactured by the licensee whose quality was approved by Capital Controls could be marked with the legend, 'Manufactured in India under license from Capitals Control Company Inc. Colmar, Pennsylvania, USA". However, if the agreement was terminated, the licensee was not to use the trademark and legend.

35. As stated, the purpose of this Agreement was that the licensee desired to obtain the right and license to manufacture the products in accordance with the Technical Know-How owned or acquired by Capital Controls and for which that company was willing to grant license on the terms and conditions stated in that Agreement. The first and foremost restriction was that the rights under the agreement were non-transferable and the right was restricted to sell the products exclusively in India and the countries listed in the Appendix to the Agreement. The Agreement also contained a non-competing clause providing that the licensee must not manufacture or have manufactured for it, sell or offer for sale or be financially interested in similar products without prior written permission of Capital Controls. Respondent no.1 had also agreed that its

affiliated companies would sell the product in India only through the licensee. The Agreement provided for payment of royalties under clause 11.

36. Another very significant clause of this Agreement was the Term and Termination clause. The agreement was to continue in force for ten years from the date it was filed with the Reserve Bank of India, subject to earlier termination in terms of clause 15.2. Clause 14.2 provided practically for the conditions of termination of this Agreement similar to those contemplated for the Share Holders Agreement. Neither any modification/amendment of this Agreement nor any waiver of its terms and conditions was to be binding upon the parties unless made in writing and duly executed by both the parties. Appendix I to this agreement recorded the products which the joint venture company was to manufacture. In the event of dispute, the parties were expected to settle it by friendly negotiations, failing which it was to be referred to the ICC, by three Arbitrators designated in conformity with the relevant Rules. Clause 26, the Arbitration clause, read as under:-

> "Any dispute or difference arising under or in connection with this Agreement, or any breach thereof, which cannot be settled by friendly negotiation and agreement between the parties shall be finally settled by arbitration conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators designated in conformity with those Rules. The Arbitration proceedings shall be held in London, England and shall be governed by and subject to English Law. Judgment upon the award rendered may be entered in any court of competent jurisdiction."

37. Clauses 15.1 and 15.2 of the Principal Agreement referred to the Trademark Registered User License Agreement. Firstly, it is provided that respondent no.9, Mr. Kocha and Chloro Controls acknowledged that Capital Controls was the sole owner of certain trademarks and trade-names used by Capital

Controls in connection with the sale of the products. Besides agreeing that they would not adopt, use or register as a trademark or tradename any word or symbol, which in the opinion of Capital Controls is confusingly similar to their trademarks, there the joint venture company was required to enter into a Trademark Registered User License Agreement for obtaining the right to use certain trademarks and tradenames and it was further specifically provided that the said agreement formed part of the Financial and Technical Know-How License Agreement.

38. The Trademark Registered User Agreement, as already noticed, was executed between the respondent no.1 and respondent no.5, the joint venture company. The relationship between the parties under this agreement was contractual and respondent no.1 had agreed to grant user permission to use the trademarks, subject to the terms and conditions specified in the agreement. The agreement was executed with the clear intention that the license owner (respondent No. 1) would provide its secret drawings, plans, specifications, test data, formulae and other manufacturing procedures and as well as technical know-how for assembly, manufacture, quality control and testing of goods to the licensee, the joint venture company. The agreement dealt with various aspects including grant of non-exclusive right to use the trademarks in relation to the goods in the territory as the registered user of the trademarks. In terms of clause 10 of the agreement, the joint venture company was not to acquire any ownership interest in the trademarks or registrations thereof by virtue of use of trademark and it was specifically agreed that every permitted use of trademarks by the user would enure to the benefit of the licensor company. This Agreement was to terminate automatically in the event the License Agreement i.e. the Financial and Technical Know-How License Agreement, was terminated for any reason. Clause 13 also provided that the permitted use of the trademarks did not involve the payment of any royalty or other consideration, other than the royalties

payable under the Financial and Technical Know-How License Agreement by joint venture company to the licensor company. This agreement was terminable on the conditions stipulated in clause 16, which again were similar to the termination clause provided in other agreements. This Agreement did not contain an arbitration clause.

Supplementary Collaboration Agreement

39. The last of the documents in this series which requires to be mentioned by the Court is the Supplementary Collaboration Agreement. Any joint venture agreement in India which is in collaboration with a foreign partner can be commenced only after obtaining the permission of the Government of India. The parties herein had already executed a joint venture agreement dated 16th November, 1995. The company obtained the permission of the Government of India vide its letter No. FC-II 830(96)245(96) dated 11th October, 1996 amended on 21st April, 1997. The company then commenced the operation and business of the joint venture company with effect from 1st April, 1997.

40. In the letter by the Government of India dated 11th October, 1996, besides noticing the items of manufacture activity covered by the foreign collaboration agreement, foreign equity participation being 50% and other conditions which had been specifically postulated, under clause 7 of the letter it was specified that the approval letter was made a part of the foreign collaboration agreement executed between the parties and only those provisions of the agreement which were covered by the said letter or which were not at variance with the said letter would be binding on the Government of India or the Reserve Bank of India. Thus, the parties were directed to proceed to finalize the agreement.

41. Vide its letter dated 21st December, 1996, the joint venture company had written to the Ministry of Industry, Department of Industrial Policy and Promotion, Government of India, requesting to amend point No. 2 of the above-mentioned

approval letter. The request was to widen the scope of the manufacture activities covered by the foreign collaboration agreement. The company wished to add the manufacture of gas and electro-chlorination equipments, amongst other stated items. The other amendment that was sought for was increase in the authorized share capital from Rs.25 lakhs to paid-up capital of 50 lakhs in the joint venture company. Both these requests of the joint venture company were accepted by the Government of India vide their letter dated 21st April, 1997 and clauses (2), (3) and (4) of the earlier approval letter dated 11th October, 1996 were modified. All other terms and conditions of the approval letter remained the same. The Government of India had asked for acknowledgement of the said letter.

42. In furtherance to this letter of the Government of India, the joint venture company and the respondent no.2 executed this Supplementary Collaboration Agreement. The important part of this one-page agreement is 'we hereby conform that we shall adhere to the terms and conditions as stipulated by the Government of India. Letter No. FC.II: 830(96) 295(96) dated 11.10.1996, amended 21.04.1997.' It also stated that the companies had entered into the joint venture agreement dated 16th November, 1995 and had commenced their operation with effect from 1st April, 1997. In other words, the Supplementary Collaboration Agreement was a mere confirmation of the previous joint venture agreement. By this time i.e., somewhere in August 1997, all other agreements had been executed, the joint venture company had come into existence and, in furtherance to those agreements, it had commenced its business.

43. As we have already noticed under the head 'Corporate Structure', the name of Respondent No. 1, Capital Control Co. Inc. was changed to Severn Trent Water Purification Inc. with effect from 1st April, 2002. Later on, respondent no.2, Capital Control (Delaware) Co. Inc. was merged with the respondent no.1 on 31st March, 2003. Thus, for all purposes and intents, in fact and in law, interest of respondent no.1 and 2 was

controlled and given effect to by Severn Trent.

44. On this issue, version of the respondents had been disputed in the earlier round of litigation between the parties where respondent No. 1, Severn Trent Water Purification Co. Inc., USA, had filed a petition for winding up respondent No. 5-Chloro Controls India Pvt. Ltd., the joint venture company, on just and equitable ground under Section 433(j) of the Companies Act. In this petition, specific issue was raised that merger of Capital Controls (Delaware) Co. with Severn Trent was not intimated to the respondent No. 5 company prior to the filing of the arbitration petition by Severn Trent under Section 9 of the 1996 Act as well as that Severn Trent was not a share holder of the joint venture company and thus had no locus standi to file the petition. This Court vide its judgment dated 18th February, 2008 in Civil Appeal No. 1351 of 2008 titled *Severn Trent Water Purification Inc. v. Chloro Control (India) Pvt. Ltd. and Anr.* held that the winding up petition by Severn Trent Water Purification Inc. was not maintainable as it was not a contributory. But the question whether that company was a creditor of the joint venture company was left open.

45. At this very stage, we may make it clear that we do not propose to deal with any of the contentions raised in that petition whether decided or left open, as the judgment has already attained finality. In terms of the settled position of law, the said judgment cannot be brought in challenge in the present proceedings, collaterally or otherwise.

46. Certain disputes had already arisen between the parties that resulted in termination of the joint venture agreements. Vide letter dated 21st July, 2004, Severn Trent Services informed respondent no.9, respondent no.5 and Chloro Controls India Pvt. Ltd., the present appellant, that they had failed to remedy the issues and grievances communicated to them in their previous correspondences and meetings and also failed to engage in any productive negotiation in this connection and therefore, they were terminating from that very day, the joint venture agreements executed between them and

the appellant company, which included agreements stated in that letter i.e. the Shareholders Agreement, the International Distributor Agreement, the Financial and Technical Know-How License Agreement, the Export Sales Agreement and the Trademark Registered User Agreement, all dated 16th November, 1995 and requested them to commence the winding up proceedings of the joint venture company, respondent No. 5. They were also called upon to act in accordance with the terms of the agreement in the event of such termination. It may be noticed here itself that prior to the serving of the notice of termination, a suit had been instituted by the appellant in which application under Section 8/45 of the 1996 Act was filed.

Contentions of the learned Counsel appearing for the parties in the backdrop of above detailed facts

47. The appellant had filed a derivative suit being Suit No. 233 of 2004 praying, inter alia, for a decree of declaration that the joint venture agreements and the supplementary collaboration agreement are valid, subsisting and binding and that the scope of business of the joint venture company included the manufacture, sale, distribution and service of entire range of chlorination equipments including electro-chlorination equipment. An order of injunction was also obtained restraining respondent Nos. 1 and 2 from interfering in any way and/or preventing respondent No.5 from conducting its business of sale of chlorination equipments including electro-chlorination equipment and that they be not permitted to sell their products in India save and except through the joint venture company, in compliance of clause 2.5 of the Financial and Technical Know-How License Agreement read with the Supplementary Collaboration Agreement. Besides this, certain other reliefs have also been prayed for.

48. After the institution of the suit, as already noticed, the respondent Nos.1 and 2 had terminated the joint-venture agreements vide notices dated 23rd January, 2004 and 21st July, 2004. Resultantly, in the amended plaint, specific prayer was made that both these notices were wrong, illegal and

invalid; in breach of the joint venture agreements and of no effect; and the joint venture agreements were binding and subsisting. To be precise, the appellant had claimed damages, declaration and injunction in the suit primarily relying upon the agreements entered into between the parties. In this suit, earlier interim injunction had been granted in favour of the appellant, which was subsequently vacated at the appellate stage. The respondent Nos.1 and 2 filed an application under Section 8 of the Act, praying for reference of the suit to the arbitral tribunal in accordance with the agreement between the parties. This application was contested and finally decided by the High Court in favour of respondent Nos.1 and 2, vide order dated 4th March, 2010 making a reference of the suit to arbitration.

49. It is this Order of the Division Bench of the High Court of Bombay that has given rise to the present appeals before this Court. While raising a challenge, both on facts and in law, to the judgment of the Division Bench of the Bombay High Court making a reference of the entire suit to arbitration, Mr. Fali S. Nariman, learned senior counsel appearing for the appellant, has raised the following contentions :

1. There is inherent right conferred on every person by Section 9 of the Code of Civil Procedure, 1908, (for short 'CPC') to bring a suit of a civil nature unless it is barred by a statute or there was no agreement restricting the exercise of such right. Even if such clause was there (is invoked), the same would be hit by Section 27 of the Indian Contract Act, 1872 and under Indian law, arbitration is only an exception to a suit and not an alternative to it. The appellant, in exercise of such right, had instituted a suit before the Court of competent jurisdiction, at Bombay and there being no bar under any statute to such suit. The Court could not have sent the suit for arbitration under the provisions of the 1996 Act.

2. The appellant, being *dominus litus* to the suit, had

included respondent Nos.3 and 4, who were necessary parties. The appellant had claimed different and distinct reliefs. These respondents had not been added as parties to the suit merely to avoid the arbitration clause but there were substantive reliefs prayed for against these respondents. Unless the Court, in exercise of its power under Order I, Rule 10(2) of the CPC, struck out the name of these parties as being improperly joined, the decision of the High Court would be vitiated in law as these parties admittedly were not parties to the arbitration agreement.

3. On its plain terms, Section 45 of the 1996 Act provides that a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration. The expression 'party' refers to parties to the action or suit. The request for arbitration, thus, has to come from one of the parties to the suit or action or any person claiming through or under him. The Court then can refer those parties to arbitration. The expression 'parties' used under Section 45 would necessarily mean all the parties and not some or any one of them. If the expression 'parties' is not construed to mean all parties to the action and the agreement, it will result in multiplicity of proceedings, frustration of the intended one-stop remedy and may cause further mischief.

Judgment of the High Court in referring the entire suit, including the parties who were not parties to the arbitration agreement as well as against whom the cause of action did not arise from arbitration agreement, suffers from error of law.

4. The 1996 Act is an amending and consolidating Act being an enactment setting out in one statute the law relating to arbitration, international commercial arbitration and enforcement of foreign arbitral awards. Further, the 1996 Act has no provision like Section 34 of the Arbitration Act, 1940 (for short "1940 Act"). In Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (for short '1961 Act'), there existed a mandate only to stay the proceedings and not to actually refer the parties to arbitration. Thus, the position before 1996 in India, as in England, permitted a partial stay of the suit, both as regards matters and parties. But after coming into force of the 1996 Act, it is no longer possible to contend that some parties and/or some matters in a suit can be referred to arbitration leaving the rest to be decided by another forum.

5. Bifurcation of matters/cause of action and parties is not permissible under the provisions of the 1996 Act. Such procedure is unknown to the law of arbitration in India. The judgment of this Court in the case of *Sukanya Holdings Pvt. Ltd.* (supra) is a judgment in support of this contention. This judgment of the Court is holding the field even now. In the alternative, it is submitted that bifurcation, if permitted, would lead to conflicting decisions by two different forums and under two different systems of law. In such situations, reference would not be permissible.

6. In the alternative, reference to arbitral tribunal is not possible in the facts and circumstances of the present case. Where three major agreements, i.e., Managing Director Agreement, Trademark Registered User Agreement and Supplementary Collaboration Agreement do not have any arbitration clause, there the International Distributor

Agreement exclusively provides the jurisdiction for resolution of dispute to the federal or state courts in the Eastern District of the Commonwealth of Pennsylvania, USA. This latter agreement, thus, provided for resolution of disputes under a specific law and by a specific forum. Thus, for uncertainty and indefiniteness, the alleged arbitration clause is unenforceable.

Thus, in the present case, out of all the agreements signed between different parties, four agreements, i.e., Managing Director Agreement, International Distributor Agreement, Trademark Registered User Agreement and the Supplementary Collaboration Agreement, have no arbitration clause. Furthermore, different agreements have been signed by different parties and respondent No.9 is not a party to some of the agreements containing/ not containing an arbitration clause. In any case, respondent Nos.3 and 4 are not party to any of the Agreements and the cause of action of the appellant against them is limited to the scope of International Distributor Agreement vis-à-vis the products covered under the joint-venture agreement.

On these contentions, it is submitted that the judgment of the High Court is liable to be set aside and no reference to arbitral tribunal is possible. Also, the submission is that, within the ambit and scope of Section 45 of the 1996 Act, multiple agreements, where some contain an arbitration clause and others don't, a composite reference to arbitration is not permissible. There has to be clear intention of the parties to refer the dispute to arbitration.

50. Mr. Harish Salve, learned senior counsel, while supporting the judgment of the High Court for the reasons stated therein, argued in addition that the submissions made by Mr.

F.S. Nariman, learned senior counsel, cannot be accepted in law and on the facts of the case. He contended that :

(i) Under the provisions of the 1996 Act, particularly in Part II, the Right of Reference to Arbitration is indefeasible and therefore, an interpretation in favour of such reference should be given primacy over any other interpretation.

(ii) In substance, the suit and the reliefs claimed therein relate to the dispute with regard to the agreed scope of business of the joint venture company as regards gas based chlorination or electro based chlorination. This major dispute in the present suit being relatable to joint venture agreement therefore, execution of multiple agreements would not make any difference. The reference of the suit to arbitral Tribunal by the High Court is correct on facts and in law.

(iii) The filing of the suit as a derivative action and even the joinder of respondent Nos.3 and 4 to the suit were primarily attempts to escape the impact of the arbitration clause in the joint venture agreements. Respondent Nos. 3 and 4 were neither necessary nor appropriate parties to the suit. In the facts of the case the party should be held to the bargain of arbitration and even the plaint should yield in favour of the arbitration clause.

(iv) All agreements executed between the parties are in furtherance to the Shareholders Agreement and were intended to achieve only one object, i.e., constitution and carrying on of business of chlorination products by the joint venture company in India and the specified countries. The parties having signed the various agreements, some containing an arbitration clause and others not, performance of the latter being dependent upon the

Principal Agreement and in face of clause 21.3 of the Principal Agreement, no relief could be granted on the bare reading of the plaint and reference to arbitration of the complete stated cause of action was inevitable.

(v) The judgment of this Court in the case of *Sukanya* (supra) does not enunciate the correct law. Severability of cause of action and parties is permissible in law, particularly, when the legislative intent is that arbitration has to receive primacy over the other remedies. Sukanya being a judgment relatable to Part 1 (Section 8) of the 1996 Act, would not be applicable to the facts of the present case which exclusively is covered under Part II of the 1996 Act.

(vi) The 1996 Act does not contain any restriction or limitation on reference to arbitration as contained under Section 34 of the 1940 Act and therefore, the Court would be competent to pass any orders as it may deem fit and proper, in the circumstances of a given case particularly with the aid of Section 151 of the CPC.

(vii) A bare reading of the provisions of Section 3 of the 1961 Act on the one hand and Section 45 of the 1996 Act on the other clearly suggests that change has been brought in the structure and not in the substance of the provisions. Section 3 of the 1961 Act, of course, primarily relates to stay of proceedings but demonstrates that the plaintiff claiming through or under any other person who is a party to the arbitration agreement would be subject to the applications under the arbitration agreement. Thus, the absence of equivalent words in Section 45 of 1996 Act would not make much difference. Under Section 45, the applicant seeking

reference can either be a party to the arbitration agreement or a person claiming through or under such party. It is also the contention that a defendant who is neither of these, if cannot be referred to arbitration, then such person equally cannot seek reference of others to arbitration. Such an approach would be consistent with the development of arbitration law.

51. The contention raised before us is that Part I and Part II of the 1996 Act operate in different fields and no interchange or interplay is permissible. To the contra, the submission is that provisions of Part I have to be construed with Part II. On behalf of the appellant, reliance has been placed upon the judgment of this Court in the case *Bhatia International v. Bulk Trading S.A. and Anr.* [(2002) 4 SCC 105]. The propositions stated in the case of *Bhatia International* (supra) do not directly arise for consideration of this Court in the facts of the present case. Thus, we are not dealing with the dictum of the Court in *Bhatia International's* case and application of its principles in this judgment.

It is appropriate for us to deal with the interpretation, scope and ambit of Section 45 of the 1996 Act particularly relating to an international arbitration covered under the Convention on Recognition and Enforcement of Foreign Arbitral Awards (for short, 'the New York Convention').

52. Now, we shall proceed to discuss the width of Section 45 of the 1996 Act.

Interpretation of Section 45 of the 1996 Act

53. In order to invoke jurisdiction of the Court under Section 45, the applicant should satisfy the pre-requisites stated in Section 44 of the 1996 Act.

54. Chapter I, Part II deals with enforcement of certain foreign awards in accordance with the New York Convention, annexed as Schedule I to the 1996 Act. As per Section 44, there

has to be an arbitration agreement in writing. To such arbitration agreement the conditions stated in Schedule I would apply. In other words, it must satisfy the requirements of Article II of Schedule I. Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration their disputes in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. The arbitration agreement shall include an arbitration clause in a contract or an arbitration agreement signed by the parties or entered in any of the specified modes. Subject to the exceptions stated therein, the reference shall be made.

55. The language of Section 45 read with Schedule I of the 1996 Act is worded in favour of making a reference to arbitration when a party or any person claiming through or under him approaches the Court and the Court is satisfied that the agreement is valid, enforceable and operative. Because of the legislative intent, the mandate and purpose of the provisions of Section 45 being in favour of arbitration, the relevant provisions would have to be construed liberally to achieve that object. The question that immediately follows is as to what are the aspects which the Court should consider while dealing with an application for reference to arbitration under this provision.

56. The 1996 Act makes it abundantly clear that Part I of the Act has been amended to bring these provisions completely in line with the UNCITRAL Model Law on International Commercial Arbitration (for short, the 'UNCITRAL Mode Law'), while Chapter I of Part II is meant to encourage international commercial arbitration by incorporating in India, the provisions of the New York Convention. Further, the protocol on Arbitration Clauses (for short 'Geneva Convention') was also incorporated as part of Chapter II of Part II.

57. For proper interpretation and application of Chapter I of Part II, it is necessary that those provisions are read in conjunction with Schedule I of the Act. To examine the

provisions of Section 45 without the aid of Schedule I would not be appropriate as that is the very foundation of Section 45 of the Act. The International Council for Commercial Arbitration prepared a Guide to the Interpretation of 1958 New York Convention, which lays/contains the Road Map to Article II. Section 45 is enacted materially on the lines of Article II of this Convention. When the Court is seized with a challenge to the validity of an arbitration agreement, it would be desirable to examine the following aspects :

"1. Does the arbitration agreement fall under the scope of the Convention?

2. Is the arbitration agreement evidenced in writing?

3. Does the arbitration agreement exist and is it substantively valid?

4. Is there a dispute, does it arise out of a defined legal relationship, whether contractual or not, and did the parties intend to have this particular dispute settled by arbitration?

5. Is the arbitration agreement binding on the parties to the dispute that is before the Court?

6. Is this dispute arbitrable?"

58. According to this Guide, if these questions are answered in the affirmative, then the parties must be referred to arbitration. Of course, in addition to the above, the Court will have to adjudicate any plea, if taken by a non-applicant that the arbitration agreement is null and void, inoperative or incapable of being performed. In these three situations, if the Court answers such plea in favour of the non-applicant, the question of making a reference to arbitration would not arise and that would put the matter at rest.

59. If the parties are referred to arbitration and award is made under these provisions of the Convention, then it shall be binding and enforceable in accordance with the provisions of Sections 46 to 49 of the 1996 Act. The procedure prescribed under Chapter I of Part II is to take precedence and would not

be affected by the provisions contained under Part I and/or Chapter II of Part II in terms of Section 52. This is the extent of priority that the Legislature had intended to accord to this Chapter 1 of Part II.

60. Amongst the initial steps, the Court is required to enquire whether the dispute at issue is covered by the arbitration agreement. Stress has normally been placed upon three characteristics of arbitrations which are as follows -

(1) arbitration is consensual. It is based on the parties' agreement;

(2) arbitration leads to a final and binding resolution of the dispute; and

(3) arbitration is regarded as substitute for the court litigation and results in the passing of an binding award.

61. Mr. Nariman, learned senior counsel appearing on behalf of the appellant, contended that in terms of Section 45 of the 1996 Act, parties to the agreement shall essentially be the parties to the suit. A stranger or a third party cannot ask for arbitration. They have to be essentially the same. Further, the parties should have a clear intention, at the time of the contract, to submit any disputes or differences as may arise, to arbitration and then alone the reference contemplated under Section 45 can be enforced.

62. To the contra, Mr. Salve, the learned senior counsel appearing for respondent No. 1, submitted that the phrase "at the request of one of the parties or any person claiming through or under him" is capable of liberal construction primarily for the reason that under the 1996 Act, there is a greater obligation to refer the matters to arbitration. In fact, the 1996 Act is the recognition of an indefeasible Right to Arbitration. Even a party which is not a signatory to the arbitration agreement can claim through the main party. Particularly, in cases of composite transactions, the approach of the Courts should be to hold the

parties to the bargain of arbitration rather than permitting them to escape the reference on such pleas.

63. At this stage itself, we would make it clear that we are primarily discussing these submissions purely on a legal basis and not with regard to the merits of the case, which we shall shortly revert to.

64. We have already noticed that the language of Section 45 is at a substantial variance to the language of Section 8 in this regard. In Section 45, the expression 'any person' clearly refers to the legislative intent of enlarging the scope of the words beyond 'the parties' who are signatory to the arbitration agreement. Of course, such applicant should claim through or under the signatory party. Once this link is established, then the Court shall refer them to arbitration. The use of the word 'shall' would have to be given its proper meaning and cannot be equated with the word 'may', as liberally understood in its common parlance. The expression 'shall' in the language of the Section 45 is intended to require the Court to necessarily make a reference to arbitration, if the conditions of this provision are satisfied. To that extent, we find merit in the submission that there is a greater obligation upon the judicial authority to make such reference, than it was in comparison to the 1940 Act. However, the right to reference cannot be construed strictly as an indefeasible right. One can claim the reference only upon satisfaction of the pre-requisites stated under Sections 44 and 45 read with Schedule I of the 1996 Act. Thus, it is a legal right which has its own contours and is not an absolute right, free of any obligations/limitations.

65. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a

signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming 'through' or 'under' the signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in Law and Practice of Commercial Arbitration in England (Second Edn.) by Sir Michael J. Mustill:

"1. The claimant was in reality always a party to the contract, although not named in it.

2. The claimant has succeeded by operation of law to the rights of the named party.

3. The claimant has become a part to the contract in substitution for the named party by virtue of a statutory or consensual novation.

4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence."

66. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the Courts under the English Law have, in certain cases, also applied the "Group of Companies Doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. ['Russell on Arbitration' (Twenty Third Edition)].

67. This evolves the principle that a non-signatory party

could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, 'intention of the parties' is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

68. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

69. In a case like the present one, where origin and end of all is with the Mother or the Principal Agreement, the fact that a party was non-signatory to one or other agreement may not be of much significance. The performance of any one of such agreements may be quite irrelevant without the performance and fulfillment of the Principal or the Mother Agreement. Besides designing the corporate management to successfully complete the joint ventures, where the parties execute different agreements but all with one primary object in mind, the Court would normally hold the parties to the bargain of arbitration and not encourage its avoidance. In cases involving execution of such multiple agreements, two essential features exist; firstly, all ancillary agreements are relatable to the mother agreement

and secondly, performance of one is so intrinsically inter-linked with the other agreements that they are incapable of being beneficially performed without performance of the others or severed from the rest. The intention of the parties to refer all the disputes between all the parties to the arbitral tribunal is one of the determinative factor.

70. We may notice that this doctrine does not have universal acceptance. Some jurisdictions, for example, Switzerland, have refused to recognize the doctrine, while others have been equivocal. The doctrine has found favourable consideration in the United States and French jurisdictions. The US Supreme Court in *Ruhrgos AG v Marathon Oil Co.* [526 US 574 (1999)] discussed this doctrine at some length and relied on more traditional principles, such as, the non-signatory being an alter ego, estoppel, agency and third party beneficiaries to find jurisdiction over the non-signatories.

71. The Court will have to examine such pleas with greater caution and by definite reference to the language of the contract and intention of the parties. In the case of composite transactions and multiple agreements, it may again be possible to invoke such principle in accepting the pleas of non-signatory parties for reference to arbitration. Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically inter-mingled or inter-dependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of 'composite performance' would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other.

72. As already noticed, an arbitration agreement, under

Section 45 of the 1996 Act, should be evidenced in writing and in terms of Article II of Schedule 1, an agreement in writing shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams. Thus, the requirement that an arbitration agreement be in writing is an expression incapable of strict construction and requires to be construed liberally, as the words of this Article provide. Even in a given circumstance, it may be possible and permissible to construe the arbitration agreement with the aid and principle of 'incorporation by reference'. Though the New York Convention is silent on this matter, in common practice, the main contractual document may refer to standard terms and conditions or other standard forms and documents which may contain an arbitration clause and, therefore, these terms would become part of the contract between the parties by reference. The solution to such issue should be case-specific. The relevant considerations to determine incorporation would be the status of parties, usages within the specific industry, etc. Cases where the main documents explicitly refer to arbitration clause included in standard terms and conditions would be more easily found in compliance with the formal requirements set out in the Article II of the New York Convention than those cases in which the main contract simply refers to the application of standard forms without any express reference to the arbitration clause. For instance, under the American Law, where standard terms and conditions referred to in a purchase order provided that the standard terms would have been attached to or form part of the purchase order, this was considered to be an incorporation of the arbitration agreement by reference. Even in other countries, the recommended criterion for incorporation is whether the parties were or should have been aware of the arbitration agreement. If the Bill of Lading, for example, specifically mentions the arbitration clause in the Charter Party Agreement, it is generally considered sufficient for incorporation. Two different approaches in its interpretation have been adopted, namely, (a) interpretation of documents approach; and (b) conflict of laws approach. Under

the latter, the Court could apply either its own national law or the law governing the arbitration.

73. In India, the law has been construed more liberally, towards accepting incorporation by reference. In the case of Owners and Parties Interested in the *Vessel M.V. "Baltic Confidence" & Anr. v. State Trading Corporation of India Ltd. & Anr.* [(2001) 7 SCC 473], the Court was considering the question as to whether the arbitration clause in a Charter Party Agreement was incorporated by reference in the Bill of Lading and what the intention of the parties to the Bill of Lading was. The primary document was the Bill of Lading, which, if read in the manner provided in the incorporation clause thereof, would include the arbitration clause of the Charter Party Agreement. The Court observed that while ascertaining the intention of the parties, attempt should be made to give meaning and effect to the incorporation clause and not to invalidate or frustrate it by giving it a literal, pedantic and technical reading. This Court, after considering the judgments of the courts in various other countries, held as under :

> "19. From the conspectus of the views expressed by courts in England and also in India, it is clear that in considering the question, whether the arbitration clause in a Charter Party Agreement was incorporated by reference in the Bill of Lading, the principal question is, what was the intention of the parties to the Bill of Lading? For this purpose the primary document is the Bill of Lading into which the arbitration clause in the Charter Party Agreement is to be read in the manner provided in the incorporation clause of the Bill of Lading. While ascertaining the intention of the parties, attempt should be made to give meaning to the incorporation clause and to give effect to the same and not to invalidate or frustrate it giving a literal, pedantic and technical reading of the clause. If on a construction of the arbitration clause of the Charter Party Agreement as incorporated in the Bill of Lading it does not lead to inconsistency or insensibility or absurdity then effect should

> be given to the intention of the parties and the arbitration clause as agreed should be made binding on parties to the Bill of Lading. If the parties to the Bill of Lading being aware of the arbitration clause in the Charter Party Agreement have specifically incorporated the same in the conditions of the Bill of Lading then the intention of the parties to abide by the arbitration clause is clear. Whether a particular dispute arising between the parties comes within the purview of the arbitration clause as incorporated in the Bill of Lading is a matter to be decided by the arbitrator or the court. But that does not mean that despite incorporation of the arbitration clause in the Bill of Lading by specific reference the parties had not intended that the disputes arising on the Bill of Lading should be resolved by an arbitrator."

74. Reference can also be made to the judgment of this Court in the case of *Olympus Superstructure Pvt. Ltd. v. Meena Vijay Khetan & Ors.* [(1999) 5 SCC 651], where the parties had entered into a purchase agreement for the purchase of flats. The main agreement contained the arbitration clause (clause 39). The parties also entered into three different Interior Design Agreements, which also contained arbitration clauses. The main agreement was terminated due to disputes about payment and non-grant of possession. These disputes were referred to arbitration. A sole arbitrator was appointed to make awards in this respect. Inter alia, the question was raised as to whether the disputes under the Interior Design Agreements were subject to their independent arbitration clauses or whether one and the same reference was permissible under the main agreement. It was argued that the reference under clause 39 of the main agreement could not permit the arbitrator to deal with the disputes relating to Interior Design Agreements and the award was void. The Court, however, took the view that parties had entered into multiple agreements for a common object and the expression 'other matters…connected with' appearing in clause 39 would permit such a reference. The

Court held as under :

"30. If there is a situation where there are disputes and differences in connection with the main agreement and also disputes in regard to "other matters" "connected" with the subject-matter of the main agreement then in such a situation, in our view, we are governed by the general arbitration clause 39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same arbitral tribunal. This clause 39 no doubt does not refer to any named arbitrators. So far as clause 5 of the Interior Design Agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and the said clause 5, in our opinion, comes into play only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differences are solely confined to the Interior Design Agreement. That, in our view, is the true intention of the parties and that is the only way by which the general arbitration provision in clause 39 of the main agreement and the arbitration provision for a named arbitrator contained in clause 5 of the Interior Design Agreement can be harmonised or reconciled. Therefore, in a case like the present where the disputes and differences cover the main agreement as well as the Interior Design Agreement, - (that there are disputes arising under the main agreement and the Interior Design Agreement is not in dispute) - it is the general arbitration clause 39 in the main agreement that governs because the questions arise also in regard to disputes relating to the overlapping items in the schedule to the main agreement and the Interior Design Agreement, as detailed earlier. There cannot be conflicting awards in regard to items which overlap in the two agreements. Such a situation was never contemplated by the parties. The intention of the parties when they incorporated clause 39 in the main

agreement and clause 5 in the Interior Design Agreement was that the former clause was to apply to situations when there were disputes arising under both agreements and the latter was to apply to a situation where there were no disputes or differences arising under the main contract but the disputes and differences were confined only to the Interior Design Agreement. A case containing two agreements with arbitration clauses arose before this Court in *Agarwal Engg. Co. v. Technoimpex Hungarian Machine Industries Foreign Trade Co*. There were arbitration clauses in two contracts, one for sale of two machines to the appellant and the other appointing the appellant as sales representative. On the facts of the case, it was held that both the clauses operated separately and this conclusion was based on the specific clause in the sale contract that it was the "sole repository" of the sale transaction of the two machines. Krishna Iyer, J. held that if that were so, then there was no jurisdiction for travelling beyond the sale contract. The language of the other agreement appointing the appellant as sales representative was prospective and related to a sales agency and "later purchases", other than the purchases of these two machines. There was therefore no overlapping. The case before us and the above case exemplify contrary situations. In one case the disputes are connected and in the other they are distinct and not connected. Thus, in the present case, clause 39 of the main agreement applies. Points 1 and 2 are decided accordingly in favour of the respondents."

75. The Court also took the view that a dispute relating to specific performance of a contract in relation to immoveable property could be referred to arbitration and Section 34(2)(b)(i) of the 1996 Act was not attracted. This finding of the Court clearly supports the view that where the law does not prohibit the exercise of a particular power, either the Arbitral Tribunal or the Court could exercise such power. The Court, while taking

this view, has obviously rejected the contention that a contract for specific performance was not capable of settlement by arbitration under the Indian law in view of the statutory provisions. Such contention having been rejected, supports the view that we have taken.

THRESHOLD REVIEW

76. Where the Court which, on its judicial side, is seized of an action in a matter in respect of which the parties have made an arbitration agreement, once the required ingredients are satisfied, it would refer the parties to arbitration but for the situation where it comes to the conclusion that the agreement is null and void, inoperative or incapable of being performed. These expressions have to be construed somewhat strictly so as to ensure that the Court returns a finding with certainty and on the correct premise of law and fact as it has the effect of depriving the party of its right of reference to arbitration. But once the Court finds that the agreement is valid then it must make the reference, without any further exercise of discretion {refer *General Electric Co. v. Renusagar Power Co.* [(1987) 4 SCC 137]}. These are the issues which go to the root of the matter and their determination at the threshold would prevent multiplicity of litigation and would even prevent futile exercise of proceedings before the arbitral tribunal.

77. The issue of whether the courts are empowered to review the existence and validity of the arbitration agreement prior to reference is more controversial. A majority of the countries admit to the positive effect of kompetenz kompetenz principle, which requires that the arbitral tribunal must exercise jurisdiction over the dispute under the arbitration agreement. Thus, challenge to the existence or validity of the arbitration agreement will not prevent the arbitral tribunal from proceeding with hearing and ruling upon its jurisdiction. If it retains jurisdiction, making of an award on the substance of the dispute would be permissible without waiting for the outcome of any court action aimed at deciding the issue of the jurisdiction. The negative effect of the kompetenz kompetenz principle is that

arbitrators are entitled to be the first to determine their jurisdiction which is later reviewable by the court, when there is action to enforce or set aside the arbitral award. Where the dispute is not before an arbitral tribunal, the Court must also decline jurisdiction unless the arbitration agreement is patently void, inoperative or incapable of being performed.

78. This is the position of law in France and in some other countries, but as far as the Indian Law is concerned, Section 45 is a legislative mandate and does not admit of any ambiguity. We must take note of the aspect of Indian law that Chapter I of Part II of the 1996 Act does not contain any provision analogous to Section 8(3) under Part I of the Act. In other words, under the Indian Law, greater obligation is cast upon the Courts to determine whether the agreement is valid, operative and capable of being performed at the threshold itself. Such challenge has to be a serious challenge to the substantive contract or to the agreement, as in the absence of such challenge, it has to be found that the agreement was valid, operative and capable of being performed; the dispute would be referred to arbitration. [*State of Orissa v. Klockner and Company & Ors.* (AIR 1996 SC 2140)].

79. Alan Redfern and Martin Hunter in Law and Practice of International Commercial Arbitration, (Fourth Edition) have opined that when several parties are involved in a dispute, it is usually considered desirable that the dispute should be dealt with in the same proceedings rather than in a series of separate proceedings. In general terms, this saves time, money, multiplicity of litigation and more importantly, avoids the possibility of conflicting decisions on the same issues of fact and law since all issues are determined by the same arbitral tribunal at the same time. In proceedings before national courts, it is generally possible to join additional parties or to consolidate separate sets of proceedings. In arbitration, however, this is difficult, sometimes impossible, to achieve this because the arbitral process is based upon the agreement of the parties.

80. Where there is multi-party arbitration, it may be because there are several parties to one contract or it may be because there are several contracts with different parties that have a bearing on the matter in dispute. It is helpful to distinguish between the two. Where there are several parties to one contract, like a joint venture or some other legal relationship of similar kind and the contract contains an arbitration clause, when a dispute arises, the members of the consortium or the joint venture may decide that they would each like to appoint an arbitrator. In distinction thereto, in cases involving several contracts with different parties, a different problem arises. They may have different issues in dispute. Each one of them will be operating under different contracts often with different choice of law and arbitration clauses and yet, any dispute between say the employer and the main contractor is likely to involve or affect one or more of the suppliers or sub-contractors, even under other contracts. What happens when the dispute between an employer and the main contractor is referred to arbitration, and the main contractor wishes to join the sub-contractor in the proceedings, on the basis that if there is any liability established, the main contractor is entitled to pass on such liability to the sub-contractor? This was the issue raised in the Adgas case {*Abu Dhabi Gas Liquefaction Co. Ltd. v. Eastern Bechtel Corp.* [1982] 2 Lloyd's Rep. 425, CA}. Adgas was the owner of a plant that produced liquefied natural gas in the Arabian Gulf. The company started arbitration in England against the main contractors under an international construction contract, alleging that one of the huge tanks that had been constructed to store the gas was defective. The main contractor denied liability but added that, if the tank was defective, it was the fault of the Japanese sub-contractor. Adgas brought ad hoc arbitration proceedings against the main contractor before a sole arbitrator in London. The main contractor then brought separate arbitration proceedings, also in London, against the Japanese sub-contractor.

81. There is little doubt that if the matter had been litigated

in an English court, the Japanese company would have been joined as a party to the action. However, Adgas did not agree that the Japanese sub-contractor should be brought into its arbitration with the main contractor, since this would have lengthened and complicated the proceedings. The Japanese sub-contractor also did not agree to be joined. It preferred to await the outcome of the main arbitration, to see whether or not there was a case to answer.

82. Lord Denning, giving judgment in the English Court of Appeal, plainly wished that an order could be made consolidating the two sets of arbitral proceedings so as to save time and money and to avoid the risk of inconsistent awards:

> "As we have often pointed out, there is a danger in having two separate arbitrations in a case like this. You might get inconsistent findings if there were two separate arbitrators. This has been said in many cases…it is most undesirable that there should be inconsistent findings by two separate arbitrators on virtually the self-same question, such as causation. It is very desirable that everything should be done to avoid such a circumstance [Abu Dhabi Gas, op.cit.at 427]"

83. We have already referred to the contention of Mr. Fali S. Nariman, the learned senior counsel appearing for the appellant, that the provisions of Section 45 of the 1996 Act are somewhat similar to Article II(3) of the New York Convention and the expression 'parties' in that Section would mean that 'all parties to the action' before the Court have to be the parties to the arbitration agreement. If some of them are parties to the agreement, while the others are not, Section 45 does not contemplate the applicable procedure and the status of the non-signatories. The consequences of all parties not being common to the action and arbitration proceedings are, as illustrated above, multiplicity of proceedings and frustration of the intended 'one stop action'. The Rule of Mischief would support such interpretation. Even if some unnecessary parties are added to

the action, the Court can always strike out such parties and even the cause of action in terms of the provisions of the CPC. However, where such parties cannot be struck off, there the proceedings must continue only before the Court.

84. Thus, the provisions of Section 45 cannot be effectively applied or even invoked. Unlike Section 24 of the 1940 Act, under the 1996 Act the Court has not been given the power to refer to arbitration some of the parties from amongst the parties to the suit. Section 24 of 1940 Act vested the Court with the discretion that where the Court thought fit, it could refer such matters and parties to arbitration provided the same could be separated from the rest of the subject matter of the suit. Absence of such provision in the 1996 Act clearly suggests that the Legislature intended not to permit bifurcated or partial references of dispute or parties to arbitration. Without prejudice to this contention, it was also the argument that it would not be appropriate and even permissible to make reference to arbitration when the issues and parties in action are not covered by the arbitration agreement. Referring to the consequences of all parties not being common to the action before the Court and arbitration, the disadvantages are:

a) There would be multiplicity of litigation;

b) Application of principle of one stop action would not be possible; and

c) It will frustrate the application of the Rule of Mischief. The Court can prevent the mischief by striking out unnecessary parties or causes of action.

85. It would, thus, imply that a stranger or a third party cannot ask for arbitration. The expression 'claiming through or under' will have to be construed strictly and restricted to the parties to the arbitration agreement.

86. Another issue raised before the Court is that there is possibility of the arbitration proceedings going on simultaneously with the suit, which would result in rendering

passing of conflicting orders possible. This would be contrary to the public policy of India that Indian courts can give effect to the foreign awards which are in conflict with judgment of the Indian courts.

87. To the contra, Mr. Salve, learned senior counsel appearing for respondent No.1, contended that the expressions 'parties to arbitration', 'any person claiming through or under him' and 'at the request of one of the party' appearing in Section 45 are wide enough to include some or all the parties and even non-signatory parties for the purposes of making a reference to arbitration. It is also the contention that on the true construction of Sections 44, 45 and 46 of the 1996 Act, it is not possible to accept the contention of the appellant that all the parties to an action have to be parties to the arbitration agreement as well as the Court proceedings. This would be opposed to the principle that parties should be held to their bargain of arbitration. The Court always has the choice to make appropriate orders in exercise of inherent powers to bifurcate the reference or even stay the proceedings in a suit pending before it till the conclusion of the arbitration proceedings or otherwise. According to Mr. Salve, if the interpretation advanced by Mr. Nariman is accepted, then mischief will be encouraged which would frustrate the arbitration agreement because a party not desirous of going to arbitration would initiate civil proceedings and add non-signatory as well as unnecessary parties to the suit with a view to avoid arbitration. This would completely frustrate the legislative object underlining the 1996 Act. Non-signatory parties can even be deemed to be parties to the arbitration agreement and may successfully pray for referral to arbitration.

88. As noticed above, the legislative intent and essence of the 1996 Act was to bring domestic as well as international commercial arbitration in consonance with the UNCITRAL Model Rules, the New York Convention and the Geneva Convention. The New York Convention was physically before the Legislature and available for its consideration when it

enacted the 1996 Act. Article II of the Convention provides that each contracting State shall recognise an agreement and submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not concerning a subject matter capable of settlement by arbitration. Once the agreement is there and the Court is seized of an action in relation to such subject matter, then on the request of one of the parties, it would refer the parties to arbitration unless the agreement is null and void, inoperative or incapable of performance.

89. Still, the legislature opted to word Section 45 somewhat dissimilarly. Section 8 of the 1996 Act also uses the expression 'parties' simpliciter without any extension. In significant contra-distinction, Section 45 uses the expression 'one of the parties or any person claiming through or under him' and 'refer the parties to arbitration', whereas the rest of the language of Section 45 is similar to that of Article II(3) of the New York Contention. The Court cannot ignore this aspect and has to give due weightage to the legislative intent. It is a settled rule of interpretation that every word used by the Legislature in a provision should be given its due meaning. To us, it appears that the Legislature intended to give a liberal meaning to this expression.

90. The language of Section 45 has wider import. It refers to the request of a party and then refers to an arbitral tribunal, while under Section 8(3) it is upon the application of one of the parties that the court may refer the parties to arbitration. There is some element of similarity in the language of Section 8 and Section 45 read with Article II(3). The language and expressions used in Section 45, 'any person claiming through or under him' including in legal proceedings may seek reference of all parties to arbitration. Once the words used by the Legislature are of wider connotation or the very language of section is structured with liberal protection then such provision should normally be construed liberally.

91. Examined from the point of view of the legislative

object and the intent of the framers of the statute, i.e., the necessity to encourage arbitration, the Court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious cause of action, parties and prayers.

Legal Relationship

92. Now, we should examine the scope of concept of 'legal relationship' as incorporated in Article II(1) of the New York Convention vis-à-vis the expression 'any person claiming through or under him' appearing in Section 45 of the 1996 Act. Article II(1) and (3) have to be read in conjunction with Section 45 of the Act. Both these expressions have to be read in harmony with each other. Once they are so read, it will be evident that the expression "legal relationship" connotes the relationship of the party with the person claiming through or under him. A person may not be signatory to an arbitration agreement, but his cause of action may be directly relatable to that contract and thus, he may be claiming through or under one of those parties. It is also stated in the *Law and Practice of International Commercial Arbitration, Alan Redfern and Martin Hunter* (supra), that for the purposes of both the New York Convention and the UNCITRAL Model Law, it is sufficient that there should be a defined "legal relationship" between the parties, whether contractual or not. Plainly there has to be some contractual relationship between the parties, since there must be some arbitration agreement to form the basis of the arbitral proceedings. Given the existence of such an agreement, the dispute submitted to arbitration may be governed by the principles of delictual or tortuous liability rather than by the law of contract.

93. In the case of *Roussel - Uclaf v. G.D. Searle & Co. Ltd. And G.D. Searle & Co.* [1978 Vol. 1 LLR 225], the Court held:

"The argument does not admit of much elaboration, but I

see no reason why these words in the Act should be construed so narrowly as to exclude a wholly-owned subsidiary company claiming, as here, a right to sell patented articles which it has obtained from and been ordered to sell by its parent. Of course, if the arbitration proceedings so decide, it may eventually turn out that the parent company is at fault and not entitled to sell the articles in question at all; and, if so, the subsidiary will be equally at fault. But, if the parent is blameless, it seems only common sense that the subsidiary should be equally blameless. The two parties and their actions are, in my judgment, so closely related on the facts in this case that it would be right to hold that the subsidiary can establish that it is within the purview of the arbitration clause, on the basis that it is "claiming through or under" the parent to do what it is in fact doing whether ultimately held to be wrongful or not."

94. However, the view expressed by the Court in the above case does not find approval in the decision of the Court of Appeal in the case of *City of London v. Sancheti* [(2009) 1 Lloyds Law Reports 116]. In paragraph 34, it was held that the view in the case of Roussel Uclaf need not be followed and stay could not be obtained against a party to an arbitration agreement or a person claiming through or under such a party, as mere local or commercial connection is not sufficient. But the Court of Appeal hastened to add that, in cases such as the one of Mr. Sancheti, the Corporation of London was not party to the arbitration agreement, but the relevant party is the United Kingdom Government. The fact that in certain circumstances, the State may be responsible under international law for the acts of one of its local authorities, or may have to take steps to redress wrongs committed by one of the local authorities, does not make the local authority a party to the arbitration agreement.

95. Having examined both the above-stated views, we are of the considered opinion that it will be the facts of a given case that would act as precept to the jurisdictional forum as to

whether any of the stated principles should be adopted or not. If in the facts of a given case, it is not possible to construe that the person approaching the forum is a party to the arbitration agreement or a person claiming through or under such party, then the case would not fall within the ambit and scope of the provisions of the section and it may not be possible for the Court to permit reference to arbitration at the behest of or against such party.

96. We have already referred to the judgments of various courts, that state that arbitration could be possible between a signatory to an agreement and a third party. Of course, heavy onus lies on that party to show that in fact and in law, it is claiming under or through a signatory party, as contemplated under Section 45 of the 1996 Act.

97. Michael J. Mustill and Stewart C. Boyd in The Law and Practice of Commercial Arbitration in England have observed that the applicant must show that the person whose claim he seeks to stay is either a party to the arbitration agreement or a person claiming through or under such a party. It is further noticed that it occasionally happens that the plaintiff is not himself a party to the arbitration agreement on which the application is founded. This may arise in the following situations:

(i) The plaintiff has acquired the rights, which the action is brought to enforce, from someone who is a party to an arbitration agreement with the defendant;

(ii) The plaintiff is bringing the action on behalf of someone else, who is a party to an arbitration agreement with the defendant.

(iii) When the expression used in the provision, the words 'claiming under plaintiff' relate to substantive right which is being asserted.

98. The requirements can scarcely be interpreted in their literal sense, this would mean that a person could claim a stay even though not a party to the arbitration agreement. However,

the applicant must be party to the agreement against whom legal proceedings have been initiated rather than a party as intervenor.

99. Joinder of non signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCA's Guide to the Interpretation of the 1958 New York Convention also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration agreement could be read as being in conflict with the requirement of written agreement under Article I of the Convention, the most compelling answer is "no" and the same is supported by a number of reasons.

100. Various legal basis may be applied to bind a non-signatory to an arbitration agreement. The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called the "alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.

101. We may also notice the Canadian case of *The City of Prince George v. A.L. Sims & Sons Ltd.* [YCA XXIII (1998), 223] wherein the Court took the view that an arbitration agreement is neither inoperative nor incapable of being performed if a multi-party dispute arises and not all parties are bound by the arbitration agreement: the parties bound by the arbitration agreement are to be referred to arbitration and court proceedings may continue with respect to the other parties, even if this creates a risk of conflicting decisions.

102. We have already discussed that under the Group of Companies Doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-

signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties.

103. The question of formal validity of the arbitration agreement is independent of the nature of parties to the agreement, which is a matter that belongs to the merits and is not subject to substantive assessment. Once it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it. Third parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its ratione personae scope. Furthermore, the Convention does not prevent consent to arbitrate from being provided by a person on behalf of another, a notion which is at the root of the theory of implied consent.

104. If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the an action. But this general concept is subject to exceptions which are that when a third party, i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration.

105. In the present case, the corporate structure of the respondent companies as well as that of the appellant companies clearly demonstrates a legal relationship which not only is inter-legal relationship but also intra-legal relationship between the parties to the lis or persons claiming under them. They have contractual relationship which arises out of the

various contracts that spell out the terms, obligations and roles of the respective parties which they were expected to perform for attaining the object of successful completion of the joint venture agreement. This joint venture project was not dependant on any single agreement but was capable of being achieved only upon fulfillment of all these agreements. If one floats a joint venture company, one must essentially know-how to manage it and what shall be the methodology adopted for its management. If one manages it well, one must know what goods the said company is to produce and with what technical knowhow. Even if these requisites are satisfied, then also one is required to know, how to create market, distribute and export such goods. It is nothing but one single chain consisting of different components. The parties may choose to sign different agreements to effectively implement various aforementioned facets right from managing to making profits in a joint venture company. A party may not be signatory to an agreement but its execution may directly be relatable to the main contract even though he claims through or under one of the main party to the agreement. In such situations, the parties would aim at achieving the object of making their bargain successful, by execution of various agreements, like in the present case.

106. The New York Convention clearly postulates that there should be a defined legal relationship between the parties, whether contractual or not, in relation to the differences that may have arisen concerning the subject matter capable of settlement of arbitration. We have referred to a number of judgments of the various courts to emphasize that in given circumstances, if the ingredients above-noted exist, reference to arbitration of a signatory and even a third party is possible. Though heavy onus lies on the person seeking such reference, multiple and multi-party agreements between the parties to the arbitration agreement or persons claiming through or under such parties is neither impracticable nor impermissible.

107. Next, we are to examine the issue whether the cause of action in a suit can be bifurcated and a partial reference may

be made by the Court. Whatever be the answer to this question, a necessary corollary is as to whether the Court should or should not stay the proceedings in the suit? Further, this may give rise to three different situations. Firstly, while making reference of the subject matter to arbitration, whether the suit may still survive, partially or otherwise; secondly, whether the suit, still pending before the Court, should be stayed completely; and lastly, whether both the arbitration and the suit proceedings could be permitted to proceed simultaneously in accordance with law.

108. Mr. Nariman, the learned senior counsel, while relying upon the judgments in the cases of *Turnock v. Sartoris* [1888 (43) *Chancery Division,* 1955 SCR 862], *Taunton-Collins v. Cromie & Anr.,* [1964 Vol.1 Weekly Law Reports 633] and *Sumitomo Corporation v. CDS Financial Services (Mauritius) Ltd. and Others* [(2008) 4 SCC 91] again emphasized that the parties to the agreement have to be parties to the suit and also that the cause of action cannot be bifurcated unless there was a specific provision in the 1996 Act itself permitting such bifurcation or splitting of cause of action. He also contended that there is no provision like Sections 21 and 24 of the 1940 Act in the 1996 Act and thus, it supports the view that bifurcation of cause of action is impermissible and such reference to arbitration is not permissible.

109. In the case of *Turnock* (supra), the Court had stated that it was not right to cut up that litigation into two actions, one to be tried before the arbitrator and the other to be tried elsewhere, as in that case matters in respect of which the damages were claimed by the plaintiff could not be referred to arbitration because questions arising as to the construction of the agreement and provisions in the lease deed were involved and they did not fall within the power of the arbitrator in face of the arbitration agreement. In the case of *Taunton-Collins* (supra), the Court again expressed the view that it was undesirable that there should be two proceedings before two different tribunals, i.e., the official referee and an Arbitrator, as

they may reach inconsistent findings.

110. This Court dealt with the provisions of the 1940 Act, in the case of *Anderson Wright Ltd. v. Moran & Company* [1955 SCR 862], and described the conditions to be satisfied before a stay can be granted in terms of Section 34 of the 1940 Act. The Court also held that it was within the jurisdiction of the Court to determine a question whether the plaintiff was a party to the contract containing the arbitration clause or not. Still in the case of *Sumitomo Corporation* (supra), this Court primarily declined the reference to arbitration for the reason that the disputes stated in the petition did not fall within the ambit of the arbitration clause contained in the agreement between the parties and also that the Joint Venture Agreement did not itself contain a specific arbitration clause. An observation was also made in paragraph 20 of the judgment that the 'party' would mean 'the party to the judicial proceeding should be a party to the arbitration agreement.

111. It will be appropriate to refer to the contentions of Mr. Salve, the learned senior counsel. According to him, reference, even of the non-signatory party, could be made to arbitration and upon such reference the proceedings in an action before the Court should be stayed. The principle of bifurcation of cause of action, as contemplated under the CPC, cannot stricto sensu apply to Section 45 of the 1996 Act in view of the non-obstante language of the Section. He also contended that parties or issues, even if outside the scope of the arbitration agreement, would not per se render the arbitration clause inoperative. Even if there is no specific provision for staying the proceedings in the suit under the 1996 Act, still in exercise of its inherent powers, the Court can direct stay of the suit proceedings or pass such other appropriate orders as the court may deem fit.

112. We would prefer to first deal with the precedents of this Court cited before us. As far as *Sumitomo Corporation* (supra) is concerned, it was a case dealing with the matter where the proceedings under Section 397-398 of the

Companies Act had been initiated and the Company Law Board had passed an order. Whether the appeal against such order would lie to the High Court was the principal question involved in that case. The denial of arbitration reference, as already noticed, was based upon the reasoning that disputes related to the joint venture agreement to which the parties were not signatory and the said agreement did not even contain the arbitration clause. On the other hand, it was the other agreement entered into by different parties which contained the arbitration clause. As already noticed, in paragraph 20, the Court had observed that a party to an arbitration agreement has to be a party to the judicial proceedings and then alone it will fall within the ambit of Section 2(h) of the 1996 Act. As far as the first issue is concerned, we shall shortly proceed to discuss it when we discuss the merits of this case, in light of the principles stated in this judgment. However, the observations made by the learned Bench in the case of *Sumitomo Corporation* (supra) do not appear to be correct. Section 2(h) only says that 'party' means a party to an arbitration agreement. This expression falls in the Chapter dealing with definitions and would have to be construed along with the other relevant provisions of the Act. When we read Section 45 in light of Section 2(h), the interpretation given by the Court in the case of *Sumitomo Corporation* (supra) does not stand to the test of reasoning. Section 45 in explicit language permits the parties who are claiming through or under a main party to the arbitration agreement to seek reference to arbitration. This is so, by fiction of law, contemplated in the provision of Section 45 of the 1996 Act.

113. We have already discussed above that the language of Section 45 is incapable of being construed narrowly and must be given expanded meaning to achieve the twin objects of arbitration, i.e., firstly, the parties should be held to their bargain of arbitration and secondly, the legislative intent behind incorporating the New York Convention as part of Section 44 of the Act must be protected. Moreover, paragraph 20 of the

judgment of *Sumitomo Corporation* (supra) does not state any principle of law and in any event it records no reasons for arriving at such a conclusion. In fact, that was not even directly the issue before the Court so as to operate as a binding precedent. For these reasons, respectfully but without hesitation, we are constrained to hold that the conclusion or the statement made in paragraph 20 of this judgment does not enunciate the correct law.

Scope of jurisdiction while referring the parties to arbitration

114. An application for appointment of arbitral tribunal under Section 45 of the 1996 Act would also be governed by the provisions of Section 11(6) of the Act. This question is no more res integra and has been settled by decision of a Constitution Bench of seven Judges of this Court in the case of *SBP and Co. v. Patel Engineering Ltd. and Anr.* [(2005) 8 SCC 618], wherein this Court held that power exercised by the Chief Justice is not an administrative power. It is a judicial power. It is a settled principle that the Chief Justice or his designate Judge will decide preliminary aspects which would attain finality unless otherwise directed to be decided by the arbitral tribunal. In para 39 of the judgment, the Court held as under :

> "39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by

> recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal."

115. This aspect of the arbitration law was explained by a two Judge Bench of this Court in the case of *Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.* [(2007) 4 SCC 599] wherein, while referring to the judgment in *SBP & Co.* (supra) particularly the above paragraph, this Court held that the scope of order under Section 11 of the 1996 Act would take in its ambit the issue regarding territorial jurisdiction and the existence of the arbitration agreement. The Court noticed that if these issues are not decided by the Chief Justice or his designate, there would be no question of proceeding with the arbitration. It held as under:

> "27…Thus, the Chief Justice has to decide about the territorial jurisdiction and also whether there exists an arbitration agreement between the parties and whether such party has approached the court for appointment of the arbitrator. The Chief Justice has to examine as to whether the claim is a dead one or in the sense whether

the parties have already concluded the transaction and have recorded satisfaction of their mutual rights and obligations or whether the parties concerned have recorded their satisfaction regarding the financial claims. In examining this if the parties have recorded their satisfaction regarding the financial claims, there will be no question of any issue remaining. It is in this sense that the Chief Justice has to examine as to whether there remains anything to be decided between the parties in respect of the agreement and whether the parties are still at issue on any such matter. If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue has not become dead by the lapse of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above para that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation.

(emphasis supplied)"

116. Thus, the Bench while explaining the judgment of this Court in *SBP & Co.* (supra) has stated that the Chief Justice may not decide certain issues finally and upon recording satisfaction that prima facie the issue has not become dead even leave it for the arbitral tribunal to decide.

117. In *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.* [(2009) 1 SCC 267], another equi-bench of this Court after discussing various judgments of this Court, explained *SBP & Co.* (supra) in relation to scope of powers of the Chief Justice and/or his designate while exercising jurisdiction under Section 11(6), held as follows :

"22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/ his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/ his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration."

118. We may notice that at first blush, the judgment in the case of *Shree Ram Mills* (supra) is at some variance with the judgment in the case of *National Insurance Co. Ltd.* (supra) but when examined in depth, keeping in view the judgment in the case of *SBP & Co.* (supra) and provisions of Section 11(6) of the 1996 Act, both these judgments are found to be free from contradiction and capable of being read in harmony in order to bring them in line with the statutory law declared by the larger Bench in *SBP & Co.* (supra). The expressions "Chief Justice does not in strict sense decide the issue" or "is prima facie satisfied", will have to be construed in the facts and circumstances of a given case. Where the Chief Justice or his designate actually decides the issue, then it can no longer be prima facie, but would be a decision binding in law. On such an issue, the Arbitral Tribunal will have no jurisdiction to re-determine the issue. In the case of *Shree Ram Mills* (supra), the Court held that the Chief Justice could record a finding where the issue between the parties was still alive or was dead by lapse of time. Where it prima facie found the issue to be alive, the Court could leave the question of limitation and also open to be decided by the arbitral tribunal.

119. The above expressions are mere observations of the

Court and do not fit into the contours of the principle of ratio decidendi of the judgment. The issues in regard to validity or existence of the arbitration agreement, the application not satisfying the ingredients of Section 11(6) of the 1996 Act and claims being barred by time etc. are the matters which can be adjudicated by the Chief Justice or his designate. Once the parties are heard on such issues and the matter is determined in accordance with law, then such a finding can only be disturbed by the Court of competent jurisdiction and cannot be reopened before the arbitral tribunal. In *SBP & Co.* (supra), the Seven Judge Bench clearly stated, "the finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act are incapable of being reopened before the arbitral tribunal". Certainly the Bench dealing with the case of *Shree Ram Mills* (supra) did not intend to lay down any law in direct conflict with the Seven Judge Bench judgment in *SBP & Co.* (supra). In the reasoning given in Shree Ram Mills' case, the Court has clearly stated that matters of existence and binding nature of arbitration agreement and other matters mentioned therein are to be decided by the Chief Justice or his designate and the same is in line with the judgment of this Court in the case of *SBP & Co.* (supra). It will neither be permissible nor in consonance with the doctrine of precedent that passing observations by the Bench should be construed as the law while completely ignoring the ratio decidendi of that very judgment. We may also notice that the judgment in *Shree Ram Mills* (supra) was not brought to the notice of the Bench which pronounced the judgment in the case of *National Insurance Co. Ltd.* (supra).

120. As far as the classification carved out by the Court in the case of *National Insurance Co. Ltd.* (supra) are concerned, it draws its origin from paragraph 39 of the judgment in the case of *SBP & Co.* (supra) wherein the Constitution Bench of the Court had observed that "it may not be possible at that stage to decide whether a live claim made is one which comes within the purview of the arbitration clause. It will be

more appropriate to leave the seriously disputed questions to be decided by the Arbitral Tribunal on taking evidence along with the merits of the claim, subject matter of the arbitration."

121. The foundation for category (2) in para 22 of the *National Insurance Company Ltd.* (supra) is directly relatable to para 39 of the judgment of this court in *SBP & Co.* (supra) and matters falling in that category are those which, depending on the facts and circumstances of a given case, could be decided by the Chief Justice or his designate or even may be left for the decision of the arbitrator, provided there exists a binding arbitration agreement between the parties. Similar is the approach of the Bench in the case of *Shree Ram Mills* (supra) and that is why in paragraph 27 thereof, the Court has recorded that it would be appropriate sometimes to leave the question regarding the claim being alive to be decided by the arbitral tribunal and the Chief Justice may record his satisfaction that parties have not closed their rights and the matter has not been barred by limitation.

122. As already noticed, the observations made by the Court have to be construed and read to support the ratio decidendi of the judgment. Observations in a judgment which are stared upon by the judgment of a larger bench would not constitute valid precedent as it will be hit by the doctrine of staire decisis. In the case of the *Shri Ram Mills* (supra) surely the Bench did not intend to lay down the law or state a proposition which is directly in conflict with the judgment of the Constitution Bench of this Court in the case of *SBP & Co.* (supra).

123. We have no reason to differ with the classification carved out in the case of *National Insurance Co.* (supra) as it is very much in conformity with the judgment of the Constitution Bench in the case of *SBP* (supra). The question that follows from the above discussion is as to whether the views recorded by the judicial forum at the threshold would be final and binding on the parties or would they constitute the prima facie view. This again has been a matter of some debate before this Court. A

three Judge Bench of this Court in the case of *Shin-Etsu Chemical Co. Ltd. v. M/s. Aksh Optifibre Ltd. & Anr.* [(2005) 7 SCC 234] was dealing with an application for reference under Section 45 of the 1996 Act and consequently, determination of validity of arbitration agreement which contained the arbitration clause governed by the ICC Rules in Tokyo, Japan. The appellant before this Court had terminated the agreement in that case. The respondent filed a suit claiming a decree of declaration and injunction against the appellant for cancellation of the agreement which contained the arbitration clause. In that very suit, the appellant also prayed that this long term sale and purchase agreement, which included the arbitration clause be declared void ab initio, inoperative and incapable of being performed on the ground that the said agreement contained unconscionable, unfair and unreasonable terms; was against public policy and was entered into under undue influence. The appellant had also filed an application under Section 8 of the 1996 Act for reference to arbitration. Some controversy arose before the Trial Court as well as before the High Court as to whether the application was one under Section 8 or Section 45 but when the matter came up before this Court, the counsel appearing for both the parties rightly took the stand that only Section 45 was applicable and Section 8 had no application. In this case, the Court was primarily concerned and dwelled upon the question whether an order refusing reference to arbitration was appealable under Section 50 of the 1996 Act and what would be its effect.

124. We are not really concerned with the merits of that case but certainly are required to deal with the limited question whether the findings recorded by the referring Court are of final nature, or are merely prima facie and thus, capable of being re-adjudicated by the arbitral tribunal. Where the Court records a finding that the agreement containing the arbitration clause or the arbitration clause itself is null and void, inoperative or incapable of being performed on merits of the case, it would decline the reference. Then the channel of legal remedy available to the party against whom the reference has been

declined would be to take recourse to an appeal under Section 50(1)(a) of the 1996 Act. The Arbitral Tribunal in such situations does not deliver any determination on the issues in the case. However, in the event that the referring Court deals with such an issue and returns a finding that objections to reference were not tenable, thus rejecting, the plea on merits, then the issue arises as to whether the arbitral tribunal can re-examine the question of the agreement being null and void, inoperative or incapable of performance, all over again. Sabharwal, J., after deliberating upon the approaches of different courts under the English and the American legal systems, stated that both the approaches have their own advantages and disadvantages. The approach whereby the courts finally decide on merits in relation to the issue of existence and validity of the arbitration agreement would result to a large extent in avoiding delay and increased cost. It would not be for the parties to wait for months or years before knowing the final outcome of the disputes regarding jurisdiction alone. Then, he held as follows :

> "56. I am of the view that the Indian Legislature has consciously adopted a conventional approach so as to save the huge expense involved in international commercial arbitration as compared to domestic arbitration.
>
> 57. In view of the aforesaid discussion, I am of the view that under Section 45 of the Act, the determination has to be on merits, final and binding and not prima facie."

125. However, Srikrishna, J. took a somewhat different view and noticing the truth that there is nothing in Section 45 to suggest that a finding as to the nature of the arbitration agreement has to be ex facie or prima facie, observed that if it were to be held that the finding of the court under Section 45 should be a final, determinative conclusion, then it is obvious that until such a pronouncement is made, the arbitral proceedings would have to be in limbo. So, he held as follows :

> "105. I fully agree with my learned Brother's view that the

> object of dispute resolution through arbitration, including international commercial arbitration, is expedition and that the object of the Act would be defeated if proceedings remain pending in the court even after commencing of the arbitration. It is precisely for this reason that I am inclined to the view that at the pre-reference stage contemplated by Section 45, the court is required to take only a prima facie view for making the reference, leaving the parties to a full trial either before the Arbitral Tribunal or before the court at the post-award stage."

126. Dharmadhikari, J., the third member of the Bench, while agreeing with the view of Srikrishna, J. and noticing, "Where a judicial authority or the court refuses to make a reference on the grounds available under Section 45 of the Act, it is necessary for the judicial authority or the court which is seized of the matter to pass a reasoned order as the same is subject to appeal to the appellate court under Section 50(1)(a) of the Act and further appeal to this Court under sub-section (2) of the said section." expressed no view on the issue of prima facie or finality of the finding recorded on the pre-reference stage, he left the question open in the following paragraph :

> "112. Whether such a decision of the judicial authority or the court, of refusal to make a reference on grounds permissible under Section 45 of the Act would be subjected to further re-examination before the Arbitral Tribunal or the court in which eventually the award comes up for enforcement in accordance with Section 48(1)(a) of the Act, is a legal question of sufficient complexity and in my considered opinion since that question does not directly arise on the facts of the present case, it should be left open for consideration in an appropriate case where such a question is directly raised and decided by the court."

127. The judgment of this Court in *Shin-Etsu Chemical Co. Ltd.* (supra) preceded the judgment of this Court in the case

of *SBP & Co.* (supra). Though the Constitution Bench in the latter case referred to this judgment in paragraph 89 of the judgment but did not discuss the merits or otherwise of the case presumably for absence of any conflict. However, as already noticed, the Court clearly took the view that the findings returned by the Chief Justice while exercising his judicial powers under Section 11 relatable to Section 8 are final and not open to be questioned by the arbitral tribunal. Sections 8 and 45 of the 1996 Act are provisions independent of each other. But for the purposes of reference to arbitration, in both cases, the applicant has to pray for a reference before the Chief Justice or his designate in terms of Section 11 of the 1996 Act. We may refer to the exact terminology used by the larger Bench in *SBP & Co.* (supra) in relation to the finality of such matters, as reflected in para 12 of the judgment which reads as under :

> "12. Section 16 of the Act only makes explicit what is even otherwise implicit, namely, that the Arbitral Tribunal constituted under the Act has the jurisdiction to rule on its own jurisdiction, including ruling on objections with respect to the existence or validity of the arbitration agreement. Sub-section (1) also directs that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. It also clarifies that a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Sub-section (2) of Section 16 enjoins that a party wanting to raise a plea that the Arbitral Tribunal does not have jurisdiction, has to raise that objection not later than the submission of the statement of defence, and that the party shall not be precluded from raising the plea of jurisdiction merely because he has appointed or participated in the appointment of an arbitrator. Sub-section (3) lays down that a plea that the Arbitral Tribunal is exceeding the scope of its authority, shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. When the Tribunal decides these two

> questions, namely, the question of jurisdiction and the question of exceeding the scope of authority or either of them, the same is open to immediate challenge in an appeal, when the objection is upheld and only in an appeal against the final award, when the objection is overruled. Sub-section (5) enjoins that if the Arbitral Tribunal overrules the objections under sub-section (2) or (3), it should continue with the arbitral proceedings and make an arbitral award. Sub-section (6) provides that a party aggrieved by such an arbitral award overruling the plea on lack of jurisdiction and the exceeding of the scope of authority, may make an application on these grounds for setting aside the award in accordance with Section 34 of the Act. The question, in the context of sub-section (7) of Section 11 is, what is the scope of the right conferred on the Arbitral Tribunal to rule upon its own jurisdiction and the existence of the arbitration clause, envisaged by Section 16(1), once the Chief Justice or the person designated by him had appointed an arbitrator after satisfying himself that the conditions for the exercise of power to appoint an arbitrator are present in the case. Prima facie, it would be difficult to say that in spite of the finality conferred by sub-section (7) of Section 11 of the Act, to such a decision of the Chief Justice, the Arbitral Tribunal can still go behind that decision and rule on its own jurisdiction or on the existence of an arbitration clause. It also appears to us to be incongruous to say that after the Chief Justice had appointed an Arbitral Tribunal, the Arbitral Tribunal can turn round and say that the Chief Justice had no jurisdiction or authority to appoint the Tribunal, the very creature brought into existence by the exercise of power by its creator, the Chief Justice. The argument of the learned Senior Counsel, Mr K.K. Venugopal that Section 16 has full play only when an Arbitral Tribunal is constituted without intervention under Section 11(6) of the Act, is one way of reconciling that provision with Section 11 of the Act, especially in the context of sub-section (7) thereof. We are

inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the Arbitral Tribunal and at subsequent stages of the proceeding except in an appeal in the Supreme Court in the case of the decision being by the Chief Justice of the High Court or by a Judge of the High Court designated by him."

(Emphasis supplied)

128. We are conscious of the fact that the above dictum of the Court is in relation to the scope and application of Section 11 of the 1996 Act. It has been held in various judgments of this Court but more particularly in the case of *SBP* (supra) which is binding on us that before making a reference, the Court has to dispose of the objections as contemplated under Section 8 or Section 45, as the case may be, and wherever needed upon filing of affidavits. Thus, to an extent, the law laid down by this Court on Section 11 shall be attracted to an international arbitration which takes place in India as well as domestic arbitration. This, of course, would be applicable at pre-award stage. Thus, there exists a direct legal link, limited to that extent.

129. We are not oblivious of the principle 'Kompetenz kompetenz'. It requires the arbitral tribunal to rule on its own jurisdiction and at the first instance. One school of thought propagates that it has duly the positive effect as it enables the arbitrator to rule on its own jurisdiction as it widely recognized international arbitration. However, the negative effect is equally important, that the Courts are deprived of their jurisdiction. The arbitrators are to be not the sole judge but first judge, of their jurisdiction. In other words, it is to allow them to come to a decision on their own jurisdiction prior to any court or other judicial authority and thereby limit the jurisdiction of the national courts to review the award. The kompetenz kompetenz rule, thus, concerned not only is the positive but also the negative effect of the arbitration agreement. [refer Fouchard Gaillard

Goldman on International Commercial Arbitration]

130. This policy has found a favourable mention with reference to the New York Convention in some of the countries. This is one aspect. The more important aspect as far as Chapter I of Part II of the 1996 Act is concerned, is the absence of any provision like Section 16 appearing in Part I of the same Act. Section 16 contemplates that the arbitrator may determine its own jurisdiction. Absence of such a provision in Part II, Chapter I is suggestive of the requirement for the Court to determine the ingredients of Section 45, at the threshold itself. It is expected of the Court to answer the question of validity of the arbitration agreement, if a plea is raised that the agreement containing the arbitration clause or the arbitration clause itself is null and void, inoperative or incapable of being performed. Such determination by the Court in accordance with law would certainly attain finality and would not be open to question by the arbitral tribunal, even as per the principle of prudence. It will prevent multiplicity to litigation and re-agitating of same issues over and over again. The underlining principle of finality in Section 11(7) would be applicable with equal force while dealing with the interpretation of Sections 8 and 45. Further, it may be noted that even the judgment of this Court in *SBP & Co.* (supra) takes a view in favour of finality of determination by the Court despite the language of Section 16 in Part I of the 1996 Act. Thus, there could hardly be any possibility for the Court to take any other view in relation to an application under Section 45 of the 1996 Act. Since, the categorization referred to by this Court in the case of *National Insurance Company Ltd.* (supra) is founded on the decision by the larger Bench of the Court in the case of *SBP & Co.* (supra), we see no reason to express any different view. The categorization falling under para 22.1 of the *National Insurance Company* case (supra) would certainly be answered by the Court before it makes a reference while under para 22.2 of that case, the Court may exercise its discretion and decide the dispute itself or refer the dispute to the arbitral tribunal. Still, under the cases falling under

para 22.3, the Court is expected to leave the determination of such dispute upon the arbitral tribunal itself. But wherever the Court decides in terms of categories mentioned in paras 22.1 and 22.2, the decision of the Court is unreviewable by the arbitral tribunal.

131. Another very significant aspect of adjudicating the matters initiated with reference to Section 45 of the 1996 Act, at the threshold of judicial proceedings, is that the finality of the decision in regard to the fundamental issues stated under Section 45 would further the cause of justice and interest of the parties as well. To illustratively demonstrate it, we may give an example. Where party 'A' is seeking reference to arbitration and party 'B' raises objections going to the very root of the matter that the arbitration agreement is null and void, inoperative and incapable of being performed, such objections, if left open and not decided finally at the threshold itself may result in not only parties being compelled to pursue arbitration proceedings by spending time, money and efforts but even the arbitral tribunal would have to spend valuable time in adjudicating the complex issues relating to the dispute between the parties, that may finally prove to be in vain and futile. Such adjudication by the arbitral tribunal may be rendered ineffective or even a nullity in the event the courts upon filing of an award and at execution stage held that agreement between the parties was null and void inoperative and incapable of being performed. The Court may also hold that the arbitral tribunal had no jurisdiction to entertain and decide the issues between the parties. The issue of jurisdiction normally is a mixed question of law and facts. Occasionally, it may also be a question of law alone. It will be appropriate to decide such questions at the beginning of the proceedings itself and they should have finality. Even when the arbitration law in India contained the provision like Section 34 of the 1940 Act which was somewhat similar to Section 4 of the English Arbitration Act, 1889, this Court in the case of *Anderson Wright Ltd.* (supra) took the view that while dealing with the question of grant or refusal of stay as contemplated

under Section 34 of the 1940 Act, it would be incumbent upon the Court to decide first of all whether there is a binding agreement for arbitration between the parties to the suit or not. Applying the analogy thereof will fortify the view that determination of fundamental issues as contemplated under Section 45 of the 1996 Act at the very first instance by the judicial forum is not only appropriate but is also the legislative intent. Even, the language of Section 45 of the 1996 Act suggests that unless the Court finds that an agreement is null and void, inoperative and incapable of being performed, it shall refer the parties to arbitration.

Correctness of Law stated in Sukanya

132. Though rival contentions have been raised before us on the correctness of the judgment of this Court in *Sukanya Holdings Pvt. Ltd.* (supra), Mr. Salve vehemently tried to persuade us to hold that this judgment does not state the correct exposition of law and to that effect it needs to be clarified by this Court in the present case. On the contrary, Mr. Nariman argued that this judgment states the correct law and, in fact, the principles stated should be applied to the present case.

133. The ambit and scope of Section 45 of the 1996 Act, we shall be discussing shortly but at this stage itself, we would make it clear that it is not necessary for us to examine the correctness or otherwise of the judgment in the case of *Sukanya* (supra). This we say for varied reasons. Firstly, Sukanya was a judgment of this Court in a case arising under Section 8 Part I of the 1996 Act while the present case relates to Section 45 Part II of the Act. As such that case may have no application to the present case. Secondly, in that case the Court was concerned with the disputes of a partnership concern. A suit had been filed for dissolution of partnership firm and accounts also challenging the conveyance deed executed by the partnership firm in favour of one of the parties to the suit. The Court noticing the facts of the case emphasized that where the subject matter of the suit includes subject matter for arbitration agreement as well as other disputes, the Court did

not refer the matter to arbitration in terms of Section 8 of the Act. In the case in hand, there is a mother agreement and there are other ancillary agreements to the mother agreement. It is a case of composite transaction between the same parties or the parties claiming through or under them falling under Section 45 of the Act. Thus, the dictum stated in para 13 of the judgment of Sukanya would not apply to the present case. Thirdly, on facts, the judgment in *Sukanya's* case, has no application to the case in hand.

134. Thus, we decline to examine the merit or otherwise of this contention.

On Merits

135. The Corporate structure of the companies in the present case has already been stated by us in paragraph 7 which we need not refer here again in detail. Suffice it to note that Kocha group had floated a company and incorporated the same under the Indian laws, which was carrying on the business of manufacture of chlorination equipment under the name and style 'Chloro Control India Private Limited'. They were negotiating with Severn Trent Water Purification Inc. for an international joint venture agreement to deal with the manufacture, distribution and sale of gas chlorination equipment and electro-chlorination equipment, "Hypogen Series 3300" etc. On this basis, they had entered into a joint venture agreement which was signed between them. The joint venture agreement contemplated that the business shall be carried on under the name and style of Capital Controls India Ltd. Private Limited. The agreements gave 50 per cent shareholding to the foreign collaborators which were to be equally divided between Capital Control (Del) Company Inc. and Capital Control Company Inc. These joint venture agreements were executed between the parties on 16th November, 1995 but the joint venture company had been incorporated on 14th November, 1995 itself. Severn Trent Services (Del) Inc. is the holding company of the companies which have entered into the joint venture agreement for floating both, the Capital Control India Ltd. as well as Severn

Trent De Nora LLC. The disputes had arisen actually between the Kocha Group on the one hand and Severn Trent Water Purification Inc. on the other, and the disputes were mainly with regard to Capital Control (India) Pvt. Ltd. Inc. Now, we must note, even at the cost of repetition, the parties signatory to each of these agreements and we must also note which of these agreements did not contain arbitration clause. Shareholders Agreement dated 16th November, 1995 was executed between the Capital Control (Delaware) Company Inc. and Chloro Control India Private Ltd. Capital Control Delaware Company Inc. was a subsidiary of Severn Trent Services (Delaware) Inc. and was formed on 21st September, 1994. Capital Control Company Inc. came to be merged with Capital Control (Delaware) Company Inc. in March 1994. As a result the Capital Control Delaware Company was no more in existence. Thus, the reference to Capital Control Company Inc. includes reference to Capital Control Company Inc. as well as Capital Control (Delaware) Company Inc.

136. The corporate structure of the Companies involved in the present litigation clearly shows that name of Capital Control Company Inc., incorporated in the year 1994, was changed to Severn Trent Water Purification Inc. with effect from April, 2002. Thus, both these companies together were subsidiaries of the holding company Severn Trent Services (Delaware) Inc. The joint venture agreement was executed between Chloro Control (India) Pvt. Ltd. and the erstwhile Capital Control Company Inc. resulting into creation of the joint venture company, Capital Control (India) Pvt. Ltd. This is the basic structure which one has to make clear before examining the agreements and their impact. The negotiations between the appellant and the respondent nos.1 and 2 or their holding companies were going on since 1990 and ultimately culminated into execution of the joint venture agreement. In terms of the Shareholders Agreement, the authorized share capital of the company was five million rupees consisting of equity shares of Rs.10/- each. Initially the parties had decided to issue equity

capital of 1,50,000 equity shares of Rs.10/- each with 50% of the initial equity to Capital Controls and the remaining 50% to Chloro Controls. It is necessary to refer in some detail the relevant clauses of this Agreement as this agreement is the 'Principal or the Mother Agreement'. All other agreements were executed in furtherance to and for achieving the purpose of this Agreement. This agreement notices that Capital Control was engaged in the design, manufacture, import, marketing, export etc. of gas and electro-chlorination equipments. The company was to be registered and as is evident, in furtherance to the negotiations, steps for registration of the said company had been taken and finally it came to be incorporated on 14th November, 1995. The main object of the joint venture company was the manufacture, service and sale of the products. In terms of the Principal Agreement, establishment of a plant, management of the company, appointment of Directors, implementation of decisions of the Board of Directors, appointment or re-appointment of the Managing Director, dividend policy, loans, financial information, trademarks, transfer of shares, sale-purchase of chlorination equipment, assets, government approvals, performance of Chloro Controls, trademark, service of notices, modifications, severability and arbitration, settlement of disputes by arbitration etc. were the matters specifically provided for under this agreement. A very significant feature of this contract was that the Kocha Group was put under an injunction to not engage directly or indirectly or be financially interested in the manufacture, sale or distribution of chlorination equipment and related products, which is similar to those manufactured or sold by the company during the term of the agreement. Similarly, a restriction was also placed upon Capital Controls and even its holding companies to not directly or indirectly engage in or to be financially interested in the manufacture, sale or distribution in India of products manufactured or sold by the company, during the term of the agreement.

137. The Principal Agreement specifically referred to

various agreements or even terms and conditions thereof. Clause 7 of the agreement provided for execution of the International Distributor Agreement which was Appendix II to this Agreement. The Financial and Technical Know-how Licence Agreement was executed in furtherance to clause 14 thereof. Similarly, the Trademark Registered User License Agreement was required to be executed between the parties in terms of clause 15 of this Agreement. Other terms and conditions of the Principal Agreement referred to management of the company by appointment or reappointment of Directors or Managing Directors inasmuch as Clause 8.6 contemplated execution of the agreement which was appended as Appendix III. Still, certain other clauses of the Principal Agreement specifically dealt with the sale of goods manufactured by the joint venture company, nationally and internationally. This resulted in signing of the International Distribution and Export Sales Agreement between the parties.

138. All the five agreements signed by the parties were primarily to fulfill their obligations and ensure performance of this Principal Agreement. The Supplementary Collaboration Agreement executed in August 1997 was only to comply with the conditions of the Government Approval which were granted vide letter dated 11th October, 1996, as amended by letter dated 21st April, 1997. The companies which executed the various agreements were the companies signatory to the Principal Agreement or their holding companies or the companies belonging to the respondent group in which they had got merged for the purposes of attaining effective designing, manufacturing, import, export and marketing of the agreed chlorinated products.

139. All the subsequent agreements were, therefore, ancillary or incidental agreements to the Principal Agreement. Thus, the joint venture entered between the parties had different facets. Its foundation was provided under the Principal Agreement but all the agreed terms could only be fulfilled by performance of the ancillary agreements. If one segregates the

Principal Agreement from the rest, the subsequent agreements would be rendered ineffective. If the agreed goods were not manufactured in India with the technical know-how of the respondent No. 1 company and the joint venture company was not incorporated, the question of the Distribution Agreement, Managing Director Agreement, Financial and Technical Know-How License Agreement or the Export Sales Agreement would not have even arisen, in any event. Conversely, if the ancillary agreements were not performed in a collective manner, the Principal Agreement would be of no consequence. In other words, it was one composite transaction for attaining the purpose of business of the joint venture company. All these agreements are so intrinsically connected to each other that it is neither possible nor probable to imagine the execution and implementation of one without the collective performance of all the other agreements. The intention of the parties was clear that all these agreements were being executed as integral parts of a composite transaction. It can safely be covered under the principle of 'agreements within an agreement'. For instance, the Financial and Technical Know-How License Agreement not only finds a specific mention in the Principal Agreement but its contents also are referable to the clauses of the Principal Agreement. The Financial and Technical Know-How License Agreement was Appendix III to the Principal Agreement and the details of the goods which were contemplated to be manufactured, distributed and sold under the Principal Agreement had been specified in Appendix I of the Financial and Technical Know-How Agreement. If the latter agreement was not there, the Principal Agreement between the parties would have remained incomplete and the parties would have been at a disadvantage to know as to what goods were to be manufactured and what goods could not have been manufactured. The Principal Agreement referred either specifically or by necessary implication to all other agreements. They were inter-dependent for their performance and one could not be read and understood completely without the aid of the other.

140. Having held that all these other agreements as well as the mother/ principal agreement were part of a composite transaction to facilitate implementation of the principal agreement and that was in reality the intention of the parties, now, we will deal with the question of parties to the principal agreement. When the mother agreement dated 16th November, 1995 was executed between the parties, presumably the Certificate of Incorporation of Capital Control India Private Ltd. had not been issued to the parties though it had been incorporated on 14th November, 1995. If the company had been duly incorporated and the Certificate of Incorporation was available to the parties, then there could be no reason for the parties to propose in the Principal Agreement that the joint venture company would be in the name of Capital Controls India Private Ltd. or any other name which would be mutually agreed between the parties. The reference to joint venture company, thus, was not by a specific name. Both the parties have signed this agreement with the clear intention that the company, Capital Control India Pvt. Ltd., will be the joint venture company. Thus, non-mentioning of the name of the joint venture company in the principal agreement, though it had been incorporated on 14th November, 1995, is immaterial and inconsequential in face of intention of the parties appearing from the written documents on record. Once the Principal Agreement was signed, all other agreements had to be executed by or in favour of the joint venture company. That is how to all these other agreements the joint venture company i.e. Capital Control India Pvt. Ltd. is a party. It further completely supports the view that non-mentioning of the name of Capital Control India Pvt. Ltd. can hardly affect the findings of the Court. With regard to the management of the joint venture company and implementation of the Principal Agreement, the parties had entered into the Managing Director Agreement dated 16th November, 1995. This agreement was signed by each of the concerned partners i.e. by Capital Control India Pvt. Ltd., respondent No. 5 and the Kocha Group, respondent No. 9. This agreement provided as to how the Managing Directors were to be appointed or

reappointed and how the meeting of the Board of Directors of the company were to be conducted in accordance with law and the terms of the Mother Agreement. This agreement came to be signed between the joint venture company and the Kocha Group.

141. Other aspect of performance of the Principal Agreement was the Financial and Technical Know-How License Agreement. This agreement had been signed between the Capital Control Company Inc., subsequently known as Severn Trent Water Purification, respondent No. 1, one the one hand and the joint venture company, respondent No. 5. Severn Trent Water Purification Inc. is the holding company of the joint venture to the extent of its share holding and is the company into which Capital Control (Del.) Co. Inc. had merged. Severn Trent Water Purification Inc. is thus, the resultant product of Capital Control (Del.) Company Inc. being merged into Capital Control Company Inc. and its name was changed with effect from 1st April, 2002. All these three companies had at the relevant time been or when came into existence were and are subsidiaries of Severn Trent (Del.) Inc. The requisite technical know-how was possessed by these companies and was agreed to be imparted in favour of the joint venture company, in furtherance to and as per the terms and conditions contained in the Principal Agreement.

142. Similarly, Severn Trent Water Purification Inc. had entered into an International Distributor Agreement and an Export Sales Agreement with the joint venture to facilitate the sale, marketing and export of goods, under these two different agreements. Thus, it is crystal clear that all the six material agreements had been signed by some parties or their holding companies or the companies into which the signatory company had merged. None of these companies is either stranger to the transaction or not an appropriate party. The parties who have signed the agreements could alone give rights or benefits to the joint venture company and they, in turn, were the companies descendants in interest or the subsidiaries of Severn Trent

Services Del. Inc.

143. May be all the parties to the lis are not signatory to all the agreements in question, but still they would be covered under the expression 'claiming through or under' the parties to the agreement. The interests of these companies are not adverse to the interest of the principal company and/or the joint venture company. On the contrary, they derive their basic interest and enforceability from the Mother Agreement and performance of all the other agreements by respective parties had to fall in line with the contents of the Principal Agreement. In view of the settled position of law that we have indicated above, we will have no hesitation in holding that these companies claim their interest and invoke the terms of the agreement or defend the action in the capacity of a 'party claiming through or under' the parties to the agreement.

ARBITRATION

144. When we refer to all the six relevant agreements in relation to the arbitration clause, the Shareholders Agreement, the Financial and Technical Know-How License Agreement and the Export Sales Agreement contained the arbitration clause while the other three agreements, i.e., International Distributor Agreement, the Managing Director's Agreement and the Trademark Registered User License Agreement did not contain any such arbitration clause. The arbitration clause contained in the Principal Agreement in clause 30 has been reproduced above. It requires that any dispute or difference arising under or in connection with that agreement which could not be settled by friendly negotiation and agreement between the parties, would be finally settled by arbitration conducted in accordance with the Rules of ICC. This clause is widely worded. It is comprehensive enough to include the disputes arising 'under and in connection with' the agreement. The word 'connection' has been added by the parties to expand the scope of the disputes under the agreements. The intention to make it more comprehensive is writ large from the language of the agreement and particularly clause 30 of the Mother Agreement. It is useful

to notice that the agreement has to be construed and interpreted in accordance with laws of the Union of India, as consented by the parties.

145. The expression 'connection' means a link or relationship between people or things or the people with whom one has contact (Concise Oxford Dictionary (Indian Edition). 'Connection' means act of uniting; state of being united; a relative; relation between things one of which is bound up with (Law Lexicon 2nd Edn. 1997).

146. Thus, even the dictionary meaning of this expression is liberally worded. It implies expansion in its operation and effect both. Connection can be direct or remote but it should not be fanciful or marginal. In other words, there should be relevant connection between the dispute and the agreement by specific words or by necessary implication like reference to all other agreements in one (principal) agreement. The expression appearing in clause 30 has to be given a meaningful interpretation particularly when the Principal Agreement itself, by specific words or by necessary implication, refers to all other agreements. This would imply that the other agreements originate from the Principal Agreement and hence, its terms and conditions would be applicable to those agreements. There are three agreements, as already noticed, which do not contain any specific arbitration clause. Both the Managing Director Agreement and the International Distributor Agreement directly relate to the Principal Agreement stating the manner in which the affairs would be managed and the Managing Directors be appointed. At the same time, the International Distributor Agreement is executed between the Severn Trent Water Purification Inc. the erstwhile Capital Control Company Inc. and the Capital Control India Private Ltd., the joint venture company. Firstly, the chances of dispute between the same group of companies were remote and secondly these were the companies which were held by the same management. The parties had also agreed to have relationship as that of seller and distributor to make the joint venture company a success.

The interest of Capital Controls Company Inc. and that of the Capital Control India Private Ltd., to the extent of the former's share, were common. Furthermore, this being an integral part of the Principal Agreement would, in our opinion, be squarely covered by the arbitration clause contained in the Mother/Shareholders Agreement. This agreement has been specifically referred in clause 7 of the Mother/Shareholders Agreement. Not only that there is incorporation by reference of International Distribution Agreement in the Mother/Shareholders Agreement but, in fact, it is an integral part thereof.

147. Another aspect of the case is that all these agreements were executed simultaneously on 16th November, 1995 which fact fully supports the view that the parties intended to have all these agreements as a composite transaction. Furthermore, when the parties signed the Supplementary Collaboration Agreement in August 1997, by that time all these agreements had not only been signed and understood by the parties but, in fact, had also been acted upon.

148. In the Supplementary Collaboration Agreement, the parties re-confirmed the existence of the joint venture agreement dated 16th November, 1995 and made a specific stipulation that both the parties confirmed to adhere by the terms and conditions stipulated by the Government of India in its letters dated 11th October, 1996, amended on 21st April, 1997. This was signed by Madhusudan B. Kocha, member of the Kocha group on behalf of the joint venture company and Capital Controls (Delaware) Inc. The necessity for executing this agreement was in face of the condition of Government approval as well as the subsequent amendment of clause 2, 3 and 4 of the approval letter dated 11th October, 1996 i.e. items of manufacture, proposed location and foreign equity.

149. The conduct of the parties and even the subsequent events leave no doubt in the mind of the Court that the parties had executed, intended and actually implemented the composite transaction contained in the Principal Agreement. The Courts have also applied the Group of Companies Doctrine

in such cases. As already noticed, this Court in the case of *Olympus Superstructure Pvt. Ltd.* (supra) permitted reference to arbitration where there were multiple contracts between the parties, interpreting the words 'in connection with' and 'disputes relating to connected matters'.

150. Besides making the reference, the Court also held that making of two awards which may be conflicting in relation to the items which are likely to overlap in two agreements could not be permitted. The courts have also accepted and more so in group company cases that the fact that a party being non-signatory to one or other agreement may not be of much significance, the performance of one may be quite irrelevant with the performance and fulfillment of the principal or the mother agreement. That, in fact, is the situation in the present case.

151. One of the arguments advanced was that the International Distributor Agreement had specifically provided for construction, interpretation and performance of the agreement and for the transaction under that agreement to be governed by and interpreted by the laws of State of Pennysylvania, USA and parties thereto agreed that any litigation thereunder shall be brought in any federal or state court in the Eastern District of the Commonwealth of Pennysylvania which fact would oust the possibility of reference to arbitration in terms of clause 30 of the Principal Agreement, as the parties had chosen a specific forum of the court system. Discussion on this argument may not be greatly relevant in view of the above discussion in this judgment. This being a composite transaction, the parties could opt for any remedy.

152. In the present case, we have already noticed, that some agreements contain the arbitration clause, while others don't. The Shareholders Agreement, Financial and Technical Knowhow Licence Agreement and Export Sales Agreement contain the arbitration clause, while the International Distributor Agreement, Managing Directors Agreement and Trade Mark Registered User Agreement do not contain the arbitration clause. The arbitration clause contained under clause 30 of the

Shareholders Agreement and that under clause 26 of the Financial and Technical Knowhow Licence Agreement are identical. They both require the disputes to be referred to arbitration in London as per the ICC Rules. However, the arbitration clause contained in clause 18 of the Export Sales Agreement provides for reference of the disputes to arbitration at Pennsylvania, USA, in accordance with rules of American Arbitration Association. It also provides that the judgment upon the Award rendered could be entered in any court of competent jurisdiction. Still, clause 21 of the International Distributor Agreement required the construction, interpretation and performance of the agreement to be governed by and interpreted under the laws of the State of Pennsylvania, USA. Any litigation thereunder was to be brought in any federal or State Court located in the Eastern District of the Commonwealth of Pennsylvania, which was to be binding upon the parties.

153. As already noticed, two of the agreements did not contain any arbitration clause, but they also did not subject the parties even for litigative jurisdiction. They are the Managing Directors Agreement and the Trademark Registered User Agreement. These two agreements had been executed in furtherance to and for compliance of the terms and conditions of the mother agreement which contained the arbitration clause. They were, thus, intrinsically inter-connected with the mother agreement.

154. All these agreements were signed on the same day and in furtherance to the mother agreement. None of the parties have invoked the jurisdiction of the Court at Pennsylvania, USA. Thus, it was an alternative remedy that too restricted to the disputes, if any arising from that agreement. Where different agreements between the parties provide for alternative remedies, it does not necessarily mean that the other remedy or jurisdiction stands ousted. Where the parties to such composite transaction provide for different alternative forums, including arbitration, it has to be taken that real intention of the

parties was to give effect to the purpose of agreement and refer the entire subject matter to arbitration and not to frustrate the remedy in law. It was for the parties to chose either to institute a suit qua the International Distributor Agreement at Pennsylvania or to invoke the arbitration agreement in terms of clause 30 of the mother agreement. They have chosen the latter remedy. The question, therefore, does not arise as to which law would apply since the only litigation taken out by the parties is the suit instituted by the appellant before the original side of the Bombay High Court and the subsequent application for reference to arbitration filed by the Respondent No. 1 under Section 45 of the 1996 Act.

155. The effect of execution of multiple agreements has been discussed by us in some elaboration above. The real intention of the parties was not only to refer all their disputes arising under the agreement which could not be settled despite friendly negotiations to arbitration, but even the disputes which arose in connection with the shareholder/mother agreement to arbitration.

156. Thus, a composite reference was well within the comprehension of the parties to various agreements which were executed on the same day and for the same purpose. There cannot be any doubt to the contention that in terms of Section 9 of the CPC, the courts in India shall have jurisdiction to try all suits of civil nature. Further, this section gives a right to a person to institute a suit before the court of competent jurisdiction. However, the language of Section 9 itself makes it clear that the civil courts have jurisdiction to try all suits of civil nature except the suits of which taking cognizance is either expressly or impliedly barred. In other words, the jurisdiction of the court and the right to a party emerging from Section 9 of the CPC is not an absolute right, but contains inbuilt restrictions. It is an accepted principle that jurisdiction of the court can be excluded. In the case of *Dhulabhai v. State of M.P. and Anr.* [AIR 1969 SC 78], this Court has settled the principle that jurisdiction of the Civil Court is all embracing, except to the extent it is

excluded by law or by clear intendment arising from such law. In *Nahar Industrial Enterprises Ltd. v. Hong Kong & Shanghai Banking Corporation* [(2009) 8 SCC 646], this Court has even stated the conditions for exclusion of jurisdiction. They are, (a) whether the legislative intent to exclude is expressed explicitly or by necessary implication, and (b) whether the statute in question provides for an adequate and satisfactory alternative remedy to a party aggrieved by an order made under it.

157. The provisions of Section 45 of the 1996 Act are to prevail over the provisions of the CPC and when the Court is satisfied that an agreement is enforceable, operative and is not null and void, it is obligatory upon the court to make a reference to arbitration and pass appropriate orders in relation to the legal proceedings before the court, in exercise of its inherent powers.

158. In the present case, the court can safely gather definite intention on behalf of the parties to have their disputes collectively resolved by the process of arbitration. Even if different forums are provided, recourse to one of them which is capable of resolving all their issues should be preferred over a refusal of reference to arbitration. There appears to be no uncertainty in the minds of the parties in that regard, rather the intention of the parties is fortified and clearly referable to the mother agreement.

159. It is not the case of any of the parties before us that any of the parties to the present litigation had taken steps before that Court or had invoked the jurisdiction of that court under that system. There is no apparent conflict of interest as of now. The arbitration clause would stand incorporated into the International Distributor Agreement as this agreement itself was Appendix II to the Principal Agreement. This Court in the case of *M.R. Engineers and Contractors Pvt. Ltd. v. Som Datt Builders Ltd.* [(2009) 7 SCC 696] has stated that firstly the subject of reference be enacted by mutual intention, secondly a mere reference to a document may not be sufficient and the reference should be sufficient to bring out the terms and conditions of the

referred document and also that the arbitration clause should be capable of application in respect of a dispute under the contract and not repugnant to any term thereof. All these three conditions are satisfied in the present case.

160. The terms and conditions of the International Distribution Agreement were an integral part of the Principal Agreement as Appendix II and the Principal Agreement had an arbitration clause which was wide enough to cover disputes in all the ancillary agreements. It is not necessary for us to examine the choice of forum or legal enforceability of legal system in the present case, as we find no repugnancy even where the main contract is governed by law of some other country and the arbitration clause by Indian law. They both could be invoked, neither party having invoked the former will be no bar for invocation of the latter in view of arbitration clause 30 of the mother agreement.

161. Reliance was also placed on the judgment of this Court in the case of *Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar* [AIR 2011 SC 1899] where the Court had declined reference of multiple and multi party agreement. That case is of no help to the appellant before us. In that case, there were four parties, the seller of the land, the builder, purchaser of the flat and the bank. The bank had signed an agreement with the purchaser of the flat to finance the flat, but it referred to other agreement stating that it would provide funds directly to the builder. There was an agreement between the builder and the owner of the land and the purchaser of the land to sell the undivided share and that contained an arbitration clause. The question before the Court was whether while referring the disputes to the arbitration, the disputes between the bank on the one hand, and the purchaser of the flat on the other could be referred to arbitration. The Court, in reference to Section 8 of the 1996 Act, held that the bank was a non-party to the arbitration agreement, therefore, neither the reference was permissible nor they could be impleaded at a subsequent stage. This judgment on facts has no application. The distinction

between Section 8 and Section 45 has elaborately been dealt with by us above and in view of that, we have no hesitation in holding that this judgment, on facts and law, is not applicable to the present case.

162. Thus, in view of the above, we hold that the disputes referred to and arising from the multi-party agreements are capable of being referred to arbitral tribunal in accordance with the agreement between the parties.

163. Another argument advanced with some vehemence on behalf of the appellant was that respondent Nos.3 and 4 were not party to any of the agreements entered into between the parties and their cause of action is totally different and distinct, and their rights were controlled by the agreement of distribution executed by respondent Nos.1 and 2 in their favour for distribution of products of gas and electro-chlorination. It was contended that there cannot be splitting of parties, splitting of cause of action and remedy by the Court.

164. On the other hand, it was contended on behalf of the respondent No.1 that it is permissible to split cause of action, parties and disputes. The mater referable to arbitration could be segregated from the civil action. The court could pass appropriate orders referring the disputes covered under the arbitration agreement between the signatory party to arbitration and proceed with the claim of respondent Nos. 3 and 4 in accordance with law.

165. As far as this question of law is concerned, we have already answered the same. On facts, there is no occasion for us to deliberate on this issue, because respondent Nos. 3 and 4 had already consented for arbitration. In light of that fact, we do not wish to decide this question on the facts of the present case.

166. Having dealt with all the relevant issues in law, now we would provide answer to the questions framed by us in the beginning of the judgment as follows :

Answer

167. Section 45 is a provision falling under Chapter I of Part II of the 1996 Act which is a self-contained Code. The expression 'person claiming through or under' would mean and take within its ambit multiple and multi-party agreements, though in exceptional case. Even non-signatory parties to some of the agreements can pray and be referred to arbitration provided they satisfy the pre-requisites under Sections 44 and 45 read with Schedule I. Reference of non-signatory parties is neither unknown to arbitration jurisprudence nor is it impermissible.

168. In the facts of a given case, the Court is always vested with the power to delete the name of the parties who are neither necessary nor proper to the proceedings before the Court. In the cases of group companies or where various agreements constitute a composite transaction like mother agreement and all other agreements being ancillary to and for effective and complete implementation of the Mother Agreement, the court may have to make reference to arbitration even of the disputes existing between signatory or even non-signatory parties. However, the discretion of the Court has to be exercised in exceptional, limiting, befitting and cases of necessity and very cautiously.

169. Having answered these questions, we do not see any reason to interfere with the judgment of the Division Bench of the Bombay High Court under appeal. We direct all the disputes arise in the suit and from the agreement between the parties to be referred to arbitral tribunal and be decided in accordance with the Rules of ICC.

170. The appeals are dismissed. However, in the facts and circumstances of the present case, we do not award costs.

O R D E R

1. Upon pronouncement of the judgment Mr. F.S. Nariman, learned senior counsel appearing for the petitioner, mentioned

that the petitioner had filed an application for injunction in the suit before the High Court. The same was dismissed. Appeal against the order dismissing the application had been filed before this Court and was ordered to be listed along with SLP (C) No. 8950 of 2010 (which is an appeal against the order of the High Court making reference to arbitral tribunal). However, the Court had not heard arguments on that appeal.

2. Learned senior counsel appearing for the respondents, Mr. K.V. Vishwanathan, submitted that the special leave petitions were listed but they were not admitted.

3. In view of the common stand taken by the counsel for the parties, we permit the petitioner to move an independent application praying for hearing for those special leave petitions i.e. SLP(C)Nos.26514-26515 of 2011 (listed along with SLP(C)No. 8950/2010) pending for admission.

K.K.T. Appeals dismissed.

GURMAIL SINGH
v.
STATE OF PUNJAB & ANR.
(Criminal Appeal No. 1782 of 2008 etc.

NOVEMBER 21, 2012

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

Penal Code, 1860:

ss. 302/149 - Death caused by 8 accused - By fire-arm and sharp-edged 'gandasa' - Land dispute between rival parties - Leading to one murder by a relative of the accused - Prosecution against three of the accused abated due to their death - Trial court convicted one appellant-accused u/s. 324 and u/s. 25 of Arms Act and acquitted the other appellant-accused of all the charges - Another accused was convicted u/s. 304 (Part I) - High Court convicted all the accused including the two appellants-accused u/s. 302/149 - On appeal, held: The conviction of the appellants-accused u/s. 302/149 is correct - The facts of the case prove that the accused assembled with a common object of committing murder - Arms Act, 1959 - s. 25.

s. 149 - Applicability of - Held: To bring a case within s. 149, there must be in existence an unlawful assembly; an offence is committed by a member of such assembly and the offence committed must be in prosecution of a common object of the unlawful assembly or must be such that the members of the unlawful assembly knew that it was likely to be committed in prosecution of the common object.

The two appellants-accused alongwith six others were prosecuted for having caused death of one person and for causing injuries to others. The prosecution case was that there was a land dispute pending in a court

between the accused party and the complainant partly. The dispute had also led to murder of the son of the deceased by a relative of the accused party to which the deceased was the eye-witness. One of the appellant-accused also sustained injuries during the incident. During trial, three of the accused died and thus the prosecution abated against them. The trial court believed the prosecution story. However, it held that no case was made out that the accused persons formed unlawful assembly with any common object. The Court convicted one accused u/s. 304 (Part-I) IPC. Appellant-accused in Appeal No. 1782/2008 was punished u/s. 324 IPC and the appellant-accused in Appeal No.1783/2008 was acquitted of all the charges. Appeals were filed by the convicts as well as the State. High Court upheld all the conclusions of the trial court except the conclusion regarding formation of unlawful assembly with a common object and held that presence of eight persons armed with guns and gandasas with a motive to wreak vengeance on the deceased and his family, pointed to the existence of an unlawful assembly having a common object and thus the ingredients of s. 149 IPC were made out. Further it held that an offence u/s. 302 IPC was made out against the accused (including the two appellants) and sentenced them to life imprisonment. Hence the present appeals.

Dismissing the appeals, the Court

HELD: 1. The appellants are liable to be convicted for an offence punishable u/s. 302 IPC. The record does not show any undue delay either in lodging the FIR or in dispatching the special report to the Illaqa Magistrate. It is wrong to make a fetish out of every delay in lodging an FIR. Given the facts of this case, there was no unreasonable or unexplained delay in lodging the FIR. [Paras 37, 40 and 71] [530-C; 531-B; 540-F]

Jitender Kumar v. State of Haryana **(2012) 6 SCC 204: 2012 (4) SCR 408 - relied on.**

2. It is not correct to say that there was no motive for the appellants to commit the crime. It is quite clear that there was a land dispute between the families of rival parties. Evidence in this regard was led by PW-3, a Court Ahlmad working in the concerned court. The existence of a land dispute was also testified to by PW-4. That the land dispute was not a trivial matter is clear from the fact that it even led to the murder allegedly by a relative of the accused. The deceased was an eye-witness to the murder. Thus, not only was there a motive for committing the crime but the motive had already led to a murder on an earlier occasion. [Paras 41 & 42] [531-C-E]

3. The courts below have not doubted the presence of PW4 -complainant at the scene of the crime and there is no reason to differ with this concurrent finding only because he did not suffer any injuries or that his presence was not mentioned by the deceased in his dying declaration. Under the circumstances of the case that his sister was married to the son of the deceased, the presence of PW-4 in the village is explained. [Paras 45 and 48] [532-B-F]

4. The prosecution's "failure" to explain the injuries on the accused would not disprove the case of the prosecution. Although the accused in his statement u/s. 313 Cr.P.C. says that complainant party attacked him with gandasas, the evidence on record does not indicate that any of the victims were armed. On the contrary, the evidence indicates that the accused received injuries at the hands of his co-accused in the darkness. As long as the evidence on record is trustworthy, the failure of the prosecution to explain the injuries on an accused may not necessarily impact on its case. [Paras 49 and 50] [532-G-H; 533-A-C]

Mano Dutt v. State of U.P. **(2012) 4 SCC 79: 2012 (3) SCR 686 - relied on.**

5. Section 149 IPC constructively criminalizes all the members of an unlawful assembly, if a member of that assembly commits an offence in prosecution of a common object of that assembly or if the members of that assembly knew likely to be committed in prosecution of that object. To bring a case within Section 149 IPC, three features must be present. Firstly, there must be in existence an unlawful assembly within the meaning of Section 141 IPC. This is a mixed question of fact and law, which was overlooked by the trial Judge. Secondly, an offence must have been committed by a member of the unlawful assembly. Thirdly, the offence committed must be in prosecution of a common object of the unlawful assembly or must be such as the members of the unlawful assembly knew likely to be committed in prosecution of that object. [Para 54] [535-A-D]

6. In the present case, eight persons had assembled with guns and sharp-edged gandasas. There cannot be any conclusive proof with regard to what was in the contemplation of the unlawful assembly, but it is clear that the assembly was not without a purpose. Their getting together and firing a few shots in the air before the incident actually took place suggests that they gathered to either display a show of strength or commit an offence. It is unlikely that they would have gathered in the village from two other villages, only for a show of strength. Even if they did, the explanation to Section 141 IPC makes it clear that an assembly, not unlawful when it assembled, may subsequently become an unlawful assembly. Thus, the accused persons had assembled with a common object of committing an offence and not merely as a show of strength and, therefore, they constituted an unlawful assembly. [Paras 56 and 59] [536-E-G; 537-C-D]

7. The trial court held that offences under part I of Section 304 of the IPC and under Section 324 of the IPC were committed. The trial court proceeded on the basis that since the injuries inflicted on the deceased were not on any vital part of his body, it cannot be said that the common object of the unlawful assembly was to kill him. It is not possible to overlook the fact that at least one injury caused to the deceased with a firearm was on a vital part of his body. That apart, he had as many as 116 lacerated wounds and 15 pallets were found in his body. He also had a couple of incised wounds, though not on any vital part of his body. It is not as if only one gunshot was fired or one gandasa blow given to him. The evidence is clear that the offence committed was murder. Assuming this was not so, in view of the third clause of Section 300 IPC, there can be no doubt that if the unlawful assembly did not murder the deceased, it certainly caused such bodily injury to the deceased and others with him as to result in his death. Given the number and nature of injuries, it is difficult to come to any conclusion other than that the injuries were sufficient in the ordinary course of nature to cause death. [Paras 60, 61 and 63] [537-D-G; 538-C-E]

Lalji v. State of U.P. **(1989) 1 SCC 437: 1989 (1) SCR 130;** *Chanakya Dhibar (dead) v. State of West Bengal* **(2004) 12 SCC 398: 2003 (6) Suppl. SCR 1181;** *Roy Fernandes v. State of Goa* **(2012) 3 SCC 221: 2012 (1) SCR 477 - relied on.**

Case Law Reference:

2012 (4) SCR 408	**Relied on**	**Para 38**
2012 (3) SCR 686	**Relied on**	**Para 50**
1989 (1) SCR 130	**Relied on**	**Para 65**
2003 (6) Suppl. SCR 1181	**Relied on**	**Para 65**

2012 (1) SCR 477	**Relied on**	**Para 65**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1782 of 2008.

From the Judgment & Order dated 10.10.2006 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal Nos. 445-DBA, 232-SB of 1995 and in Criminal Revision No. 514 of 1995.

WITH

Crl. A. No. 1783 of 2008.

Rajeev Sharma, Rupesh Kumar, Sukh Deo Singh for the Appellant.

V. Madhukar, AAG, Paritosh Anil (for Kuldip Singh) for the Respondents.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. The substantive question before us is whether the High Court was right in reversing the view expressed by the Trial Court that the provisions of Section 149 of the Indian Penal Code (for short IPC) did not apply to the facts and circumstances of the case. Our answer is in the affirmative and we uphold the decision of the High Court in this regard. The appeals before us require to be dismissed.

The appeals:

2. Two appeals are before us: The first appeal is Criminal Appeal No. 1782 of 2008 filed by Gurmail Singh son of Bachan Singh. He has challenged his conviction by the High Court for an offence punishable under Section 302 of the IPC for which he was earlier acquitted by the Trial Court. He has also challenged the upholding of his conviction by the High Court for an offence under Section 324 of the IPC for causing injuries to Kaka Singh and Piaro.

3. The second appeal is Criminal Appeal No. 1783 of 2008 filed by Gurmail Singh son of Nahar Singh. He has challenged

his conviction by the High Court for an offence punishable under Section 302 of the IPC read with Section 149 thereof as well as for an offence under Section 148 of the IPC. Gurmail Singh son of Nahar Singh has also challenged his conviction under Section 324 read with Section 34 of the IPC for causing simple injuries to Kaka Singh and Piaro as well as his conviction under Section 326 read with Section 149 of the IPC for causing grievous injuries to Gurmail Kaur. Gurmail Singh son of Nahar Singh had earlier been acquitted of all charges by the Trial Court.

The facts:

4. There was a dispute between the families of Gurdial Singh and Nachhatar Singh. The disputants are related. The dispute pertained to ownership of land and a civil suit is pending between the parties in this regard in Mansa.

5. It appears that as a result of the land dispute, Nachhatar Singh allegedly murdered Gurdial Singh's son Mohinder Singh on 20th February 1989. Gurdial Singh was an eyewitness to the alleged murder. We are told that the trial is still pending.

6. On 10th March 1989 at about 9/9.30 p.m. Gurdial Singh and his two brothers, Kaka Singh and Dial Singh along with Joginder Singh, the complainant (whose daughter is married to Gurdial Singh's son) were irrigating their fields in village Heeron Kalan, Police Station Bhikhi, District Bhatinda (Punjab). They were informed by Gurmail Kaur and Piaro (both daughters of Gurdial Singh) that some shots were fired in the village near Nachhatar Singh's house. On receiving this information, all of them left for the village.

7. When they were about to enter their house, a lalkara (a challenge) was given by Gurmail Singh son of Nahar Singh (and nephew of Nachhatar Singh) and Bibi (Nachhatar Singh's sister) to the effect that no one from Gurdial Singh's party would be spared. On this, eight persons (the accused) which included Nachhatar Singh's nephews, their associates and Nachhatar Singh's sister Bibi attacked them. It needs to be mentioned

here that some of these eight persons were residents of village Shahpur Kalan, while others were residents of village Jharon, both under Police Station Longowal, District Sangrur (Punjab).

8. During the attack, Jarnail Singh (nephew of Nachhatar Singh) allegedly fired a shot with a 12-bore double barrel gun at Gurdial Singh and injured him on his left thigh. He allegedly fired another shot at Gurdial Singh and injured him on the finger of his right hand. Jarnail Singh has been convicted by the High Court of an offence punishable under Section 302 of the IPC, but we say nothing in this regard since he has filed a separate petition in this Court against his conviction.

9. Gurmail Singh son of Bachan Singh (an associate) fired at Piaro with a 12-bore double barrel gun and injured her left ankle. He also fired two shots at Kaka Singh which hit him on the front side of his right shoulder and behind his right upper arm.

10. Gurmail Singh son of Nahar Singh (and nephew of Nachhatar Singh) along with Pargat Singh (an associate) gave gandasa blows to Gurdial Singh on his right shoulder and on his right arm. Shingara Singh (husband of Bibi) also gave Gurdial Singh a gandasa blow on the left side of the forehead.

11. Shingara Singh and Raju gave gandasa blows to Gurmail Kaur (daughter of Gurdial Singh) from the blunt end of the gandasa. Dial Singh also received some injuries.

12. In the scuffle that took place, Gurmail Singh son of Bachan Singh received some injuries.

13. After the attack and on cries being raised by the victims, the assailants left the scene. The injured were taken to the Civil Hospital where Gurdial Singh succumbed to his injuries. Necessary medical attention was provided to Kaka Singh, Dial Singh, Gurmail Kaur and Piaro who had sustained injuries. Joginder Singh (complainant) went to the police station and lodged a first information report (FIR for short) at about 11.30 p.m. This reached the Ilaqa Magistrate the next morning

at about 6.30 a.m.

14. Based on the FIR, investigations were carried out and a charge sheet was filed against eight persons. During the trial, three accused Shingara Singh, Bibi and Raju died and the prosecution abated against them. Of the remaining five accused, we are concerned only with the appeals of Gurmail Singh son of Bachan Singh (an associate) and Gurmail Singh son of Nahar Singh and nephew of Nachhatar Singh.

15. As can be seen, Gurmail Singh son of Bachan Singh had injured Piaro and Kaka Singh with a 12-bore double barrel gun. He also received some injuries in the scuffle that took place. Gurmail Singh son of Nahar Singh was responsible for giving gandasa blows to Gurdial Singh.

16. In the trial before the Additional Sessions Judge, Bhatinda, the prosecution examined twelve witnesses while the defence examined one witness. The Trial Judge convicted Jarnail Singh under part I of Section 304 of the IPC. Gurmail Singh son of Bachan Singh was convicted under Section 25 of the Arms Act for possessing an unlicenced gun. He was also convicted under Section 324 of the IPC for causing injuries to Kaka Singh and Piaro. Gurmail Singh son of Nahar Singh was acquitted of the charges against him.

Decision of the Trial Court:

17. The Trial Judge held that there was a land dispute between Gurdial Singh and Nachhatar Singh. He relied on the statement of PW-3 Darshan Singh, a Court Ahlmad who confirmed the pendency of the civil suit between Gurdial Singh and Nachhatar Singh. The Trial Judge also relied on the evidence of PW-4 Joginder Singh (complainant) to hold that there was a land dispute between Gurdial Singh and Nachhatar Singh. He also noted his testimony to the effect that Mohinder Singh son of Gurdial Singh was murdered by Nachhatar Singh and that Gurdial Singh was an eyewitness to the alleged murder. On this basis, the Trial Judge concluded that there some enmity between the two families and that the appellants

and others had a motive for committing the offences for which they were charged.

18. Before the Trial Judge, it was contended that there was a delay in lodging the FIR of the incident and in sending a report to the Ilaqa Magistrate. The Trial Judge did not attach much significance to this and observed that the FIR was lodged after a delay of about 1½ hours and it is not as if the delay was unreasonable. Moreover, the offence was first registered under Section 307 of the IPC but on the death of Gurdial Singh, it was converted into one punishable under Section 302 of the IPC. It was held that there was no challenge to the genuineness of the FIR nor was there any allegation that it was fabricated or doctored.

19. On the merits of the case, the Trial Judge relied on the evidence of the eyewitnesses, PW-4 Joginder Singh, PW-5 Gurmail Kaur and PW-6 Piaro. Kaka Singh did not enter the witness box (he was apparently won over by the defence) but the testimony of the eyewitnesses was relied on to hold that Gurmail Singh son of Bachan Singh had injured him. The Trial Judge rejected the contention that PW-5 Gurmail Kaur and PW-6 Piaro were interested witnesses and therefore they ought not to be believed.

20. It was urged that Joginder Singh (complainant) was not present when the occurrence took place since he did not receive any injury. The Trial Judge rejected this contention, taking note of the fact that Joginder Singh (complainant) hid himself.

21. The Trial Judge also rejected the contention that there were improvements in the statements of PW-5 Gurmail Kaur and PW-6 Piaro and held that there could be discrepancies with the passage of time.

22. The medical evidence indicated that Gurdial Singh had received two injuries caused by a firearm and injuries from a sharp weapon. The post-mortem examination of the body of Gurdial Singh showed as many as 116 lacerated wounds and

15 pellets were found in his thigh. The injuries were ante mortem in nature. The medical evidence also showed that Kaka Singh received two injuries through a firearm and similarly a firearm caused the injury received by Piaro. The injuries on Gurmail Kaur from a blunt object were confirmed by the medical evidence.

23. Therefore, on the facts alleged by the prosecution, the Trial Judge agreed with the prosecution and believed all its witnesses. On the issues raised regarding the motive for the crime and the alleged delay in lodging the FIR and submitting a report to the Ilaqa Magistrate, the Trial Judge ruled in favour of the prosecution.

24. However, on the substantive legal issue before him, the Trial Judge pithily observed that the prosecution did not lead any evidence to show the formation of an unlawful assembly by the accused persons nor was any evidence led to show that the assembly had any common object. Individual convictions were, accordingly, handed down.

25. The Trial Judge was of the view that since the firearm and gandasa injuries caused to Gurdial Singh were on non-vital parts of his body, they were not dangerous to life and so there was no intention on the part of Jarnail Singh and Gurmail Singh son of Nahar Singh to kill him. Under these circumstances, Jarnail Singh was convicted of an offence punishable under part I of Section 304 of the IPC.

26. As far as Gurmail Singh son of Nahar Singh is concerned, it was held that since the accused party was armed with guns, causing injuries to Gurdial Singh with gandasas does not arise. Therefore, Gurmail Singh son of Nahar Singh was acquitted of the charges against him.

27. With regard to the firearm injuries caused to Kaka Singh and Piaro on non-vital parts of their body, it was held that Gurmail Singh son of Bachan Singh was guilty of an offence punishable under Section 324 of the IPC.

Decision of the High Court:

28. Against the decision of the Trial Judge, the convicts filed appeals and the State also preferred appeals, though against the acquittal and for enhancement of the sentence awarded. The High Court of Punjab and Haryana disposed of the appeals by judgment and order dated 10th October 2006 (under appeal).

29. The contentions urged by the accused persons before the High Court were essentially a reiteration of the contentions urged before the Trial Court.

30. The High Court held that the accused had a motive for committing the crime. The motive being the land dispute between the families and also that Gurdial Singh was an eyewitness to the alleged murder of his son Mohinder Singh by Nachhatar Singh. It was held that there was no delay in lodging the FIR by Joginder Singh. The High Court found that there was no substance in the contention that Joginder Singh was not present at the scene of the crime. The High Court did not give much significance to the contention that had Joginder Singh been present, he too would have suffered some injuries. The High Court was of the view that the witnesses had withstood their cross examination and it could not be said that they had given an incorrect version of the events because of inimical relations. The High Court found no merit in the contention that the investigating officer was biased.

31. With regard to the injuries suffered by Gurmail Singh son of Nahar Singh, it was held that the evidence showed that the injuries were caused by his co-accused in the darkness. In any case, it was held that the question was not about the injuries suffered by Gurmail Singh son of Nahar Singh but the murder of Gurdial Singh and the injuries to his brother and two daughters.

32. In other words, the High Court agreed with and upheld the conclusions arrived at by the Trial Judge on all issues.

33. However, with regard to the constitution of an unlawful assembly, the High Court disagreed with the Trial Court. It was held that the presence of eight persons armed with guns and gandasas with a motive to wreak vengeance on Gurdial Singh and his family clearly pointed to the existence of an unlawful assembly having a common object. That Gurdial Singh was the target is clear from the number and nature of injuries received by him, which subsequently resulted in his death. Alternatively, it was held that the members of the unlawful assembly knew that an offence against Gurdial Singh was likely to be committed. As such, the ingredients of Section 149 of the IPC were made out.

34. With regard to an offence under part I of Section 304 of the IPC, it was held that the intention of the appellants was to cause the death of Gurdial Singh or to inflict such bodily injury as is likely to cause death. Consequently, it was held that an offence punishable under Section 302 of the IPC was made out. Accordingly, the appellants were sentenced to imprisonment for life.

Submissions and discussion:

35. Learned counsel for the appellants reiterated the contentions urged before the High Court. But we find no merit in them.

Peripheral issues:

(a) Delay in lodging the FIR:

36. It was contended that there was considerable delay in lodging the FIR and also in sending the special report to the Ilaqa Magistrate. The incident took place on 10th March, 1989 at about 9/9.30 p.m. and the FIR was lodged at about 11.30 p.m. There was, therefore, a delay of about two hours in lodging the FIR. We do not think this delay is per se unreasonable.

37. In situations such as the present, a realistic and pragmatic approach is necessary. It is not as if the incident of firing and inflicting of gandasa blows was over within a minute

or so. The entire incident would have taken some time, and thereafter, the victims would have to recover from the shock and trauma caused by injuries suffered by them and make arrangements for medical treatment. Often several emergent issues need attention and so, it is not as if the moment an incident is over, someone is expected to rush to the police station for lodging an FIR. However, if there is an unreasonable or unexplained delay in lodging a complaint, an argument can surely be made, but it is wrong to make a fetish out of every delay in lodging an FIR. Given the facts of this case, we do not think there was any unreasonable or unexplained delay in lodging an FIR.

38. In this context, we may only refer to a recent decision of this Court (authored by one of us, Swatanter Kumar, J) in *Jitender Kumar v. State of Haryana,* (2012) 6 SCC 204 in which it was held:

> "It is a settled principle of criminal jurisprudence that mere delay in lodging the FIR may not prove fatal in all cases, but in the given circumstances of a case, delay in lodging the FIR can be one of the factors which corrode the credibility of the prosecution version. Delay in lodging the FIR cannot be a ground by itself for throwing away the entire prosecution case. The court has to seek an explanation for delay and check the truthfulness of the version put forward. If the court is satisfied, then the case of the prosecution cannot fail on this ground alone."

39. As far as the delay in sending the special report to the Illaqa Magistrate is concerned, it has come on record that Gurdial Singh was shifted to a Civil Hospital, along with other injured persons. The victims of the incident were being treated till sometime after 2.00 a.m. the next morning. Initially, an offence under Section 307 of the IPC was made out, but after Gurdial Singh succumbed to his injuries, it was converted to an offence punishable under Section 302 of the IPC. It is then that information about the death was conveyed to the Illaqa Magistrate. The fact that the Illaqa Magistrate was informed at

about 6.30 a.m. the next morning indicates that the information was not unnecessarily delayed.

40. We are satisfied that the record does not show any undue delay either in lodging the FIR or in dispatching the special report to the Illaqa Magistrate. The concurrent findings of both the courts are upheld.

(b) Motive:

41. It was then contended that there was no motive for the appellants to commit the crime. We do not agree. It is quite clear that there was a land dispute between the families of Gurdial Singh and Nachhatar Singh. Evidence in this regard was led by PW-3 Darshan Singh, a Court Ahlmad working in the concerned court at Mansa. The existence of a land dispute was also testified to by PW-4 Joginder Singh.

42. That the land dispute was not a trivial matter is clear from the fact that it even led to the murder of Mohinder Singh son of Gurdial Singh on 20th February, 1989 allegedly by Nachhatar Singh. Gurdial Singh was an eyewitness to the murder. Therefore, not only was there a motive for committing the crime but the motive had already led to a murder on an earlier occasion.

43. We, therefore, reject the submission advanced by learned counsel for the appellants in this regard and uphold the concurrent opinion of both the courts below.

(c) Presence of complainant:

44. Learned counsel for the appellants submitted that the presence of PW-4 Joginder Singh at the scene of the crime was doubtful and therefore the complaint lodged by him with the police ought not to be taken note of. In this context, it was contended that the absence of any injury on PW-4 Joginder Singh strongly suggests that he was not present when the incident occurred.

45. We are of the opinion that too much is being read into

this aspect of the case. Joginder Singh's sister, Charanjit Kaur was married to Mohinder Singh son of Gurdial Singh. After Mohinder Singh's murder on 20th February 1989, Charanjit Kaur married Kewal Singh, another son of Gurdial Singh. Under the circumstances, the presence of Joginder Singh in the village is explained.

46. Joginder Singh would surely have been aware of the enmity between the parties and when the attack took place, he hid himself so as to escape the wrath of the appellants. This is quite natural, considering the unfortunate events that had taken place only a few weeks earlier. It is for this reason that Joginder Singh did not receive any injury, as explained by him.

47. At this stage, we may mention that learned counsel also sought to take advantage of the absence of any mention of Joginder Singh in the dying declaration Exhibit PW8/A given by Gurdial Singh. The dying declaration has not been relied on, either way or for any purpose, both by the Trial Court and the High Court. Therefore, we also do not think it appropriate to deal with the contents of the dying declaration. We may, however, only note that the failure of Gurdial Singh to mention the presence of Joginder Singh does not necessarily mean that Joginder Singh was not present at the scene of the crime.

48. We may also note that both the courts below have not doubted the presence of Joginder Singh at the scene of the crime and we see no reason to differ with this concurrent finding only because Joginder Singh did not suffer any injuries or that his presence was not mentioned by Gurdial Singh in his dying declaration.

(d) Injuries on Gurmail Singh:

49. Learned counsel for the appellants contended that Gurmail Singh son of Bachan Singh had suffered serious injuries and the prosecution has not explained these. Although Gurmail Singh son of Bachan Singh in his statement under Section 313 of the Criminal Procedure Code says that Gurdial Singh, Dial Singh and Kaka Singh attacked him with gandasas,

the evidence on record does not indicate that any of the victims were armed. On the contrary, the evidence indicates that Gurmail Singh son of Bachan Singh received injuries at the hands of his co-accused in the darkness. In these circumstances, the prosecution's "failure" to explain the injuries on Gurmail Singh son of Bachan Singh would not disprove the case of the prosecution, namely, that Gurdial Singh was killed and some of those with him had been seriously injured.

50. As long as the evidence on record is trustworthy (and it has found to be so by both the courts below) the failure of the prosecution to explain the injuries on an accused person may not necessarily adversely impact on its case. In a recent decision *Mano Dutt v. State of U.P.,* (2012) 4 SCC 79 (authored by one of us, Swatanter Kumar, J) it was held as follows:

> "…… this Court has taken a consistent view that the normal rule is that whenever the accused sustains injury in the same occurrence in which the complainant suffered the injury, the prosecution should explain the injury upon the accused. But, it is not a rule without exception that if the prosecution fails to give explanation, the prosecution case must fail.
>
> Before the non-explanation of the injuries on the person of the accused, by the prosecution witnesses, may be held to affect the prosecution case, the Court has to be satisfied of the existence of two conditions:
>
> (i) that the injuries on the person of the accused were also of a serious nature; and
>
> (ii) that such injuries must have been caused at the time of the occurrence in question.
>
> Where the evidence is clear, cogent and creditworthy; and where the court can distinguish the truth from falsehood, the mere fact that the injuries on the person of the accused are not explained by the prosecution cannot, by itself, be

> the sole basis to reject the testimony of the prosecution witnesses and consequently, the whole case of the prosecution. Reference in this regard can be made to *Rajender Singh v. State of Bihar* [(2000) 4 SCC 298], *Ram Sunder Yadav v. State of Bihar* [(1998) 7 SCC 365] and *Vijayee Singh v. State of U.P.* [(1990) 3 SCC 190]."

51. It is interesting to note that the issue of injuries suffered by Gurmail Singh son of Bachan Singh was not raised by the appellants at the trial stage and has, therefore, not even been adverted to by the Trial Judge.

Substantive issue of Section 149 of the IPC:

52. The final and more significant contention urged by learned counsel for the appellants was that the ingredients of Section149 of the IPC were not made out. It was pointed out that the Trial Court concluded that there was no evidence of an unlawful assembly, nor was there any evidence to show that the appellants and those with them had any common object to commit the murder of Gurdial Singh and injure Kaka Singh, Piaro and Gurmail Kaur. It was submitted that this finding was reversed by the High Court without any sufficient material on record.

53. Before proceeding any further, it is worthwhile to quote in entirety what the Trial Judge had to say on the issue:

> "No evidence has been led by the prosecution to show that unlawful assembly was formed by the accused with the common object of those composing such assembly. They can be convicted under S. 149 IPC only if the prosecution by way of evidence proved that the persons forming unlawful assembly should be animated by common object. In the instant case no evidence has come forward to spell out that all the accused formed an unlawful assembly in prosecution of the common object of that assembly to inflict injuries to Gurdial Singh deceased etc. and in view of all this it is not possible to hold that (accused) guilty under sections 148/149 IPC."

54. Section 149 of the IPC constructively criminalizes all members of an unlawful assembly if a member of that assembly commits an offence in prosecution of a common object of that assembly or if the members of that assembly knew likely to be committed in prosecution of that object. To bring a case within Section 149 of the IPC three features must be present. Firstly, there must be in existence an unlawful assembly within the meaning of Section 141 of the IPC. This is a mixed question of fact and law, which was overlooked by the Trial Judge. Secondly, an offence must have been committed by a member of the unlawful assembly. Thirdly, the offence committed must be in prosecution of a common object of the unlawful assembly or must be such as the members of the unlawful assembly knew likely to be committed in prosecution of that object. Once these ingredients are satisfied, the provisions of Section 149 of the IPC will come into play and cover every member of the unlawful assembly.

55. Section 141 of the IPC is reproduced for convenience:

141. Unlawful assembly.—An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is—

First.—To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or

Second.—To resist the execution of any law, or of any legal process; or

Third.—To commit any mischief or criminal trespass, or other offence; or

Fourth.—By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right

of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth.—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly."

Section 149 of the IPC is reproduced for convenience:

"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

56. Insofar as the present case is concerned, as many as eight persons had assembled with guns and sharp-edged gandasas. There cannot be any conclusive proof with regard to what was in the contemplation of the unlawful assembly, but it is clear that the assembly was not without a purpose. Their getting together and firing a few shots in the air before the incident actually took place suggests that they gathered to either display a show of strength or commit an offence. It is unlikely that they would have gathered in village Heeron Kalan (District Bhatinda) from two other villages, Shahpur Kalan and Jharon (District Sangrur) only for a show of strength. Even if they did, the explanation to Section 141 of the IPC makes it clear that an assembly, not unlawful when it assembled, may subsequently become an unlawful assembly.

57. Also, given the fact that the assembly was armed, it

would not be off the mark to expect it to be for a somewhat disreputable purpose and not merely by way of a show of strength. This view is fortified by what actually transpired at the scene of occurrence, namely, the lalkara given members of the assembly that no one from Gurdial Singh's party will be spared.

58. Additionally, it is also necessary to keep in mind the antecedent circumstances, namely, the land dispute between the parties and the murder of Mohinder Singh on 20th February 1989.

59. In our opinion, if all the facts are looked at conjunctively and not disjointedly, an overall picture of compelling circumstances would emerge that the accused persons had assembled with a common object of committing an offence and not merely as a show of strength and, therefore, they constituted an unlawful assembly.

60. What is the offence committed by members of the unlawful assembly? The Trial Court would have us believe that offences under part I of Section 304 of the IPC and under Section 324 of the IPC were committed. The Trial Court proceeded on the basis that since the injuries inflicted on Gurdial Singh were not on any vital part of his body, it cannot be said that the common object of the unlawful assembly was to kill him.

61. The High Court has not agreed with this view and we endorse the opinion of the High Court in this regard. It is not possible to overlook the fact that at least one injury caused to Gurdial Singh with a firearm was on a vital part of his body. That apart, Gurdial Singh had as many as 116 lacerated wounds and 15 pallets were found in his body. He also had a couple of incised wounds, though not on any vital part of his body. It is not as if only one gunshot was fired or one gandasa blow given to Gurdial Singh - two shots were fired at him and gandasa blows given.

62. The High Court has referred to the third clause of Section 300 of the IPC which reads as follows:

> **"300. Murder.**—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—
>
> *2ndly*.— xxx xxx xxx
>
> *3rdly*.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—
>
> *4thly*.— xxx xxx xxx"

63. In our opinion, the evidence is clear that the offence committed was the murder of Gurdial Singh. Assuming this was not so, the High Court has drawn attention to the third clause of Section 300 of the IPC. There can be no doubt that if the unlawful assembly did not murder Gurdial Singh, it certainly caused such bodily injury to Gurdial Singh and others with him as to result in his death. Given the number and nature of injuries, it is difficult to come to any conclusion other than that the injuries were sufficient in the ordinary course of nature to cause death. In fact, Gurdial Singh did succumb to the injuries.

64. We have no doubt that the offence committed by the unlawful assembly was the murder of Gurdial Singh and injuries to other members of his party.

65. Did the unlawful assembly have, as a common object the murder of Gurdial Singh, or knew that he was likely to be killed in prosecution of that common object? It was pointed out in *Lalji v. State of U.P.,* (1989) 1 SCC 437 (and approved in *Chanakya Dhibar (dead) v. State of West Bengal,* (2004) 12 SCC 398 and *Roy Fernandes v. State of Goa,* (2012) 3 SCC 221) that,

> "Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case."

66. From the facts and circumstances of the case, it is quite clear that the assembly of eight had come from two different villages (Shahpur Kalan and Jharon) to Heeron Kalan at about 9/9.30 p.m. That they came with an aggressive intent is clear from the fact that two of them were armed with 12-bore double barreled guns and others with sharp-edged gandasas. Two members of the assembly (Gurmail Singh, nephew of Nachhatar Singh and Bibi, sister of Nachhatar Singh) gave a lalkara (a challenge) to effectively "finish off" Gurdial Singh and his party. Following up on this, shots were fired at Gurdial Singh, Kaka Singh and Piaro. Gurdial Singh, Dial Singh and Gurmail Kaur were subjected to gandasa blows. No one from Gurdial Singh's party (all of whom were unarmed) was spared, except Joginder Singh who had hidden himself. As already noted, Gurdial Singh succumbed to his injuries.

67. That the death of Gurdial Singh was the common object of the unlawful assembly would be clear from the result of the post mortem examination conducted on Gurdial Singh. This showed the following injuries as recorded by PW-2 Dr. H.S. Lumba, Senior Medical Officer, Civil Hospital, Sangrur:

1. There were 116 lacerated wounds varying from 0.5 cm to 0.5 cm and 0.75 cm to 0.75 cm in size on the front of left thigh in the middle part in an area of 25 cms x 27 cms. The thigh was swollen. On dissection clotted blood was present and the muscle and vessels were found lacerated 15 pallets were found & packed.

2. Incised wound 2 cms x 0.2 cm on the back of proximal inter-phalangeal joint of right index finger. The underlying bone was fractured.

3. Lacerated wound 4 in number on the back of right index finger 0.5 cm x 0.5 cm (2) and other two 0.5 cm x 0.75 cm. There was no bone injury.

4. Lacerated wounds 2 in number on the back of right middle finger 0.5 cm x 0.5 cm. There was no bone injury.

5. Incised wound 3 cms x 0.2 cm x 0.75 cm on the lateral side of proximal phalanx of the left index finger. On dissection there was no bone injury.

6. Lacerated wound 0.5 cm x 0.75 cm on the front and middle of penis.

68. Surely, these injuries are severe enough to lead to a reasonable conclusion that the common object of the unlawful assembly was the murder of Gurdial Singh.

69. In addition to the above, we need to recall that the appellants had a cause for wreaking vengeance upon Gurdial Singh. As mentioned above, the motive was the land dispute between Gurdial Singh and Nachhatar Singh in respect of which a case was pending. The additional reason was the fact that Gurdial Singh was an eyewitness to the murder of his son Mohinder Singh, allegedly by Nachhatar Singh.

70. The inference, on a totality of the facts and circumstances of the case, is compelling that the attack on Gurdial Singh was with the object of killing him and injuring those with him. The third requirement of Section 149 of the IPC is also met in this case.

71. All the ingredients of Section 149 of the IPC having been met, we have no doubt that the High Court arrived at the correct conclusion that the appellants are liable for an offence punishable under Section 302 of the IPC.

Conclusion:

72. Under the circumstances, we find no reason to interfere with the judgment and order under appeal. Accordingly, both the appeals are dismissed. However, we make it clear that since Jarnail Singh is not before us, we should not be understood to have made any comment on his role in the incident.

K.K.T. Appeals dismissed.

BHARAT SONI ETC.
v.
STATE OF CHHATISGARH
(Criminal Appeal Nos. 1262-1264 of 2010 etc.)

NOVEMBER 22, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Penal Code, 1860:

ss. 147, 148 and 302/149 - Murder by seven accused - Conviction by courts below - Held: Evidence of one eye-witness was self-contradictory and also at variance with the evidence of the other eye-witness - No convincing and consistent evidence regarding individual overt act - Recovery of weapons and fleeing of the accused from the place of occurrence would not be determinative of the liability of the accused u/s. 302/149 - It cannot be inferred that the accused had common object to murder - Thus, accused-appellants acquitted of offences punishable u/s. 302/149 - However, conviction u/s. 147 and 148 maintained.

s. 149 - Common object - Determination of - Held: It is a question of fact - Has to be determined keeping in view nature of assembly, arms carried, behaviour of the members etc.

Words and Phrases - 'Common Object' - Meaning of, in the context of s. 149 IPC.

The appellants (4 accused) and 3 other accused allegedly caused death of one person. The prosecution case was that two of the accused picked up quarrel with the deceased, PW-4 and PW 13, at which the deceased and PW 4 slapped one of the accused. Both the accused went away, threatening them. After an hour they came back with other accused and assaulted the deceased and his companions. The deceased succumbed to the

injuries. The trial court convicted all the accused u/ss. 147, 148 and 302/149 IPC. The High Court affirmed the judgment of the trial court.

Partly allowing the appeals, the Court

HELD: 1. Determination of the common object of an unlawful assembly or the determination of the question whether a member of the unlawful assembly knew that the offence that was committed was likely to be committed is essentially a question of fact that has to be made keeping in view the nature of the assembly, the arms carried by the members and the behaviour of the members at or near the scene and a host of similar or connected facts and circumstances that cannot be entrapped by any attempt at an exhaustive enumeration. [Para 15] [549-H; 550-A-B]

Dani Singh vs. State of Bihar **(2004) 13 SCC;** *Kuldip Yadav vs. State of Bihar* **(2011) 5 SCC 324: 2011(5) SCR 186;** *Rajendra Shantaram Todankar vs. State of Maharashtra* **(2003) 2 SCC 257: 2003 (1) SCR 10 - relied on.**

2.1 The versions of the two eye-witnesses i.e. PW 4 and PW 13 in so far as the involvement of the accused-appellants is concerned, are at variance with each other. Besides the testimony of PW-4 is self-contradictory. Insofar as accused 'R' is concerned, he has hardly been implicated and the prosecution evidence, properly read, would seem to show that he was a mere passive onlooker. Also, PW-13 is wholly silent with regard to the involvement of any of the four accused-appellants before this Court. [Para 22] [553-B-C]

2.2 If the oral evidence of PW-4 and PW-13 is to be excluded, the recovery of the alleged weapons at the instance of the accused, and the incident of the accused fleeing away from the place of occurrence, will not be

conclusive and determinative of the liability of the accused for the substantive offence under Section 302 IPC with the aid of Section 149 IPC. [Para 22] [553-D-E]

2.3 There is no convincing and consistent evidence of any individual overt act on the part of any of the accused-appellants to implicate any or all of them for causing the fatal injuries on the body of the deceased. In view of the prosecution evidence, it cannot be reasonably inferred that the accused- appellants, as members of an unlawful assembly, had any common object to commit the offence of murder of the deceased. Neither, the accused can be attributed with the knowledge that the offence of murder was likely to be caused or to occur in prosecution of the common object. [Para 22] [553-E-G]

2.4 At best what can be held is that the common object of the assembly of the accused was to teach PW-4 and the deceased a lesson on account of the previous altercation that had taken place in the course of which PW-4 and the deceased had slapped one of the accused. The accused persons, including the appellants, as members of the unlawful assembly, had, in fact, indulged in the use of force in prosecution of the said common object. The same would, however, render the accused appellants liable only for the offence under Section 147 and 148 IPC for which they had already been convicted by the trial court as also by the High Court. [Para 22] [553-G-H; 554-A-B]

2.5 Conviction of the appellants under Section 147 and 148 IPC is maintained. They are acquitted of the offences punishable under Section 302 read with Section 149 IPC. [Para 23] [554-C]

Case Law Reference:

(2004) 13 SCC	**Relied on**	**Para 16**

2011 (5) SCR 186	**Relied on**	**Para 17**
2003 (1) SCR 10	**Relied on**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1262-1264 of 2012.

From the Judgment & Order dated 30.11.2009 of the High Court of Chhatisgarh, at Bilaspur in Criminal Appeals No. 574, 614 & 577 of 2003.

WITH

Criminal Appeal No. 1873 of 2011.

Wills Mathews, R.P.S. Sirohi, Robin Raju, Rajinder Singh, Shree Pal Singh, Vikas Upadhyay, B.S. Banthia, Arjun Garg for the Appellant.

Apoorv Kurup, Aniruddha P. Mayee for the Respondent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Four of the seven accused persons whose conviction under Section 302 IPC and the sentence of life imprisonment has been affirmed by the High Court of Chhattisgarh have filed the instant appeals challenging Judgment and Order dated 30th November, 2009 of the High Court. We have heard the learned counsels for the appellants as well as the learned counsel for the State.

2. The short case of the prosecution is that on 05.12.2000 at about 8.55 p.m., Santosh (PW-4) lodged a FIR in the Ambikapur Police Station stating that a short while ago i.e. at about 8.40 p.m. while he was standing in front of his house alongwith deceased Vinod and Amit (PW-13), accused Gopi Ghasia(A-6) and Ranu(A-5) had come there in a state of intoxication. According to the first informant, an altercation took place in the course of which he as well as Vinod had slapped accused Gopi. Enraged, the accused persons went away threatening to kill them. According to the first informant, after

about an hour, the four accused appellants. i.e. Bharat, Dhruv, Sanjay and Rupesh accompanied by accused Ranu, Gopi and Jitender came to the place armed with different kinds of dangerous weapons. Specifically it was mentioned that accused Gopi had come armed with a Nepali Khukhri; accused Ranu had a knife with him whereas accused Jitender was armed with a Nan Chaku. In so far as accused Bharat and Dhruv are concerned, it was claimed by the first informant that while the former was armed with an iron rod, accused Dhruv had carried a leather belt in his hand. In the FIR it was further alleged that accused Ranu had assaulted the first informant Sanjay (PW-4) with a knife but he had escaped without any serious injuries. However, accused Gopi and Ranu gave knife blows to the deceased Vinod on his chest and stomach whereas accused Dhruv and Bharat had assaulted Amit Kashyap (PW-13) with the belt and iron rod that they had carried. According to the first informant, accused Rupesh and Sanjay had instigated the other accused to kill the deceased Vinod. Due to the assault committed on Vinod, he had sustained injuries for which reason he had to be taken to the hospital.

3. On receipt of the FIR a case under Sections 147,148, 149 and 307 of the IPC was registered. However as the injured Vinod died at about 9.15 p.m. on the same night, the offence under Section 302 was added in the FIR. The crime alleged was duly investigated and on completion thereof all the seven accused were charge sheeted under Section 147, 148, 302/ 149 of IPC. Thereafter, the case was committed for trial to the court of sessions and charges under Sections 147, 148, 302/ 149 IPC were framed against the accused persons. As the accused claimed innocence a regular trial was held, at the conclusion of which all the seven accused were found guilty of the charge under Section 147, 148, 302/149 IPC. They were accordingly sentenced. The separate appeals filed by the seven accused before the High Court having been dismissed by the impugned order dated 30.11.2009, the accused Bharat, Dhruv, Sanjay and Rupesh have challenged the aforesaid order

of the High Court in the appeals filed by them before this Court.

4. Before adverting to the core legal issue arising in the present appeals, namely, the liability of the accused appellants for the offence under Section 302 IPC on the basis of their constructive liability, if any, under Section 149 IPC, it will be necessary to notice, though very briefly, the salient part of the evidence adduced by the prosecution in support of the charges levelled.

5. Of the fifteen witnesses examined by the prosecution, the evidence of Sonu Kewat (PW-1), Suraj Dass (PW-2), (though declared hostile), Ram Naresh (PW-3), Prakash Suryavanshi (PW-5), Imtiaz Ali (PW-6) and Dr. S.K. Sinha (PW-7) would be relevant. Equally, the evidence of (PW-4) and PW-13 who had been examined as the eye-witnesses to the incident will have to be noticed in some details.

6. From the deposition of PW-1, PW-2, PW-3 and PW-5, it transpires that the aforesaid witnesses had come to the place of occurrence on hearing the commotion that had taken place. The said witnesses, without any major discrepancies or contradictions, have narrated that on reaching the place of occurrence they could see the deceased Vinod lying injured and all the seven accused fleeing away therefrom. However, two of the accused, namely, Dhruv and Bharat were apprehended by the persons who had gathered at the place of occurrence, having come there on hearing the commotion that had taken place. It may be noticed, at this stage, that in so far as the identity of the accused is concerned, no issue has been raised on behalf of the accused at any point of time.

7. Imtiyaz Ali (PW-6) is a witness to the recovery of the alleged weapons of assault. All such recoveries were made at the instance of the accused persons. Specifically, PW-6 has deposed that on the basis of the statement of accused Jitender a Nan Chaku (Ex.P-7) was recovered. At the instance of accused Gopi and Ranu a Nepali Khukri and a Gupti (Ex.P-8

and Ex.P-11 respectively) was recovered. Similarly, on the basis of the statement of accused Dhruv and Bharat a leather belt and an iron rod (Ex.P-14 and Ex.P-15) were recovered.

8. Dr. S.K. Sinha (PW-7) M.O. District Hospital, Ambikapur who had conducted the post mortem of the deceased Vinod had proved the report of post-mortem (Ex.P-26). This witness had deposed that corresponding to one of the external injuries found i.e. an incised wound over the abdominal wall below the umbilicus, internal injuries cutting the diaphragm and lower lobe of the right and left lung were found by him on the person of the deceased.

9. PW-4 who was examined as an eye-witness had deposed that all the seven accused persons, including the four appellants, had come together to the place of occurrence at about 8.40 pm on 05.12.2000. This witness had specifically deposed that accused Bharat, who was armed with a Gupti, had assaulted the deceased in the stomach with the said weapon. However, in the FIR filed by him, he had stated that accused Bharat was armed with an iron rod. Similarly in his deposition, PW-4 had stated that accused Dhruv was also holding a Gupti whereas in the FIR it had been mentioned that the said accused was armed with a leather belt. In a similar manner, though in the FIR accused Sanjay and Rupesh had been alleged to be the persons who were instigating the others to kill Vinod, in his deposition in court PW-4 had stated that he had seen the accused Sanjay assaulting the deceased in the thigh with a Gupti. In so far as accused Rupesh is concerned PW-4 had not implicated the said accused in any manner at all while deposing in court. Similarly, PW-4 had not implicated accused Jitender his evidence in court though in the FIR filed he had specifically mentioned that accused Jitender was armed with a Nan Chaku. In so far as the accused Gopi and Ranu is concerned PW-4 has, however, been consistent in the alleged involvement of the said two accused both in the FIR as well as in the deposition tendered in Court.

10. On the other hand, Amit Kashyap (PW 13), had deposed that the accused persons, including the present appellants, were assaulting (beating) Vinod with hands and fists and were also kicking him. However, when he (PW-13) along with others had rushed towards Vinod to save him, the accused persons took out the Guptis that they were carrying and started assaulting the deceased with the said weapons. Specifically, PW-13 had stated that accused Ranu had stabbed the deceased with a dagger on the stomach and the accused Jitender had also inflicted a Gupti blow though he could not see the particular part of the body of the deceased on which the Gupti blow was inflicted by the accused Jitender.

11. Furthermore, reading the evidence of PW-13 it is clearly discernible that the said witness has tried not to involve the accused Bharat in the incident. The motive for the same, as evident from the cross-examination of PW-13, is some relationship between the two i.e. PW-13 and accused Bharat. Specifically, PW-13 had stated that he had not seen Bharat committing any assault on the deceased and that he was also not sure as to whether Bharat had accompanied the other accused persons and also whether he was holding any weapon at all. PW-13 has also given a different sequence of the arrival of the seven accused persons at the place of occurrence. In this regard he had stated that while five accused had arrived together, accused Bharat arrived at the place of occurrence thereafter and the last to arrive was the accused Sanjay.

12. Having noticed the essential features of the evidence tendered by the prosecution witnesses we may now proceed to examine the liability of the accused appellants, all or any of them, on the principle of vicarious or constructive liability under Section 149 of the IPC. The aforesaid provision of the IPC is in the following terms:

"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object - If an offence is committed by any member of an unlawful assembly in

prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

13. An assembly of five or more persons having as its common object any of the five objects enumerated under Section 141 of the IPC is deemed to be an unlawful assembly. Membership of an unlawful assembly is itself an offence punishable under Section 143 whereas other species of the said offence are dealt with under Sections 143 to 145 of the IPC. Similarly, Sections 146 to 148 of the IPC deals with the offence of rioting which is defined to be use of force or violence by any member thereof. Section 149 makes every member of an unlawful assembly liable for offence that may be committed by any member of the unlawful assembly in prosecution of the common object of that assembly or for commission of any offence that the members of the assembly knew to be likely to be committed in prosecution of the common object of the assembly.

14. Section 149 IPC, therefore, engrafts a principle of vicarious or constructive liability inasmuch as a person would be guilty of an offence, though he may not have directly committed the same if as a member of an unlawful assembly he had shared a common object with the other members to commit such an offence or if he knew that such offence was likely to be committed in prosecution of the common object of the assembly of which he was a member.

15. The purport and effect of the provisions of Section 149 IPC has received the consideration of this court on more than one occasion. Without referring to any particular or specific precedent available on the point, it would suffice to say that determination of the common object of an unlawful assembly or the determination of the question whether a member of the unlawful assembly knew that the offence that was committed

was likely to be committed is essentially a question of fact that has to be made keeping in view the nature of the assembly, the arms carried by the members and the behaviour of the members at or near the scene and a host of similar or connected facts and circumstances that cannot be entrapped by any attempt at an exhaustive enumeration.

16. In *Dani Singh Vs. State of Bihar*[1] the meaning of the word "common object" had been considered by this Court. The relevant part of the discussion may be summarized up below:

> 11.....The word "object" means the purpose or design and, in order to make it "common", it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it.....
>
> 12.....The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident.....
>
> 13.....An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard-and-fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at

1. (2004) 13 SCC .

or before or after the scene of incident....."

17. In a recent decision of this court in *Kuldip Yadav Vs. State of Bihar*[2] to which one of us (Justice Sathasivam) was a party, the principle of constructive liability under Section 149 IPC had once again received an elaborate consideration. In paragraph 39 of the judgment it was held that:

> "It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of lawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object."

18. In para 40 of the judgment an earlier decision in *Rajendra Shantaram Todankar Vs State of Maharashtra*[3] was noticed, particularly, the opinion that ...."It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the crime."

19. Having enumerated the principles of law governing the application of the principle of constructive liability under Section 149 IPC, it will now be necessary to apply the said principles to the facts of the present case as disclosed by the evidence on record.

20. The presence of the accused appellants along with the

2. (2011) 5 SCC 324.

3. (2003) 2 SCC 257.

other accused at the place of occurrence and at the time and date as claimed by the prosecution is not in dispute. It is also not in doubt that the two of the accused i.e. Gopi and Ranu (not before us) had an altercation with Santosh (PW-4) and the deceased Vinod about an hour earlier to the incident and that the two accused had left the place threatening that they would come back to kill Santosh (PW-4) and Vinod. Thereafter, all the seven accused had come armed with weapons. From the evidence of the prosecution witness it transpires that some of the accused had attacked Santosh (PW-4) and Amit (PW-13) who were present at the spot besides assaulting the deceased Vinod in the stomach with sharp weapons resulting in his death. From the evidence of PW-1, PW-2, PW-3 and PW-5 it clearly transpires that all the seven accused, after the incident, were seen trying to flee away from the place of occurrence and, in fact, two of the accused i.e. Dhruv and Bharat (Appellants before us) were apprehended by the persons present at the spot.

21. As against the above, what we find is several serious contradictions in the evidence of PW-4 and the previous statement made by him in the FIR. The discrepancies are too significant to be ignored. As the details in this regard have already been noticed the same need not be repeated. Suffice it will be to say that such discrepancies in the evidence of PW-4 relate to vital aspects of the case, namely, the weapons carried by the accused persons; who amongst the accused had assaulted the deceased and the weapon(s) used. On the other hand, from the evidence of PW-13 it transpires that the accused persons were initially assaulting the deceased with their hands and fists and were giving him blows and kicks. It is only at a later stage i.e. when PW-13 and others had rushed to save Vinod that accused persons are reported to have taken out the weapons they were carrying i.e. guptis. Specifically PW-13 had implicated only accused Jitender and Ranu (not appellants) as the persons who had inflicted knife and gupti blows on the deceased though he had stated that he could not see the

specific part(s) of the body of the deceased on which assault was committed by the accused Jitender.

22. From the above it is clear that not only the testimony of PW-4 is self contradictory, the versions of the two eye-witnesses in so far as the involvement of the accused-appellants is concerned is at variance with each other. Insofar as accused Rupesh is concerned he has hardly been implicated and the prosecution evidence, properly read, would seem to show that he was a mere passive onlooker. Also, PW-13 is wholly silent with regard to the involvement of any of the four accused appellants before this Court. In fact, PW-13 had gone to the extent of stating that the accused Bharat may not have accompanied the other accused to the place of occurrence and he was in fact not holding any weapon at all. The recovery of the alleged weapons at the instance of the accused, if the oral evidence of PW-4 and PW-13 is to be excluded, will not be sufficient to convict the accused appellants under Section 149. The incident of the accused fleeing away from the place of occurrence, similarly, will not be conclusive and determinative of the liability of the accused for the substantive offence under section 302 with the aid of section 149 IPC. There is no convincing and consistent evidence of any individual overt act on the part of any of the accused appellants to implicate any or all of them for causing the fatal injuries on the body of the deceased. Having considered the evidence brought by the prosecution, as discussed above, we are of the view that it cannot be reasonably inferred that the accused appellants, as members of an unlawful assembly, had any common object to commit the offence of murder of the deceased Vinod. Neither, the accused can be attributed with the knowledge that the offence of murder was likely to be caused or to occur in prosecution of the common object. At best what can be said and held is that the common object of the assembly of the accused was to teach PW-4 and the deceased Vinod a lesson on account of the previous altercation that had taken place in the course of which PW-4 and the deceased had slapped one

of the accused, i.e. Gopi. The accused persons, including the present appellants, as members of the unlawful assembly were committed and in fact had indulged in the use of force in prosecution of the aforesaid common object. The same would, however, render the accused appellants liable only for the offence under Section 147 and 148 of the IPC for which they have already been convicted by the learned trial court as also by the High Court.

23. We are, therefore, of the view that while maintaining the conviction of the appellants under Section 147and 148 of the IPC and the sentence imposed they are entitled to be acquitted for the offences under Section 302 read with Section 149 IPC. If the accused appellants have already served the sentence for the offences under Section 147 and 148 of the IPC we direct that, unless their custody is required in connection with any other case, the accused appellants be set at liberty forthwith. The Judgment and Order of the High Court is modified accordingly and the appeals are partly allowed to the extent indicated above.

K.K.T. Appeals partly allowed.

UNION OF INDIA & ORS.
v.
N.R. PARMAR & ORS.
(Civil Appeal Nos. 7514-7515 of 2005 etc.)

NOVEMBER 27, 2012

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

Service Law – Seniority – Inter-se-seniority – Between direct recruit and promotee Income Tax Inspectors – Applicability of 'quota' and 'rota' principle – Vacancies for the year 1993-94 required to be filled up by promotion as well as direct recruitment – Simultaneously referred to Departmental Promotion Committee and to Staff Selection Commission respectively – Appointment of promotees prior to the direct recruits as the selection process for direct recruits could not be completed within the recruitment year – Determination of date of seniority of the direct recruits – Plea of promotees that the date of seniority of the direct recruits should be from the date of their actual appointment, primarily placing reliance on Office Memorandum dated 7.2.1986 – Held: The date of seniority of direct recruits could not be the date of their actual appointment, but would be the date of initiation of process of recruitment – The general principles for determining inter se seniority between promotees and direct recruits was provided in the Office Memorandum dated 22.11.1959 – The Office Memorandum dated 7.2.1986 only introduced modification in respect of the vacancies which could not be filled and were carried forward and had to be filled later through a subsequent process of selection – In the instant case, the advertised vacancies were not carried forward vacancies – Direct recruits have to be interspaced with promotees of the same recruitment year.

Interpretation of Statutes – When the language used in

a statute is unambiguous and on a plain meaning being given to the words, the end result is neither arbitrary, nor irrational nor contrary to the object of the statute, the words used should be given effect to.

The instant appeals and transferred cases, involved the dispute of *inter-se* seniority between the direct recruit and promotee income Tax Inspectors. The question to be decided was whether determination of the seniority of the direct recruits would be with reference to the date of their actual appointment, or the date of arising of the direct recruit vacancies, or the date of initiation of the process of recruitment, or the date when the Staff Selection Commission made recommendations for filling up direct recruit vacancies.

The rival parties agreed that the seniority dispute was liable to be determined on the basis of Office Memoranda dated 7.2.1986 and 3.7.1986 issued by the Department of Personnel and Training read with the clarificatory Office Memoranda and Office Notes.

Allowing the appeals and the transferred cases, the Court

HELD: 1. General principles for determining seniority in Central services have been laid down in an annexure to an Office Memorandum dated 22.11.1959 issued by the Government of India, Ministry of Home Affairs. Under the OM dated 22.11.1959 *inter se* seniority between the promotees and direct recruits was based on the "quota" and "rota" principle. The OM dated 22.11.1959, was modified by an Office Memorandum dated 7.2.1986, issued by the Government of India, Department of Personnel and Training. The modification introduced through the OM dated 7.2.1986 was to redress a situation, wherein vacancies of one of the sources were kept (or remained) unfilled during the process of selection, and

the unfilled vacancies, had to be filled up through "later" examinations or selections. For the determination of seniority, in the contingency wherein the process of recruitment resulted in filling the vacancies earmarked for the two sources of recruitment, the manner of determining *inter se* seniority between promotees and direct recruits, expressed in the OM dated 22.11.1959 remained unaltered. But where the vacancies could not be filled up, and unfilled vacancies had to be filled up "later" through a subsequent process of selection, the manner of determining *inter se* seniority between promotees and direct recruits, was modified. The O.M. dated 7.2.1986, was followed by another Office Memorandum issued by the Government of India, Department of Personnel and Training, dated 3.7.1986. The purpose of this O.M. was to "consolidate" existing governmental orders on the subject of seniority. The position expressed in the O.Ms. dated 7.2.1986 and 3.7.1986, on the subject of *inter se* seniority between direct recruits and promotees, was absolutely identical. [Paras 18, 19 and 21] [577-C-G-H; 578-B-E; 586-F; 590-B]

2. An Office Note of the Department of Personnel and Training, Establishment (D) Section, dated 20.12.1999 was issued. It was provided therein that only where the appointing authority has not been able to fill up the vacancies earmarked for direct recruits/promotees, with reference to the requisition for a particular recruitment year, inspite of its best efforts, the instructions contained in O.M. dated 7.2.1986 would come into operation; and that it was not necessary, that the direct recruits for vacancies of a particular recruitment year, should join within the recruitment year (during which the vacancies had arisen) itself. As such, the date of joining would not be a relevant factor for determining seniority of direct recruits. Initiation of action for recruitment within the recruitment year would be sufficient to assign seniority

to the concerned appointees in terms of the "rotation of quotas" principle, so as to arrange them with other appointees (from the alternative source), for vacancies of the same recruitment year. Yet another Office Note dated 2.2.2000 provided that if the process of recruitment has been initiated during the recruitment year (in which the vacancies have arisen) itself, even if the examination for the said recruitment is held in a subsequent year, and the result is declared in a year later (than the one in which the examination was held), and the selected candidates joined in a further later year (than the one in which the result was declared), the selected candidates would entitled to be assigned seniority, with reference to the recruitment year (in which the requisition of vacancies was made). The words "initiation of action for recruitment", and the words "initiation of recruitment process", were explained to mean, the date of sending the requisition to the recruiting authority. Ministry of Finance, Department of Revenue issued letter dated 11.5.2004, whereby it was clarified that Direct Recruits' seniority vis-à-vis the promotees is reckoned from the year in which they are actually recruited. They cannot claim seniority of the year in which the vacancies had arisen. By Another letter dated 27.7.2004, the application of the clarification dated 11.5.2004 was directed to be kept in abeyance till further orders. By yet another letter dated 8.9.2004, it was provided that the clarification given in the letter dated 11.5.2004, would be ignored and the seniority of direct recruits would be reckoned with reference to the date of initiation of the process of recruitment in their case. Office memorandum was issued by the Government of India, Department of Personnel and Training, dated 3.3.2008 which was in the nature of a "clarification", to the earlier consolidated instructions on seniority, contained in the OM dated 3.7.1986. [Paras 22, 23, 24 and 25] [590-D; 591-C; 593-C-D-E-F; 595-G-H; 596-A-C-D; 597-A-C; 598-F-G; 600-A-B-D-G; 602-C]

3. The OM dated 7.2.1986 is binding for the determination of the issues expressed therein, and the same has the force of law. The OM dated 3.7.1986 is in the nature of consolidatory instruction, whereby, all earlier instructions issued from time to time were compiled together. [Para 27] [605-B]

4. The OM dated 3.3.2008 clearly propounds, a manner of determining *inter se* seniority between direct recruits and promotees, by a method which is indisputably in conflict with the OMs dated 7.2.1986 and 3.7.1986. A perusal of the OM dated 3.3.2008, however reveals, that it was not the intention of the Department of Personnel and Training to alter the manner of determining *inter se* seniority between promotees and direct recruits, as had been expressed in the OMs dated 7.2.1986 and 3.7.1986. The intention was only to "clarify" the earlier OM dated 3.7.1986 (which would implicitly include the OM dated 7.2.1986). The OM dated 3.3.2008 has clearly breached the parameters and the ingredients of a "clarification". Therefore, for all intents and purposes the OM dated 3.3.2008, must be deemed to be non-est to the extent that the same is in derogation of the earlier OMs dated 7.2.1986 and 3.7.1986. Thus, the OMs dated 7.2.1986 and 3.7.1986 would have an overriding effect over the OM dated 3.3.2008 (to the extent of conflict between them). And the OM dated 3.3.2008 has to be ignored/omitted to the extent that the same is in derogation of the earlier OMs dated 7.2.1986 and 3.7.1986. [Para 29] [607-D-H]

Jagdish Ch. Patnaik and Ors. v. State of Orissa and Ors. **(1998) 4 SCC 456: 1998 (2) SCR 676;** *Suraj Prakash Gupta and S. V. State of J&K and Ors.* **(2000) 7 SCC 561: 2000 (3) SCR 807;** *Pawan Pratap Singh and Ors. v. Reevan Singh and Ors.* **(2011) 3 SCC 267: 2011 (2) SCR 831 – distinguished.**

5. The OM dated 3.3.2008 is neither in the nature of

an "amendment" nor in the nature of a "modification". Since the OM dated 3.3.2008, is a mere "consolidation" or compilation of earlier instructions on the subject of seniority, it is not prudent to draw any inferences therefrom which could not be drawn from the earlier instruction/office memoranda being "consolidated" or compiled therein, or which is contrary thereto. [Para 27] [605-G-H; 606-A]

S.S. Garewal vs. State of Punjab **(1993) 3 Suppl. 234 – relied on.**

6. Reliance on the letter dated 11.5.2004, for the determination of the present controversy, is liable to outright rejection because the letter dated 11.5.2004 though styled as a "clarification", breaches both the essential ingredients of a "clarification". A perusal of the letter dated 11.5.2004 also reveals, that it adopts a position in clear conflict with the one expressed in the OMs dated 7.2.1986 and 3.7.1986, as well as, in the ONs dated 20.12.1999 and 2.2.2000. That apart, the letter dated 11.5.2004 is liable to be ignored in view of two subsequent letters of the Ministry of Finance, Department of Revenue dated 27.7.2004 and 8.9.2004, whereby clarification was directed to be kept in abeyance till further orders. [Para 24] [597-E-F-G; 598-B-E]

7. An office note has no legal sanction, and as such, is not enforceable in law. Yet an office note is certainly relevant for determining the logic and process of reasoning which prevailed at the relevant point of time. These would aid in the interpretation of the binding office memoranda, only when the language of the office memoranda is ambiguous and where there is no conflict between the two i.e., the office note and the office memoranda sought to be interpreted. [Para 22] [590-D-F]

8. "When the language used in the statute is

unambiguous and on a plain grammatical meaning being given to the words in the statute, the end result is neither arbitrary, nor irrational nor contrary to the object of the statute, then it is the duty of the court to give effect to the words used in the statute because the words declare the intention of the law making authority best". The various ONs and letters issued by the DOPT (referred to above) do not leave room for any ambiguity. [Para 32] [609-C-E]

Jagdish Ch. Patnaik and Ors. v. State of Orissa and Ors. **(1998) 4 SCC 456: 1998 (2) SCR 676 – relied on.**

9. In the present cases, not only the requisition but also the advertisement for direct recruitment was issued by the SSC in the recruitment year in which direct recruit vacancies had arisen. In all the cases the advertised vacancies were filled up in the original/first examination/ selection conducted for the same. None of the direct recruit Income Tax Inspectors can be stated to be occupying carried forward vacancies, or vacancies which came to be filled up by a "later" examination/ selection process. The facts only reveal, that the examination and the selection process of direct recruits could not be completed within the recruitment year itself. For this, the modification/amendment in the manner of determining the *inter-se* seniority between the direct recruits and promotees, carried out through the OM dated 7.2.1986, and the compilation of the instructions pertaining to seniority in the OM dated 3.7.1986, leave no room for any doubt, that the "rotation of quotas" principle, would be fully applicable to the direct recruits in the present controversy. The direct recruits will therefore have to be interspaced with promotees of the same recruitment year. In view of the above, the Civil Appeals, the Transferred Case, as well as, the Transfer Case (filed by the direct recruits and the Union of India) are allowed. The claim of the promotees, that the direct recruit Income Tax Inspectors, in the instant case should be assigned seniority with reference to the date of their actual appointment in the Income Tax Department is declined. [Para 33] [609-F-H; 610-A-D]

Case Law Reference:

(1993) 3 Suppl. 234	**Relied on**	**Para 26**
1998 (2) SCR 676	**Distinguished**	**Para 30**
	Relied on	**Para 32**
2000 (3) SCR 807	**Distinguished**	**Para 30**
2011 (2) SCR 831	**Distinguished**	**Para 30**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7514-7515 of 2005.

WITH

Civil Appeal No. 3876-3880 of 2007.

Civil Appeal No. 7516 of 2005.

T.C. (C) No. 91 and 681 of 2006.

P.P. Malhotra, ASG, P. Vishwanatha Shetty, Arvind Varma Pallav Shishodia, Vikas Malhotra, Abhinav Mukherjee, Anil Katiyar (for B.V. Balaram Das), A.K. Behera, Dr. Krishan Singh Chauhan, Ajit Kumar Ekka, Adam Ambrose P., Chand Kiran, Vijay Kumar Paradesi, Ajay Sharma, Kiran, Sanjay Kumar Singh, Syed I. Ibrahim, T. Mahipal, R.C. Kaushik, Kishan Datta, Subramonium Prasad, Sobhit Tiwari, Pradeep Aggarwal, Lal Pratap Singh and Ruchi Kohli for the appearing parties.

N.R. Parmar (in-person).

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. The present controversy is a dispute of inter se seniority between Income Tax Inspectors of the Income Tax Department. Direct recruits and promotees are pitted on opposite sides.

2. One of the matters in hand came to be considered by the Central Administrative Tribunal, Ahmedabad Bench, Ahmedabad (hereinafter referred to as "the CAT, Ahmedabad") in *R.C. Yadav & Ors. vs. Union of India & Ors.* (OA no.92 of 2003). The said Original Application had been filed by direct recruits. Another Original Application, on the same subject matter, being OA no.123 of 2003 (*N.R. Parmar & Ors. vs. Union of India & Ors.*) was filed by promotees. Both the OA no.92 of 2003 and OA no.123 of 2003 were decided by a common order dated 12.1.2004. In its determination the CAT, Ahmedabad held, that seniority of direct recruits would have to be determined with reference to the date of their actual appointment. The implicit effect of the aforesaid determination was, that the date of arising of the direct recruit vacancies, or the date of initiation of the process of recruitment, or the date when the Staff Selection Commission had made recommendations for the filling up direct recruit vacancies, were inconsequential for determination of seniority of direct recruits.

3. The decision rendered by the CAT, Ahmedabad dated 12.1.2004 was assailed before the High Court of Gujarat at Ahmedabad (hereinafter referred to as "the Gujarat High Court"), in *Union of India & Ors. vs. N.R. Parma & Ors.* (Special Civil Appeal no.3574 of 2004). Direct recruits separately filed Special Civil Application no.1512 of 2004 (*Virender Kumar & Ors. vs. Union of India & Ors.*). The Gujarat High Court by its order dated 17.8.2004, upheld the order of the CAT, Ahmedabad, dated 12.1.2004.

4. The Union of India assailed the order passed by the Gujarat High Court dated 17.8.2004 before this Court, through Civil Appeal nos.7514-7515 of 2005 (*Union of India & Ors. vs. N.R. Parmar & Ors.*). Direct recruits have also separately raised a challenge to the order passed by the Gujarat High Court dated 17.8.2004, by filing Civil Appeal No.7516 of 2005 (*Virender Kumar & Ors. vs. Union of India & Ors.*).

5. On the same subject, an identical controversy was

raised before the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as "the CAT, Principal Bench"). After a series of legal battles between the rivals, i.e., promotee Income Tax Inspectors and direct recruit Income Tax Inspectors (details whereof are being narrated at a later juncture), the CAT, Principal Bench passed an order dated 22.9.2004. The aforesaid order of the CAT, Principal Bench was assailed by direct recruit Income Tax Inspectors by filing Writ Petition (C) nos.3446-49 of 2005 before the Delhi High Court.

6. In Writ Petition (C) nos.3446-49 of 2005 a Division Bench of the Delhi High Court on 2.3.2005, while issuing notice, had stayed the impugned order passed by the CAT, Principal Bench dated 22.9.2004. Mukund Lal (one of the applicants in OA no.2107 of 2003, *Mahender Pratap & Ors. vs. Union of India & Ors.*), respondent no.9 in Writ Petition (C) nos.3446-49 of 2005, filed an application for vacation of the interim order passed by the Delhi High Court dated 2.3.2005 (whereby the order of the CAT, Principal Bench dated 22.9.2004 had been stayed). Since the application was not disposed of by the Delhi High Court within the time frame expressed in Article 226(3) of the Constitution of India, Mukund Lal aforesaid, approached this Court to assail the order dated 2.3.2005 by filing Civil Appeal nos.3876-3880 of 2007. Since the subject matter of the controversy in the aforesaid writ petitions was identical to the one raised in Civil Appeal nos.7514-7515 of 2005 (*Union of India & Ors. vs. N.R. Parma & Ors.*) and Civil Appeal no.7516 of 2005 (*Virender Kumar & Ors. vs. Union of India & Ors.*), the said writ petitions were transferred to be heard with the Civil Appeals referred to hereinabove. On transfer to this Court, the aforesaid writ petitions were re-numbered as Transferred Case (C) No.91 of 2006 (*Pritpal Singh & Ors. vs. Union of India & Ors.*).

7. OA no.270 of 2002 (*R.K. Bothra & Ors. vs. Union of India & Ors.*), OA no.271 of 2002 (*G.R. Chalana & Ors. vs.*

Union of India & Ors.), OA no.275 of 2002 (*Bhanwar Lal Soni & Ors. vs. Union of India & Ors.*), OA no.293 of 2002 (*Ranjeet Singh Rathore & Ors. vs. Union of India & Ors.*), were filed by promotee Income Tax Inspectors before the Central Administrative Tribunal, Jodhpur Bench, Jodhpur (hereinafter referred to as "the CAT, Jodhpur"), to assail the seniority-list wherein direct recruit Income Tax Inspectors, though appointed later, were placed higher in the seniority-list, i.e., above promotee Income Tax Inspectors, merely because they occupied vacancies of earlier years. The CAT, Jodhpur allowed the claim of the promotee Income Tax Inspectors by a common order dated 8.9.2003. The order passed by the CAT, Jodhpur dated 8.9.2003 was assailed before the High Court of Judicature for Rajasthan at Jodhpur (hereinafter referred to as "the Rajasthan High Court") by filing four writ petitions (DBC WP no.785 of 2004, *Union of India & Ors. vs. R.K. Bothra & Ors.*; DBC WP no.786 of 2004, *Union of India & Ors. vs. Banwari Lal Soni & Ors;* DBC WP no.787 of 2004, *Union of India & Ors. vs. Giriraj Prasad Sharma & Ors*; DBC WP no.788 of 2004, *Union of India & Ors. vs. G.R. Chalana & Ors.*). The petitioners in the aforesaid writ petitions before the Rajasthan High Court (i.e., Union of India) filed Transfer Petition (C) no.681 of 2006 under Article 139A(1) of the Constitution of India, seeking the transfer of the aforesaid writ petitions to this Court by asserting that the controversy raised therein was identical to the one pending adjudication before this Court in the Civil Appeals already mentioned above. Accordingly Transfer Petition (C) no.681 of 2006 was ordered to be tagged with Civil Appeal nos.7514-7515 of 2005 (and other connected matters).

8. Learned counsel for the rival parties are agreed, that the legal issue involved in all the matters, referred to hereinabove which are tagged together for disposal, is the same. During the course of hearing submissions came to be advanced first of all in Transferred Case no.91 of 2006. As such, the facts recorded in the said case have been adverted to while passing the instant judgment.

9. Appointment to the cadre of Income Tax Inspectors in the Income-Tax Department is made by way of promotion, as also, by direct recruitment in the ratio of 2:1 respectively, i.e., 66-2/3 by promotion and 33-1/3 by direct recruitment. The controversy in TC (C) no.91 of 2006 pertains to vacancies for the year 1993-94. The vacancies for the year 1993-94 which were identified to be filled up by way of promotion were referred to the Departmental Promotion Committee (hereinafter referred to as "the DPC"), whereas, those identified to be filled up by direct recruitment, were simultaneously referred to the Staff Selection Commission (hereinafter referred to as "the SSC").

10. Based on the recommendations made by the DPC, the Income-tax Department promoted five persons from the feeder cadre(s) (respondents 5, 7, 8, 10 and 11) as Income Tax Inspectors on 30.8.1993. A day later, on 1.9.1993, one more person (respondent no.6) was similarly promoted as Income Tax Inspector. Thereafter on 14.12.1993 yet another promotion (of respondent no.9) was ordered, in the same manner. Likewise, respondent no.12 was promoted as Income Tax Inspector on 8.9.1995. It is essential to emphasize, that all these promotions were ordered against promotee vacancies, identified for the year 1993-94.

11. On the receipt of a requisition pertaining to the post of Income Tax Inspectors from the Income Tax Department, the SSC issued advertisements in May/June, 1993, inviting applications for appointment by way of direct recruitment, against vacancies of Income Tax Inspectors of the year 1993-94. To fill up these vacancies, the SSC held the Inspectors of Central Excise and Income Tax Examination, 1993. All the petitioners in TC (C) no.91 of 2006 responded to the aforesaid advertisement. The said petitioners, were in the first instance, subjected to a written test conducted by the SSC in December, 1993. Thereafter, those who qualified the written examination, were invited for an interview/viva-voce. All the petitioners appeared for the viva-voce test conducted in October 1994. On

21/28.1.1995 the SSC declared the result of the Inspectors of Central Excise and Income-Tax Examination, 1993. The names of the petitioners in TC (C) no.91 of 2006, figured in the list of successful candidates. After verification of their character and antecedents, and after they were subjected to a medical fitness examination, the petitioners in TC (C) no.91 of 2006 were issued offers of appointment as Income Tax Inspectors in the Department of Income Tax. All the petitioners joined the cadre of Income Tax Inspectors between March and May, 1995.

12. In the interregnum, some promotee Income Tax Inspectors were promoted to the next higher post of Income Tax Officer. Certain direct recruits who considered themselves senior to the promoted Income Tax Officers, approached the CAT, Principal Bench, seeking consideration for promotion to the cadre of Income Tax Officers, from the date their juniors were promoted as such. Reference in this behalf may be made to two Original Applications being *K.C. Arora & Ors. vs. Union of India & Ors* (OA no.1478 of 1995) and *J.S. Tanwar & Ors. vs. Union of India & Ors.* (OA no.1899 of 1995). In the pleadings of the aforesaid two original applications, it was acknowledged by the official-respondents, that the impugned promotions in the aforesaid two original applications, had been made on purely adhoc basis, as the seniority list of the cadre of Income Tax Inspectors had not by then been finalized. It was also mentioned therein, that after the seniority-list is finalized, the official-respondents would review the promotions already made, and if necessary, a review DPC would also be convened. During the pendency of the aforesaid two original applications, the Income Tax Department issued a seniority list of the cadre of Income Tax Inspectors on 8.2.1999. The aforesaid factual-position was brought to the notice of the CAT, Principal Bench, whereupon, the aforesaid two original applications came to be disposed of with the following directions on 8.9.1999:

"6. In the result, both the OAs are disposed of as follows:

1. As admitted in the counter reply mentioned above and

in view of the seniority list dt.8.2.1999 the official respondents are directed to make promotions strictly in terms of the seniority list dt.8.2.1999. They must arrange a review DPC to consider the claim of the applicants for promotion. In case, the applicants are found fit and suitable for promotion by the review DPC then on the basis of the said seniority list, the applicants shall be granted promotion from the date their juniors got promotion. The applicants should get seniority over the juniors in case they are found suitable for promotion. However, the applicants will not be entitled to any monetary benefits. In such a case, the applicants' pay may be fixed notionally from the dates of their deemed retrospective promotion. However, the applicants will not be entitled to any actual arrears of monetary benefits till the date of actual order of promotion. The actual monetary benefits are prospective, only from the date of order of promotion and consequent date of assuming charge.

2. In the circumstances of the case, the official respondents are granted three months time from the date of receipt of copy of this order to comply with these directions.

3. In the circumstances of the case, there will be no order as to costs."

On 10.9.1999 a clarificatory order was passed by the CAT, Principal Bench. A relevant extract, of the aforesaid clarificatory order, is being reproduced hereunder:

"2. But, on reconsideration and on second thought, we feel that there is no necessity to allow this M.A. and to recall our order dt.8.9.99 for the simple reason that our order will not prejudice the case of the private respondents in any way. What we have stated in our order dt.8.9.1999 is that the official respondents should strictly enforce the seniority list dt.8.2.99 and then on that basis hold review DPC and consider the claim of the applicants for promotion. This order we have passed on the basis of the admission made

by the official respondents in their reply. Now, the private respondents are contending that the seniority list dt.8.2.1999 has been challenged by the applicants in OA 676/99 and other cases and there is a stay order granted by the Delhi High Court in C.W. No.3468/99 staying the official respondents holding a review DPC on the basis of the impugned seniority list dt.8.2.1999.

3. We may place it on record that we have not considered the correctness and legality of the impugned seniority list dt.8.2.1999. We have simply directed the administration to follow the latest seniority list as admitted by the official respondents in their reply. We may also place it on record that we have not expressed any opinion on the correctness or legality of the seniority list dt.8.2.1999. We have simply directed the Administration to follow the latest seniority list which they have issued and considers the case of the applicants for promotion. If the seniority list itself is in dispute and its correctness is challenged by other officials, then naturally the department will not be able to take any decision unless the seniority list is upheld by the Tribunal. If there is any such stay order granted by any Tribunal or High Court, then naturally our direction in our order dt.8.9.1999 will be subject to such directions or stay orders passed by any Tribunal or any High Court. We also place on record that we have not expressed any opinion whether the promotion of private respondents was regular or ad-hoc, but only referred to the contentions in the reply statement without giving a finding on that point. If the private respondents feel that their promotions were regular, then it is for them to take up the stand whenever that occasion arises. But, we have not given any finding on that disputed question of fact. In view of this clarifications issued by us, there is no necessity to allow the M.A. or recall our order dt.8.9.1999.

4. In the result, the M.A. No.1938/99 is disposed of subject to above observations. No order as to costs."

13. Some direct recruits again approached the CAT, Principal Bench by filing Original Application no.2307 of 1999 (*Sanjeev Mahajan & Ors. vs. Union of India & Ors.*) alleging, that while drawing the seniority list dated 8.2.1999, the Department of Income Tax had not applied the "quota" and "rota" principle. On 23.2.2000, the CAT, Principal Bench disposed of OA no.2307 of 1999, and other connected original applications (*Krishan Kanahiya & Ors. vs. Union of India,* OA No.676 of 1999; *H.P.S Kharab & Ors. vs. Union of India & Ors.,* OA no.387 of 1999; *Muneesh Rajani & Ors. vs. Union of India & Ors.,* OA no.964 of 1999) by a common order. In paragraph 7 of its order the CAT, Principal Bench, narrated the issues which came up for its determination as under:

> "7. The short question which is posed for our consideration is as to what is the precise date on which direct recruits can be considered for seniority vis-à-vis the promotees. Whether it is (i) the date on which the vacancies have arisen; (ii) the date when the same have been notified by the department by sending requisitions to the Staff Selection Commission; (iii) the date on which selection by the Commission is made; (iv) the date when the selection is reported to the department; or (v) the date on which the direct recruit actually assumes office."

During the course of hearing of the aforementioned original applications, it was acknowledged by the rival parties, that the questions under consideration had to be determined with reference to instructions contained in two office memoranda dated 7.2.1986 and 3.7.1986, issued by the Department of Personnel & Training (hereinafter referred to as the "DoPT"). Based on the aforesaid office memoranda, the CAT, Principal Bench, vide its order dated 23.2.2000 quashed the seniority-list dated 8.2.1999 by holding as under:

> "8. In our judgment, for deciding the aforesaid controversy a reference to the office memorandum of 7.2.1986 may usefully be made. In the earlier O.M. it has inter alia been provided as under:

.....the relative seniority of direct recruits and promotees shall be determined according to rotation of vacancies between the direct recruits and the promotees, which will be based on the quota of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules……

…….the present practice of keeping vacant slots for being filled up by direct recruits of later years, thereby giving them unintended seniority over promotees who are already in position, would be dispensed with.

Thus, if adequate number of direct recruits do not become available in any particular year, rotation of quotas for the purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees. In other words, to the extent direct recruits are not available, the promotees will be bunched together at the bottom of the seniority list below the last position upto which it is possible to determine seniority, on the basis of rotation of quotas with reference to the actual number of direct recruits who become available. The unfilled direct recruitment quota vacancies would, however, be carried forward and added to the corresponding direct recruitment vacancies of the next year (and to subsequent years where necessary) for taking action for direct recruitment for the total number according to the usual practice. Thereafter, in the year while seniority will be determined between direct recruits and promotees, to the extent of the number of vacancies for direct recruits and promotees as determined according to the quota for the year, the additional direct recruits selected against the carried forward vacancies of the previous year would be placed on en bloc below

the last promotee for direct recruit (as the case may be), in the seniority list based on the rotation of vacancies for the year. The same principle holds good for determining seniority in the event of carry forward, if any, of direct recruitment or promotion quota vacancies (as the case may be) in the subsequent years.

ILLUSTRATION:

Where the Recruitment Rules provide 50% of the vacancies of grade to be filled by promotion and the remaining 50% by direct recruitment, and assuming there are ten vacancies in the grade arising in each of the years 1986 and 1987 and that two vacancies intended for direct recruitment, remain unfilled during 1986 and they could be filled during 1987. The seniority position of the promotees and direct recruits of these two years will be as under:

1986	1987
1. P1	9. P1
2. D1	10. D1
3. P2	11. P2
4. D2	12. D2
5. P3	13. P3
6. D3	14. D3
7. P4	15. P4
8. P5	16. D4
	17. P5
	18. D5
	19. D6
	20. D7

It is not necessary to make a reference to the subsequent office memorandum of 3.7.1986 as the same is nothing but a repetition of the instructions contained in the office memorandum dated 7.2.1986.

9. We have heard the learned counsel appearing for the contending parties at considerable length and we are of the view that as far as inter se seniority is concerned, the same has to be based on the vacancies arising for a particular year. Thereafter, the seniority has to be determined on the basis of rota quota rule which has been illustrated in the aforesaid illustration contained in the O.M. of 7.2.1986. As far as direct recruits are concerned, the crucial date on which they have to be considered will be the date when the Staff Selection Commission makes the selection of direct recruits. Hence the date of forwarding the dossier of direct recruits by the Commission to the department, date of actual joining or taking over charge by the direct recruit would all be irrelevant. It would be the date on which the Staff Selection Commission makes the selection of the direct recruits that will be the material date for fixing the seniority. This would avoid injustice being done on account of administrative delays, i.e., delay in matter of issue of orders of appointment and posting and of actual taking over of charge. Similar will be the position in regard to promotees. It will be the date on which the promotee is selected for promotion by the departmental promotion committee. Hence the date on which the promotee actually assumes charge of the promotional post similarly will be relevant. The seniority list which is impugned in the present proceedings, it appears, has not followed the instructions which we are not issuing in the present order.

10. In the circumstances, the said seniority list is hereby quashed and set aside. Respondent no.3 is directed to recast the seniority list on the basis of directions contained

in this order. The present order will also apply to seniority list of UDCs which is the subject matter of OA No.676/1999.

11. All the OAs stand disposed of on the above lines. There shall, however, be no order as to costs."

14. Direct recruit Income Tax Inspectors, assailed the interpretation placed by the CAT, Principal Bench, on the office memorandum dated 7.2.1986 (in its order dated 23.2.2000), by filing a number of writ petitions (Civil Writ Petition No.460 of 2000, *Sanjiv Mahajan & Ors. vs. Union of India & Ors;* Civil Writ Petition No.670 of 2002, *Pankaj Saxena vs. Union of India & Ors.;* Civil Writ Petition No.7356 of 2000, *Chief Commissioner of Income Tax vs. Sanjiv Mahajan & Ors;* Civil Writ Petition No.5549 of 2001, *Kamal Khanna & Ors. vs. Union of India & Ors.)* before the Delhi High Court. The aforesaid writ petitions were disposed of by the Delhi High Court by a common order dated 25.9.2002, whereby, the order dated 23.2.2000 passed by the CAT, Principal Bench, was set aside with the following observations:

"23. Having regard to the fact that the judgment of the learned Tribunal is absolutely cryptic and no cogent or valid reason has been assigned in support thereof, and as the contentions raised before the Tribunal as also before us have not been considered at all, we are of the opinion that for determination of the crucial questions where for, it may be necessary, for the parties to adduce further evidence, the matter may be remitted back to the learned Tribunal for consideration of the matter afresh and the parties may bring on record such other or further materials as may be directed by the learned Tribunal. The impugned judgment is, therefore, set aside. However, having regard to the facts and circumstances of the case, we would request the learned Tribunal to consider the desirability of disposing of the matter as expeditiously as possible.

These writ petitions are disposed of with the aforementioned observations and directions without any order as to costs."

15. Consequently, the matters referred to above went back to the CAT, Principal Bench for re-adjudication. During their pendency before the CAT, Principal Bench, an additional affidavit dated 12.3.2003 was jointly filed by the official-respondents. In the aforesaid additional affidavit it was, inter alia, pleaded as under:

"Para 4

(a) ….. …..

(b) The respondent has since obtained the advice of the Central Board of Direct Taxes and the Deptt. of Personnel and Training which is the nodal Ministry for promulgation and monitoring of the relevant rules and regulations, issuing Office Memorandums and the clarifications thereof. Based on the advice of the DOP&T there has been a change in the stand taken by the respondent before this Hon'ble Tribunal and as such, an application for amendment was made before the Hon'ble Delhi High Court which allowed the application and has also taken note of the same in its judgment dt.25.9.2002. In view of the revised position, the seniority list dt.8.2.1999 was not in conformity with the clarifications provided by the DoP&T with reference to its O.M. Dt.7.2.1986 and 2.7.1986. Relevant extracts based on the DoP&T's O.M. dt.7.2.1986 and 3.7.1986 and the clarifications furnished by that department which formed part of the application for amendment of the writ petition which was filed before the Hon'ble Delhi High Court is annexed (Annexure R-1).

(c) to (q) ….. ….."

The applicants before the CAT, Principal Bench were direct recruits. They were satisfied with the latest position adopted by the official respondents before the CAT, Principal Bench

through the additional affidavit dated 12.3.2003. They therefore, chose not to press their applications any further. The CAT, Principal Bench passed the following order on 26.4.2003:

"Learned counsel for the applicants, keeping in view the amended reply dated 12.3.2003, does not press the present application.

Accordingly, the OA is dismissed as withdrawn."

16. The Income Tax Department thereupon, issued another seniority list of Income Tax Inspectors, dated 17.7.2003, by following the "quota" and "rota" principle prescribed in the office memoranda dated 7.2.1986 and 3.7.1986. The aforesaid seniority-list was assailed by promotee Income Tax Inspectors before the CAT, Principal Bench, through OA no.2068 of 2003 (*C.P.S. Yadav & Anr. vs. Union of India & Ors.*), OA no.2107 of 2003 (*Mahender Pratap & Ors. vs. Union of India & Ors.*), OA No.124 of 2004 (*S.K. Puri-II & Anr. vs. Union of India & Ors.*). The CAT, Principal Bench, by a common order dated 22.9.2004 allowed the claim preferred by the promotee Income Tax Officers, and as such, quashed the seniority list dated 17.7.2003. The direct recruit Income Tax Inspectors, who were respondents in the original applications referred to above, assailed the order passed by the CAT, Principal Bench, dated 22.9.2004, before the Delhi High Court by filing Writ Petition (C) No.3446-49 of 2005 (*Pritpal Singh & Ors. vs. Union of India & Ors.*). As already mentioned hereinabove, the aforesaid writ petitions were transferred to this Court and assigned TC (C) no.91 of 2006.

17. During the course of hearing, learned counsel for the rival parties agreed, that the seniority dispute between the promotee and direct recruit Income Tax Inspectors of the Income Tax Department was liable to be determined on the basis of office memoranda dated 7.2.1986 and 3.7.1986, read with the clarificatory office memoranda and office notes. It is important to notice, before embarking upon the claim of the

rival parties, that none of the parties have assailed the vires of the office memoranda dated 7.2.1986 and 3.7.1986 (or for that matter, the clarificatory office memoranda/office notes). It is therefore apparent, that the dispute between the rival parties is nothing but, the true and correct interpretation of the office memoranda dated 7.2.1986 and 3.7.1986, read with clarificatory office memoranda and office notes. It is therefore, that the matter in hand is being examined in the light of the aforesaid office memoranda.

18. General principles for determining seniority in Central services are shown to have been laid down in an annexure to an office memorandum dated 22.11.1959 issued by the Government of India, Ministry of Home Affairs (hereinafter referred to as "the OM dated 22.11.1959"). Paragraph 6 of the annexure, referred to above, laid down the manner of determining inter se seniority between direct recruits and promotees. Paragraph 6 is being extracted hereunder:

> "6. **Relative seniority of Direct Recruits and Promotees.**
>
> The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quotas of vacancies reserved for direct recruitment and promotion respectively in the Department Rules."

It is apparent from the above extract of the OM dated 22.11.1959, that the "quota" between promotees and direct recruits was to be read into the seniority rule. The OM also provided for a definite rotation of seniority points ("rota") between promotees and direct recruits. The rotation provided for was founded on the concept of rotation of quotas between promotees and direct recruits. It is therefore apparent, that under the OM dated 22.11.1959 inter se seniority between the promotees and direct recruits was based on the "quota" and

"rota" principle. The same has been meaningfully described as "rotation of quotas" in some of these instruments.

19. The aforesaid prescription of the manner of determining inter se seniority between the direct recruits and promotees, determined through the OM dated 22.11.1959, was modified by an office memorandum dated 7.2.1986, issued by the Government of India, Department of Personnel and Training (hereinafter referred to as, "the OM dated 7.2.1986"). The modification introduced through the OM dated 7.2.1986 was to redress a situation wherein, vacancies of one of the sources were kept (or remained) unfilled during the process of selection, and the unfilled vacancies, had to be filled up through "later" examinations or selections. For the determination of seniority, in the contingency wherein the process of recruitment resulted in filling the vacancies earmarked for the two sources of recruitment, the manner of determining inter se seniority between promotees and direct recruits, expressed in the OM dated 22.11.1959 remained unaltered. But where the vacancies could not be filled up, and unfilled vacancies had to be filled up "later" through a subsequent process of selection, the manner of determining inter se seniority between promotees and direct recruits, was modified.

20. Since it is the case of the rival parties before us, that the OM dated 7.2.1986 is the principal instruction, on the basis whereof the present controversy is to be settled, the same is being extracted hereunder in its entirety.

> **"The 7 February, 1986.**
>
> **Office Memorandum**
>
> Subject: General Principles for determining the seniority of various categories of persons employed in Central Services.
>
> As the Ministry of Finance etc. are aware, the General Principles for determination of seniority in the Central Services are contained in the Annexure to Ministry of Home

Affairs O.M. No. 9/11/55-RPS dated 22nd December 1959. According to Paragraph-6 of the said Annexure, the relative seniority of direct recruits and promotees shall be determined according to rotation of vacancies between the direct recruits and the promotees, which will be based on the quota of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules. In the Explanatory Memorandum to these Principles, it has been stated that a roster is required to be maintained based on the reservation of vacancies for direct recruitment and promotion in the Recruitment Rules. Thus where appointment to a grade is to be made 50% by direct recruitment and 50% by promotion from a lower grade, the inter-se seniority of direct recruits and promotees is determined on 1:1 basis.

2. While the above mentioned principle was working satisfactorily in cases where direct recruitment and promotion kept pace with each other and recruitment could also be made to the full extent of the quotas as prescribed, in cases where there was delay in direct recruitment or promotion, or where enough number of direct recruits or promotees did not become available, there was difficulty in determining seniority. In such cases, the practice followed at present is that the slots meant for direct recruits or promotees, which could not be filled up, were left vacant, and when direct recruits or promotees became available through later examinations or selections, such persons occupied the vacant slots, thereby became senior to persons who were already working in the grade on regular basis. In some cases, where there was short-fall in direct recruitment in two or more consecutive years, this resulted in direct recruits of later years taking seniority over some of the promotees with fairly long years of regular service already to their credit. This matter had also come up for consideration in various Court Cases both before the High Courts and the Supreme Court and in several cases the

relevant judgement had brought out the inappropriateness of direct recruits of later years becoming senior to promotees with long years of service.

3. This matter, which was also discussed in the National Council has been engaging the attention of the Government for quite some time and it has been decided that in future, while the principle of rotation of quotas will still be followed for determining the inter-se seniority of direct recruits and promotees, the present practice of keeping vacant slots for being filled up by direct recruits of later years, thereby giving them unitended seniority over promotees who are already in position, would be dispensed with. Thus, if adequate number of direct recruits do not become available in any particular year, rotation of quotas for purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees. In other words, to the extent direct recruits are not available, the promotees will be bunched together at the bottom of the seniority list, below the last position upto which it is possible to determine seniority on the basis of rotation of quotas with reference to the actual number of direct recruits who become available. The unfilled direct recruitment quota vacancies would, however, be carried forward and added to the corresponding direct recruitment vacancies of the next year (and to subsequent years where necessary) for taking action for direct recruitment for the total number according to the usual practice. Thereafter, in that year while seniority will be determined between direct recruits and promotees, to the extent of the number of vacancies for direct recruits and promotees as determined according to the quota for that year, the additional direct recruits selected against the carried forward vacancies of the previous year would be placed en-bloc below the last promotee (or direct recruit as the case may be) in the seniority list based on the rotation of vacancies for that year. The same principle holds good in

determining seniority in the event of carry forward, if any, of direct recruitment or promotion quota vacancies (as the case may be) in the subsequent years.

Illustration:

Where the Recruitment Rules provide 50% of the vacancies in a grade to be filled by promotion and the remaining 50% by direct recruitment, and assuming there are 10 vacancies in the grade arising in each of the years 1986 and 1987 and that 2 vacancies intended for direct recruitment remained unfilled during 1986 and they could be filled during 1987, the seniority position of the promotees and direct recruits of these two years will be as under:

1986	**1987**
1. P1	9. P1
2. D1	10. D1
3. P2	11. P2
4. D2	12. D2
5. P3	13. P3
6. D3	14. D3
7. P4	15. P4
8. P5	16. D4
	17. P5
	18. D5
	19. D6
	20. D7

4. In order to help the appointing authorities in determining the number of vacancies to be filled during a year under each of the methods of recruitment prescribed, a Vacancy Register giving a running account of the vacancies arising and being filled from year to year may be maintained in the proforma enclosed.

5. With a view to curbing any tendency of under-reporting/ suppressing the vacancies to be notified to the concerned authorities for direct recruitment, it is clarified that promotees will be treated as regular only to the extent to which direct recruitment vacancies are reported to the recruiting authorities on the basis of the quotas prescribed in the relevant recruitment rules. Excess promotees, if any, exceeding the share falling to the promotion quota based on the corresponding figure, notified for direct recruitment would be treated only as ad-hoc promotees.

6. The General Principles of seniority issued on 22nd December, 1959 referred to above, may be deemed to have been modified to that extent.

7. These orders shall take effect from 1st March 1986. Seniority already determined in accordance with the existing principles on the date of issue of these orders will not be reopened. In respect of vacancies for which recruitment action has already been taken, on the date of issue of these orders either by way of direct recruitment or promotion, seniority will continue to be determined in accordance with the principle in force prior to the issue of this O.M.

8. Ministry of Finance etc. are requested to bring these instructions to the notice of all the Attached/Subordinate Offices under them to whom the General Principles of Seniority contained in O.M. dated 22.12.1959 are applicable within 2 week as these orders will be effective from the next month.

Sd/- Joint Secretary to the Govt. of India"

(emphasis is ours)

Since the OM dated 7.2.1986 would primarily constitute the

determination of the present controversy, it is considered just and appropriate to render an analysis thereof. The following conclusions are apparent to us, from a close examination of the OM dated 7.2.1986:

(a) Paragraph 2 of the OM dated 7.2.1986 first records the existing manner of determining inter se seniority between direct recruits and promotees (i.e., as contemplated by the OM dated 22.11.1959), namely, "…the slots meant for direct recruits or promotees, which could not be filled up, were left vacant, and when direct recruits or promotees become available through later examinations or selections, such persons occupied the vacant slots, (and) thereby became senior to persons who were already working in the grade on regular basis. In some cases, where there was shortfall in direct recruitment in two or more consecutive years, this resulted in direct recruits of later years taking seniority over some of the promotees with fairly long years of regular service to their credit….". The words, "when direct recruits or promotees become available through later examination or selections", clearly connotes, that the situation contemplated is one where, there has been an earlier examination or selection, and is then followed by a "later" examination or selection. It is implicit, that in the earlier examination or selection there was a shortfall, in as much as, the available vacancies for the concerned recruitment year could not all be filled up, whereupon, further examination(s) or selection(s) had to be conducted to make up for the shortfall. In the instant situation, the earlier OM dated 22.11.1959 contemplated/provided, that slots allotted to a prescribed source of recruitment which remained vacant, would be filled up only from the source for which the vacancy was reserved, irrespective of the fact that a candidate from the source in question became available in the next process of examination or selection, or even thereafter. In other words the "rotation of quotas" principle was given effect to in letter and spirit under the OM dated 22.11.1959, without any scope of relaxation.

(b) The position expressed in the sub-paragraph (a) above,

was sought to be modified by the OM dated 7.2.1986, by providing in paragraph 3 thereof, that the earlier "…principle of rotation of quotas would still be followed for determining the inter se seniority of direct recruits and promotees…" except when the direct recruit vacancies were being "… filled up by direct recruits of later years…". Read in conjunction with paragraph 2 of the OM dated 7.2.1986, the words "…direct recruits of later years…" must be understood to mean, direct recruits who became available through "later" examination(s) or selection(s). Essentially the "later" examination(s) or selection(s) should be perceived as those conducted to fill up the carried forward vacancies, i.e., vacancies which could not be filled up, when the examination or selection for the concerned recruitment year was originally/ first conducted. This change it was clarified, was made to stop direct recruits of "later" years, from gaining "…unintended seniority over promotees who are already in position…", as High Courts and the Supreme Court had "…brought out the inappropriateness…" thereof. It is therefore apparent, that the OM dated 7.2.1986 partially modified the "rotation of quotas" principle in the determination of inter se seniority originally expressed in the OM dated 22.11.1959. The OM dated 7.2.1986, provided that the "rota" (rotation of quotas) would be adhered to "…only to the extent of available direct recruits and promotees…", i.e., for promotee and direct recruit vacancies which could be filled up through the original/first process of examination or selection conducted for the recruitment year in which the vacancies had arisen.

(c) For the vacancies remaining unfilled when the same were originally/first sought to be filled up, the slots available under the "rota" principle under the OM dated 22.11.1959, would be lost to the extent of the shortfall. In other words, the "rotation of quotas" principle would stop operating after, "…the last position upto which it is (was) possible to determine seniority on the basis of rotation of quotas…", for the concerned recruitment year.

(d) Paragraph 3 of the OM dated 7.2.1986 provided, the manner of assigning seniority to vacancies carried forward on account of their having remained unfilled in the original/first examination or selection process. The change contemplated in the OM dated 7.2.1986, referred to hereinabove, was made absolutely unambiguous by expressing that, "The unfilled direct quota vacancies would …be carried forwarded and added to the corresponding direct recruitment vacancies of the next year…..". It is therefore apparent, that seniority of carried forward vacancies would be determined with reference to vacancies of the recruitment year wherein their selection was made, i.e., for which the "later" examination or selection was conducted.

(e) The OM dated 7.2.1986 formulated the stratagem to be followed, where adequate number of vacancies in a recruitment year could not be filled up, through the examination or selection conducted therefor. The OM provided, "…to the extent direct recruits are not available, the promotees will be bunched together at the bottom of the seniority list, below the last position upto which it is (was) possible to determine the seniority on the basis of rotation of quotas with reference to the actual number of direct recruits who become available...".

(f) Paragraph 3 of the OM dated 7.2.1986 further postulated, that the modification contemplated therein would be applied prospectively, and that, "…the present practice of keeping vacant slots for being filled up by direct recruits of later years, …over promotees who are (were) already in position, would be dispensed with…". It is therefore apparent, that the slots assigned to a particular source of recruitment, would be relevant for determining inter se seniority between promotees and direct recruits, to the extent the vacancies could successfully be filled up (and the unfilled slots would be lost) only for vacancies which arose after the OM dated 7.2.1986, came to be issued.

(g) The illustration provided in paragraph 3 of the OM

dated 7.2.1986 fully substantiates the analysis of the OM dated 7.2.1986 recorded in the foregoing sub-paragraphs. In fact, the conclusions drawn in the foregoing sub-paragraphs have been drawn, keeping in mind the explanatory illustration narrated in paragraph 3 of the OM dated 7.2.1986.

(h) In paragraph 6 of the OM dated 7.2.1986 it was asserted, that the general principles for determining seniority in the OM dated 22.11.1959 were being "modified" to the extent expressed (in the OM dated 7.2.1986). The extent of modification contemplated by the OM dated 7.2.1986 has already been delineated in the foregoing sub-paragraphs. Para 6 therefore leaves no room for any doubt, that the OM dated 22.11.1959 stood "amended" by the OM dated 7.2.1986 on the issue of determination of inter se seniority between direct recruits and promotees, to the extent mentioned in the preceding sub-paragraphs. The said amendment was consciously carried out by the Department of Personnel and Training, with the object of remedying the inappropriateness of direct recruits of "later" examination(s) or selection(s) becoming senior to promotees with long years of service, in terms of the OM dated 22.11.1959.

21. The O.M. dated 7.2.1986, was followed by another Office Memorandum issued by the Government of India, Department of Personnel and Training, dated 3.7.1986 (hereinafter referred to as, "the O.M. dated 3.7.1986"). The purpose of the instant O.M., as the subject thereof suggests, was to "consolidate" existing governmental orders on the subject of seniority. Paragraphs 2.4.1 to 2.4.4 of the O.M. dated 3.7.1986 dealt with the issue of inter se seniority between the direct recruits and promotees. The same are accordingly being reproduced hereunder:-

"2.4.1 <u>The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quota of</u>

vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules.

2.4.2 If adequate number of direct recruits do not become available in any particular year, rotation of quotas for the purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees.

In other words, to the extent direct recruits are not available the promotees will be bunched together at the bottom of the seniority list below the last position upto which it is possible to determine seniority, on the basis of rotation of quotas with reference to the actual number of direct recruits who become available. The unfilled direct recruitment quota vacancies would, however, be carried forward and added to the corresponding direct recruitment vacancies of the next year (and to subsequent years where necessary) for taking action for direct recruitment for the total number according to the usual practice. Thereafter in that year while seniority will be determined between direct recruits and promotees, to the extent of the number of vacancies for direct recruits and promotees as determined according to the quota for that year, the additional, direct recruits selected against the carried forward vacancies of the previous year would be placed en-bloc below the last promotee (or direct recruit as the case may be), in the seniority list based on the rotation of vacancies for that year. The same principle holds good for determining seniority in the event of carry forward, if any, of direct recruitment or promotion quota vacancies (as the case may be) in the subsequent year.

ILLUSTRATION: Where the Recruitment Rules

provide 50% of the vacancies of a grade to be filled by promotion and the remaining 50% by direct recruitment, and a assuming there are ten vacancies in the grade arising in each of the year 1986 and 1987 and that two vacancies intended for direct recruitment remain unfilled during 1986 and they could be filled during 1987, the seniority position of the promotees and direct recruits of these two years will be as under:

1986	**1987**
1. P1	9. P1
2. D1	10. D1
3. P2	11. P2
4. D2	12. D2
5. P3	13. P3
6. D3	14. D3
7. P4	15. P4
8. P5	16. D4
	17. P5
	18. D5
	19. D6
	20. D7

2.4.3 In order to help the appointing authorities in determining the number of vacancies to be filled during a year under each of the methods of recruitment prescribed, a Vacancy Register giving a running account of the vacancies arising and being filled from year to year may be maintained in the proforma enclosed.

2.4.4 With a view to curbing any tendency of under-

reporting/suppressing the vacancies to be notified to the concerned authorities for direct recruitment, it is clarified that promotees will be treated as regular only to the extent to which direct recruitment vacancies are reported to the recruiting authorities on the basis of the quotas prescribed in the relevant recruitment rules. Excess promotees, if any, exceeding the share failing to the promotion quota based on the corresponding figure, notified for direct recruitment would be treated only as ad-hoc promotees."

(emphasis is ours)

The following conclusions have been drawn by us from the O.M. dated 3.7.1986:-

(a) If adequate number of direct recruits (or promotees) do not become available in any particular year, "rotation of quotas" for the purpose of determining seniority, would stop after the available direct recruits and promotees are assigned their slots for the concerned recruitment year.

(b) To the extent direct recruits were not available for the concerned recruitment year, the promotees would be bunched together at the bottom of the seniority list, below the last position upto which it was possible to determine seniority, on the basis of rotation of quotas. And vice versa.

(c) The unfilled direct recruitment quota vacancies for a recruitment year, would be carried forward to the corresponding direct recruitment vacancies of the next year (and to subsequent years, where necessary). And vice versa. In this behalf, it is necessary to understand two distinct phrases used in the OM dated 3.7.1986. Firstly, the phrase "in that year" which connotes the recruitment year for which specific vacancies are earmarked. And secondly, the phrase "in the subsequent year", which connotes carried forward vacancies, filled in addition to,

vacancies earmarked for a subsequent recruitment year.

(d) The additional direct recruits selected, against the carried forward vacancies of the previous year, would be placed en-bloc below the last promotee. And vice versa.

It is, therefore, apparent, that the position expressed in the O.Ms. dated 7.2.1986 and 3.7.1986, on the subject of inter se seniority between direct recruits and promotees, was absolutely identical. This is indeed how it was intended, because the OM dated 3.7.1986 was only meant to "consolidate" existing governmental instructions, on the subject of seniority.

22. Chronologically, it is necessary, at the present juncture to refer to an Office Note of the Department of Personnel and Training, Establishment (D) Section, dated 20.12.1999 (hereinafter referred to as, "the O.N. dated 20.12.1999"). Undoubtedly, an office note has no legal sanction, and as such, is not enforceable in law. Yet an office note is certainly relevant for determining the logic and process of reasoning which prevailed at the relevant point of time. These would aid in the interpretation of the binding office memoranda, only when the language of the office memoranda is ambiguous. Ofcourse, only where there is no conflict between the two i.e., the office note and the office memoranda sought to be interpreted. In the aforesaid background, and for the aforesaid limited purpose, reference is being made to the O.N. dated 20.12.1999. The same is being reproduced hereunder:-

"Department of Personnel and Training

Estt.(D) Section

Ref. Preceding notes.

It is not clear whether the instructions contained in our O.M. dated 07.02.1986 has been interpreted correctly. It is clarified that on a perusal of our O.M. dated 22.12.1959 read with our O.M. dated 07.02.1986 it will be clear that the inter-se seniority of direct recruits and

promotees will have to be fixed by following the principle of rotation of quotas prescribed for them in the recruitment rules subject to the condition that the rotation as per quota will be made only upto the actual number of DRs/ Promotees available and to the extent direct recruits/ promotees do not become available in any recruitment year the promotees or the direct recruits as the case may be will be bunched together at the bottom of the seniority list. In other words, only where appointing authority has not been able to fill up the post inspite of best efforts with reference to the requisition for the particular recruitment year in question, the instructions contained in O.M. dated 07.02.1986 will come into operation as will be clear from para 5 thereof. For example, if the quota in the Rrs and DR and promotee is fifty-fifty and if the UPSC has recommended only 2 DRs against the three vacancies of a particular recruitment year, say 1987 for which requisition was sent to them in 1987 and even if both the DRs had joined in 1988 the inter-se seniority of DRs and promotees may be fixed in the ratio of 1:1 upto the number of DRs available i.e. the first four places in the seniority list will be assigned alternatively to DR and promotee, the 5th in the seniority list which would have normally gone to DR will not go to the promotee because of the non-availability of DR and the 6th will in any case go to promotee. But for the instructions contained in our O.M. dated 07.02.1986, the 5th place would have been kept reserved for the DR as and when it is actually filled by DR, even if it takes a few years. However, after the issue of our O.M. dated 07.02.1986, it is no longer kept vacant but is assigned to the promotee who is available. It is not necessary that the DR for 1987 vacancy should join in 1987 itself. It would suffice if action has been initiated for 1987 DR vacancies in 1987 itself. This is because, in a case of direct recruitment, if the administrative action in filling up the post by DR takes more than a year or so the individual cannot

be held responsible for such administrative delay and hence it would not be appropriate to deprive him of his due seniority for delay on the part of administration in completing his selection by direct recruitment. In fact ordinarily the process of direct recruitment takes more than a year to be completed and if DR is to join in the same year for getting seniority of that year then no DR will get seniority of the same year because as already stated the DR process takes more than a year. Hence, as already stated initiation of action for recruitment in sufficient.

It is not clear whether our O.M. of 07.02.1986 has been interpreted correctly on the above line by the Deptt. of Revenue. Hence the above position may be suitably incorporated in the para-wise comments prepared by them and it may be modified accordingly. Subject to this, the parawise comments appear to be generally in order. It is however for the Department of Revenue to ensure the correctness of the factual position mentioned therein.

Deptt. of Revenue may please see.

Sd/-
(K. Muthu Kumar)
Under Secretary

3357/DIR E 1/99
20/12

Dir (E-1)

The clarification given above needs to be adhered to as we have been consistently advising on the aforesaid lines. Any other interpretation of the relevant instructions would be illogical.

Sd/-
DIR (E-1)
21.12.99"

(emphasis is ours)

The logic and the process of reasoning, emerging from the O.N. dated 20.12.1999, as they appear to us, are analysed below:-

(a) Only where the appointing authority has not been able to fill up the vacancies earmarked for direct recruits/promotees, with reference to the requisition for a particular recruitment year, inspite of its best efforts, the instructions contained in O.M. dated 7.2.1986 will come into operation.

(b) It is not necessary, that the direct recruits for vacancies of a particular recruitment year, should join within the recruitment year (during which the vacancies had arisen) itself. As such, the date of joining would not be a relevant factor for determining seniority of direct recruits. It would suffice if action has been initiated for direct recruit vacancies, within the recruitment year in which the vacancies had become available. This is so, because delay in administrative action, it was felt, could not deprive an individual of his due seniority. As such, initiation of action for recruitment within the recruitment year would be sufficient to assign seniority to the concerned appointees in terms of the "rotation of quotas" principle, so as to arrange them with other appointees (from the alternative source), for vacancies of the same recruitment year.

23. Following the ON dated 20.12.1999, the Department of Personnel and Training, Establishment (D) Section, examined the issue in yet another Office Note dated 2.2.2000 (hereinafter referred to as "the ON dated 2.2.2000"). Just like the earlier ON dated 20.12.1999, the instant ON dated 2.2.2000 also has no legal sanction, and as such, is not enforceable in law. But just like the earlier office note, the instant ON dated 2.2.2000 would also be relevant in determining the logic and process of reasoning which prevailed at the relevant point of time. This would aid in the interpretation of binding office memoranda, only where the language is ambiguous, and only if there is no conflict between the two (the office note and the office memoranda, sought to be interpreted). In the aforesaid

background, and for the aforesaid limited purpose, reference is also being made to the ON dated 2.2.2000. The same is being extracted hereunder:

"Department of Personnel & Training
Estt. (D) Section

Notes from p.17/ante may please be seen with reference to our earlier note on Pp.9-10 ante.

With reference to 'X' on p.18 and 'Y' on p.19/ante, it will be clear from our note on Pp.9-10/ante that <u>if action for the Recruitment Year 1986-1987 has been initiated at any time during that Recruitment Year even if the exam is held in 1988 and the results are declared in 1989 and the candidate join only in 1990, since the action for recruitment was initiated in 1986-1987 itself merely because the process of recruitment took so long for which the candidates cannot be blamed and since the responsibility for the delay in completing the process of recruitment squarely lies with the administration, it would not be appropriate to deprive the candidates of their due seniority of 1986-87. Consequently, if action was initiated during the Recruitment Year 1986-1987 even if it culminates in the joining by the selected candidates only in 1990, they will get seniority of 1986-1987. This applies equally to DRs as well as promotees. In other words, if such DRs of 1986-1987 ultimately join in 1990 yet they will be rotated with promotees of 1986-87</u>.

As regards point (1) on page 19/N, <u>it is clarified that "initiation of action for recruitment/initiation of recruitment process" would refer to the date of sending the requisition to the recruiting authority for a particular Recruitment Year</u> in question.

Points (2) & (3) are the concern of Estt.(B).

As regards point (4), it is clarified that as already

stated the concept of initiation of action for recruitment is applicable equally to direct recruits and promotees.

As regards point (5), it may be stated that even if DOPT is also one of the respondents, it is for the Administrative Ministry/Department who are concerned with the persons involved in the CAT court case to take necessary action on behalf of DOPT also. In any case, our comments are already contained in our earlier note as well as this note. It is for the Administrative Ministry/Department to incorporate them suitably in the counter reply. Hence, the counter reply on Pp.159-175/Cor. May be suitably modified in the light of our advice on Pp.9-10/ante as already advised at 'X' on p.10/ante and this note.

In future, the Department of Revenue, if they want our advice, refer such cases well in time (instead of making such reference at the eleventh hour) to enable us to consider the matter in its proper perspective without any time constraint.

Estt.(B) may please see for comments on points (2) and (3) on Pp.19-20/ante before the file is returned to Department of Revenue.

Sd/-

(Under secretary)
2.2.2000."

The logic and process of reasoning emerging from the ON dated 2.2.2000, as is apparent to us, is being analysed below:

(a) If the process of recruitment has been initiated during the recruitment year (in which the vacancies have arisen) itself, even if the examination for the said recruitment is held in a subsequent year, and the result is declared in a year later (than the one in which the examination was held), and the selected candidates joined in a further later year (than the one in which

the result was declared), the selected candidates will be entitled to be assigned seniority, with reference to the recruitment year (in which the requisition of vacancies was made). The logic and reasoning for the aforesaid conclusion (expressed in the ON dated 2.2.2000) is, if the process of direct recruitment is initiated in the recruitment year itself, the selected candidate(s) cannot be blamed for the administrative delay, in completing the process of selection.

(b) The words "initiation of action for recruitment", and the words "initiation of recruitment process", were explained to mean, the date of sending the requisition to the recruiting authority.

24. Having examined the matter thus far, it is necessary to refer to the Ministry of Finance, Department of Revenue's, letter dated 11.5.2004 (hereinafter referred to as, "the letter dated 11.5.2004"). The aforesaid letter is being reproduced below:

"New Delhi, the 11th May, 2004

To,

The Chief Commissioner of Income Tax (CCA),
CHANDIGARH

Subject: Fixation of inter-se seniority of DR and Promotee Income Tax Inspectors in view of clarification given by DOP&T in r/o OM dated 3.7.87

Sir,

I am directed to refer to your letter F.No.CC/CHD/2003-04/935 dated 4.12.2003 on the above subject and to say that the matter has been examined in consultation with DOP&T and necessary clarification in the matter is given as under:

Point/querry raised	Clarification
Whether direct recruit inspectors should be given seniority of the year in which selection process initiated or vacancy occurred orotherwise	'It is clarified by DOP&T that Direct Recruits' seniority vis-à-vis the promotees is reckoned from the year in which they are actually recruited. DRs cannot claim seniority of the year in which the vacancies had arisen. The question of grant of seniority to DRs of the period when they were not even in service does not arise.'

3. The representations may please be disposed off accordingly.

Yours faithfully,
Sd/-

Under Secretary to the Government of India"

A perusal of the letter dated 11.5.2004 reveals, that it adopts a position in clear conflict with the one expressed in the OMs dated 7.2.1986 and 3.7.1986, as well as, in the ONs dated 20.12.1999 and 2.2.2000. In the aforesaid letter dated 11.5.2004 it was sought to be "clarified", that the seniority of direct recruits vis-à-vis promotees, would be determined with reference to the year in which the direct recruits are appointed. And further, that direct recruits cannot claim seniority with reference to the year in which the vacancies against which they are appointed had arisen. In our considered view reliance on the letter dated 11.5.2004, for the determination of the present controversy, is liable to outright rejection. This is so because, the letter dated 11.5.2004 has been styled as a "clarification" (see heading in right hand column). One of the essential ingredients of a clarification is, that it "clarifies" an unclear,

doubtful, inexplicit or ambiguous aspect of an instrument. A "clarification" cannot be in conflict with the instrument sought to be clarified. The letter dated 11.5.2004 breaches both the essential ingredients of a "clarification" referred to above. That apart, the letter dated 11.5.2004 is liable to be ignored in view of two subsequent letters of the Ministry of Finance, Department of Revenue dated 27.7.2004 and 8.9.2004. The letter dated 27.7.2004 is reproduced hereunder:

"New Delhi, the 27th July, 2004

To

Chief Commissioner of Income Tax (CCA)
CHANDIGARH

Subject: Fixation of inter-se seniority of DR and Promotee Income tax Inspectors in view of clarification given by DOP&T in r/o OM dated 3.7.86.

Sir,

I am directed to refer to Board's letter of even number dated 11.5.2004 on the above subject and to request that the application of this clarification may be kept in abeyance till further orders.

Yours faithfully,

Sd/-

Under Secretary to the Government of India"

A perusal of the letter dated 27.7.2004 reveals, that the allegedly clarificatory letter dated 11.5.2004, had been kept in abeyance. The second letter dated 8.9.2004 (referred to above) is also being reproduced below:

"New Delhi, the 8th September, 2004

To

Al CCITs(CCA)

Sub: Fixation of inter se seniority between Direct Recruits (DR) and Promotee (PR) Inspectors of Income tax in various charges of the Income tax Department – regarding.

Sir,

I am directed to say that a number of OAs/WPs are pending/under adjudication in the various benches of CAT and High Courts on the above subject. The Board has been taking a consistent stand in all those cases that the policy as laid down in Sanjeev Mahajan's case (pertaining to CCIT, Delhi Charge), which was finalized in consultation with DOP&T and the Ministry of Law would prevail and that seniority of DRs would be reckoned with reference to date of initiation of recruitment process in their case.

2. Subsequently on a query raised by CCIT, Chandigarh on an issue relating to the treatment to be given to the promotee Inspectors, who would face reversion on account of refixation of seniority as per DOP&T/Ministry of Law's advice, the Board issued a clarification vide letter of even number, dated 11.5.2004, which created an adverse situation before the Gujarat High Court in a related case. As such this clarification was held in abeyance vide letter dated 27.07.2004 till further orders.

3. The matter has been reexamined and it has been decided that the stand taken/finalized by the Board in the case of Sanjeev Mahajan would hold good in future also and all the cases on the issue would be handled/defended in the light of clarification submitted in that case.

4. All CCITs(CCA) are accordingly requested to take necessary action in the matter of fixation of seniority of DRs & Promotee Inspectors accordingly.

Yours faithfully,
Sd/-
Under Secretary (V&L)"

A perusal of the letter dated 8.9.2004 reveals, that the clarification given in the letter dated 11.5.2004, would be ignored in favour of the position adopted in Sanjeev Mahajan's case, in consultation with the Department of Personnel and Training. It would be relevant to notice, that the position adopted in Sanjeev Mahajan's case, referred to in the letter dated 8.9.2004 was, that seniority of direct recruits would be reckoned with reference to the date of initiation of the process of recruitment in their case. In the aforesaid view of the matter, the letter dated 11.5.2004 is bound to be disregarded and excluded from consideration not only because it does not satisfy the legal parameters of a "clarification", but also because, it is deemed to have been superseded by the subsequent letters dated 27.7.2004 and 8.9.2004.

25. Reference necessarily needs to be made to yet another office memorandum issued by the Government of India, Department of Personnel and Training, dated 3.3.2008 (hereafter referred to as, "the OM dated 3.3.2008"). In view of the emphatic reliance on the OM dated 3.3.2008, during the course of hearing, the same is reproduced hereunder, in its entirety:

New Delhi, dated the 3rd March, 2008

OFFICE MEMORANDUM

Subjec: Consolidated instructions on seniority contained in DOP&T O.M. No.22011/7/1986-Estt.(D) dated 3.7.1986 – Clarification regarding

The undersigned is directed to refer to this Department's consolidated instructions contained in O.M. No.22011/7/1986-Estt.(D) dated 3.7.1986 laying down the principles on determination of seniority of persons appointed to services/posts under the Central Government.

2. Para 2.4.1 and 2.4.2 of the O.M. dated 3.7.1986 contains the following provisions:

2.4.1 The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees, which shall be based on the quota of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules.

2.4.2 If adequate number of direct recruits does not become available in any particular year, rotation of quotas for the purpose of determining seniority would take place only to the extent of available direct recruits and the promotees.

3. Some references have been received seeking clarifications regarding the term 'available' used in the preceding para of the OM dated 3.7.1986. It is hereby clarified that while the inter-se seniority of direct recruits and promotees is to be fixed on the basis of the rotation of quota of vacancies, the year of availability, both in the case of direct recruits as well as the promotees, for the purpose of rotation and fixation of seniority, shall be the actual year of appointment after declaration of results/ selection and completion of pre-appointment formalities as prescribed. It is further clarified that when appointments against unfilled vacancies are made in subsequent year or years, either by direct recruitment or promotion, the persons so appointed shall not get seniority of any earlier year (viz. year of vacancy/panel or year in which recruitment process is initiated) but should get the seniority of the year in which they are appointed on substantive basis. The year of availability will be the vacancy year in which a candidate of the particular batch of selected direct recruits or an officer of the particular batch of promotees joins the post/ service.

4. Cases of seniority already decided with reference to any other interpretation of the term 'available' as contained in O.M. dated 3.7.1986 need not be reopened.

5. Hindi version will follow.

Sd/-
Director (Estt.I)"
(emphasis is ours)

The following conclusions, in our view, can be drawn from the OM dated 3.3.2008:

(a) The OM dated 3.3.2008 is in the nature of a "clarification", to the earlier consolidated instructions on seniority, contained in the OM dated 3.7.1986 (referred to and analysed, in paragraph 21 above).

(b) The term "available" used in para 2.4.2 in the OM dated 3.7.1986 has been "clarified" to mean, both in case of direct recruits as well as promotees, for the purpose of fixation of seniority, would be the actual year of appointment "…after the declaration of the result/selection, i.e., after the conclusion of the selection process, and after the "…completion of the pre-appointment formalities…" (medical fitness, police verification, etc.).

(c) As per the OM dated 3.7.1986, when appointments are made against unfilled vacancies in subsequent year(s), the persons appointed would "not" get seniority with reference to the year in which the vacancy arose, or the year in which the recruitment process was initiated, or the year in which the selection process was conducted.

(d) As per the OM dated 3.3.2008, when appointments are made against unfilled vacancies in subsequent year(s), the persons appointed would get seniority of the year in which they are appointed "on substantive basis".

26. Before examining the merits of the controversy on the basis of the OM dated 3.3.2008, it is necessary to examine one related submission advanced on behalf of the direct recruits. It was the contention of learned counsel, that the OM dated 3.3.2008 being an executive order issued by the Department of Personnel and Training, would apply only prospectively. In this

behalf it was pointed out, that the disputed seniority between rival parties before this Court was based on the appointment to the cadre of Income Tax Inspectors, well before the OM dated 3.3.2008 was issued. As such, it was pointed out, that the same would not affect the merits of controversy before this Court. We have considered the instant submission. It is not possible for us to accept the aforesaid contention advanced at the hands of the learned counsel. If the OM dated 3.3.2008 was in the nature of an amendment, there may well have been merit in the submission. The OM dated 3.3.2008 is in the nature of a "clarification". Essentially, a clarification does not introduce anything new, to the already existing position. A clarification, only explains the true purport of an existing instrument. As such, a clarification always relates back to the date of the instrument which is sought to be clarified. In so far as the instant aspect of the matter is concerned, reference may be made to the decision rendered by this Court in *S.S. Garewal vs. State of Punjab,* (1993) 3 Suppl. 234, wherein this Court had observed as under:

> "8 ….. In the alternative, it was urged that the order dated April 8, 1980 could only have prospective operation with effect from the date of issue of the said order and the sub-roster indicated by the said order could be given effect to only from that date and on that basis the first post reserved for Scheduled Castes should go to Balmikis or Mazhabi Sikhs and on that basis also respondent No. 3 was entitled to be placed against point No. 7 in the 100-point roster and Shri G.S. Samra against point No. 9 in the said roster.
>
> 9. From a perusal of the letter dated April 8, 1980, we find that it gives clarifications on certain doubts that had been created by some Departments in the matter of implementation of the instructions contained in the earlier letter dated May 5, 1975. Since the said letter dated April 8, 1980 is only clarificatory in nature, there is no question of its having an operation independent of the instructions

> contained in the letter dated May 5, 1975 and the clarifications contained in the letter dated April 8, 1980 have to be read as a part of the instructions contained in the earlier letter dated May 5, 1975. In this context it may be stated that according to the principles of statutory construction a statute which is explanatory or clarificatory of the earlier enactment is usually held to be retrospective. (See: Craies on Statute Law, 7th Ed., p.58). It must, therefore, be held that all appointments against vacancies reserved for Scheduled Castes made after May 5, 1975 (after May 14, 1977 in so far as the Service is concerned), have to be made in accordance with the instructions as contained in the letter dated May 5, 1975 as clarified by letter dated April 8, 1980. On that view, the appointment of Shri Bal want Rai in 1979 has to be treated to be an appointment made under the said instructions and operation of these instructions cannot be postponed till April 8, 1980….."

In view of the above, it is not possible for us to accept that the OM dated 3.3.2008, would only apply prospectively. We are also satisfied, that the OM dated 3.3.2008 which is only a "clarification" of the earlier OM dated 3.7.1986, would relate back to the original instrument, namely, the OM dated 3.7.1986.

27. We shall now endeavour to examine the effect of OM dated 3.3.2008 on the subject of inter se seniority between direct recruits and promotees. Would the OM dated 3.3.2008 supersede the earlier OMs dated 7.2.1986 and/or 3.7.1986? And, would the OMs dated 7.2.1986 and 3.7.1986 negate the OM dated 3.3.2008, to the extent that the same is repugnant to the earlier OMs (dated 7.2.1986 and 3.7.1986)? In our view, what needs to be kept in mind while determining an answer to the aforesaid queries is, that the OM dated 7.2.1986 is in the nature of an amendment/modification. The Department of Personnel and Training consciously "amended" the earlier OM dated 22.11.1959, by the later OM dated 7.2.1986. The said amendment was consciously carried out, with the object of

remedying the inappropriateness of direct recruits of later years becoming senior to promotees with long years of service. It is not the case of any of the parties before us, that the OM dated 7.2.1986, has ever been "amended" or "modified". It is therefore imperative to conclude, that the OM dated 7.2.1986 is binding for the determination of the issues expressed therein, and that, the same has the force of law. The OM dated 3.7.1986 is in the nature of consolidatory instruction, whereby, all earlier instructions issued from time to time were compiled together. This is apparent, not only from the subject of the aforesaid OM dated 3.7.1986, but also, the contents of paragraph 1 thereof. Paragraph 1 of the OM dated 3.7.1986, is being reproduced hereunder:

"Dated 3.7.86

OFFICE MEMORANDUM

Subject: SENIORITY – consolidated orders on

The undersigned is directed to say that instructions have been issued by this Department from time to time laying down the principles for determining seniority of persons appointed to services and posts under the Central Government. For facility of reference, the important orders on the subject have been consolidated in this office memorandum. The number and date of the original communication has been quoted in the margin so that the users may refer to it to understand fully the context in which the order in question was issued."

(emphasis is ours)

It is therefore clear, that the OM dated 3.3.2008 is neither in the nature of an "amendment" nor in the nature of a "modification". Since the OM dated 3.3.2008, is a mere "consolidation" or compilation of earlier instructions on the subject of seniority, it is not prudent to draw any inferences therefrom which could not be drawn from the earlier instruction/ office memoranda being "consolidated" or compiled therein, or

which is contrary thereto.

28. It is relevant to notice, that there is a marginal note against paragraph 2.4.2 in the OM dated 3.7.1986. The aforesaid marginal note is being extracted hereunder:

"DOPT No.35014/2/80-Estt(D) dt.7.2.86"

Therefore, paragraph 2.4.2 must be deemed to have been recorded in the consolidating OM, on the basis of the OM dated 7.2.1986. The instant assertion has been made on account of it having been expressly mentioned in the opening paragraph of the OM dated 3.7.1986 (extracted above), that the number and date of the original communication has been quoted in the margin, so that the user may refer to it, to understand fully the context in which the order in question was issued. Therefore, for all intents and purposes the OM dated 3.3.2008 is with reference to the OM dated 7.2.1986. It is for this reason, that while debating the exact purport of the OM dated 3.3.2008, it has been our endeavour to examine the same, with reference to the earlier OMs dated 7.2.1986 and 3.7.1986, which were inter alia "consolidated" in the OM dated 3.3.2008.

29. A perusal of the OM dated 3.3.2008, would reveal, that a reference to paragraphs 2.4.1 and 2.4.2 of the OM dated 3.7.1986, has been made therein. Thereupon, the meaning of the term "available" used in paragraph 2.4.2 of the OM dated 3.7.1986, is statedly "clarified". In view of the conclusion drawn in the foregoing paragraph, the said clarification must be deemed to be with reference, not only to the OM dated 3.7.1986 but also the OM dated 7.2.1986. We have already noticed, in an earlier part of the instant judgment, the essential ingredients of a "clarification" are, that it seeks to explain an unclear, doubtful, inexplicit or ambiguous aspect of an instrument, which is sought to be clarified or resolved through the "clarification". And that, it should not be in conflict with the instrument sought to be explained. It is in the aforesaid background, that we will examine the two queries posed in the preceding paragraph. We have already analysed the true

purport of the OM dated 7.2.1986 (in paragraph 20 hereinabove). We have also recorded our conclusions with reference to the OM dated 3.7.1986 wherein we have duly taken into consideration the true purport of paragraph 2.4.2 contained in the OM dated 3.7.1986 (in paragraph 21 hereinabove). The aforesaid conclusions are not being repeated again for reasons of brevity. We have separately analysed the effect of the OM dated 3.3.2008 (in paragraph 26 of the instant judgment). It is not possible for us to conclude that the position expressed in the earlier office memoranda is unclear, doubtful, inexplicit or ambiguous. Certainly not on the subject sought to be clarified by the OM dated 3.3.2008. A comparison of the conclusions recorded in paragraph 20 (with reference to the OM dated 7.2.1986) and paragraph 21 (with reference to OM dated 3.7.1986) on the one hand, as against, the conclusions drawn in paragraph 26 (with reference to OM dated 3.3.2008) on the other, would lead to inevitable conclusion, that the OM dated 3.3.2008 clearly propounds, a manner of determining inter se seniority between direct recruits and promotees, by a method which is indisputably in conflict with the OMs dated 7.2.1986 and 3.7.1986. Ofcourse, it was possible for the Department of Personnel and Training to "amend" or "modify" the earlier office memoranda, in the same manner as the OM dated 7.2.1986 had modified/amended the earlier OM dated 22.11.1959. A perusal of the OM dated 3.3.2008, however reveals, that it was not the intention of the Department of Personnel and Training to alter the manner of determining inter se seniority between promotees and direct recruits, as had been expressed in the OMs dated 7.2.1986 and 3.7.1986. The intention was only to "clarify" the earlier OM dated 3.7.1986 (which would implicitly include the OM dated 7.2.1986). The OM dated 3.3.2008 has clearly breached the parameters and the ingredients of a "clarification". Therefore, for all intents and purposes the OM dated 3.3.2008, must be deemed to be non-est to the extent that the same is in derogation of the earlier OMs dated 7.2.1986 and 3.7.1986.

Having so concluded, it is natural to record, that as the position presently stands, the OMs dated 7.2.1986 and 3.7.1986 would have an overriding effect over the OM dated 3.3.2008 (to the extent of conflict between them). And the OM dated 3.3.2008 has to be ignored/omitted to the extent that the same is in derogation of the earlier OMs dated 7.2.1986 and 3.7.1986. In the light of the conclusions recorded hereinabove, we are satisfied that the OM dated 3.3.2008 is not relevant for the determination of the present controversy.

30. Besides the interpretation of the relevant OMs issued by the DOPT, learned counsel representing the promotees placed reliance on some judgments of this Court in order to press their contention, that seniority for direct recruits could not be determined with reference to a date preceding the date of their recruitment. In so far as the instant aspect of the matter is concerned, reliance was placed on *Jagdish Ch. Patnaik & Ors. v. State of Orissa and others,* (1998) 4 SCC 456; *Suraj Prakash Gupta & Ors. v. State of J&K & Anr.,* (2000) 7 SCC 561; and *Pawan Pratap Singh & Ors. v. Reevan Singh & Ors.,* (2011) 3 SCC 267.

31. The seniority rule applied in *Jagdish Ch. Patnaik's* case (supra) has been extracted in paragraph 24 of the said judgment. The seniority rule in question, inter alia expressed, that seniority would be determined with reference to the date of recruitment. In *Suraj Prakash Gupta's* case (supra), the relevant seniority rule was extracted in paragraph 53 which provided, that seniority would be determined with reference to the date of first appointment. The rule itself expressed that the words "date of first appointment" would mean the date of first substantive appointment against a clear vacancy. In *Pawan Pratap Singh's* case (supra) the question which arose for consideration, related to determination of inter se seniority between two sets of direct recruits. The first set comprised of vacancies advertised in 1987 which came to be filled up in 1994, and the second set comprised of vacancies of the year 1990 which came to be filled up in the year 1991. The

controversy in *Pawan Pratap Singh's* case (supra) was conspicuously different from the controversy in hand. In view of the fact that the seniority rules, as also the factual matrix in the cases relied upon was substantially at variance with the relevant OMs dated 7.2.1986 and 3.7.1986 (which are the subject of interpretation in so far as the present case is concerned), as also the facts of the cases in hand, it is apparent, that the judgments relied upon by the learned counsel are inapplicable to determine the present controversy.

32. One finds attracted to the observations recorded in *Jagdish Ch. Patnaik's* case (supra) wherein it was observed, "when the language used in the statute is unambiguous and on a plain grammatical meaning being given to the words in the statute, the end result is neither arbitrary, nor irrational nor contrary to the object of the statute, then it is the duty of the court to give effect to the words used in the statute because the words declare the intention of the law making authority best". We are of the view that the aforesaid observations are fully applicable to the present controversy. We may add that the various ONs and letters issued by the DOPT (referred to above) do not leave room for any ambiguity.

33. Having interpreted the effect of the OMs dated 7.2.1986 and 3.7.1986 (in paragraphs 20 and 21 hereinabove), we are satisfied, that not only the requisition but also the advertisement for direct recruitment was issued by the SSC in the recruitment year in which direct recruit vacancies had arisen. The said factual position, as confirmed by the rival parties, is common in all matters being collectively disposed of. In all these cases the advertised vacancies were filled up in the original/first examination/selection conducted for the same. None of the direct recruit Income Tax Inspectors herein can be stated to be occupying carried forward vacancies, or vacancies which came to be filled up by a "later" examination/selection process. The facts only reveal, that the examination and the selection process of direct recruits could not be completed within the recruitment

year itself. For this, the modification/amendment in the manner of determining the inter-se seniority between the direct recruits and promotees, carried out through the OM dated 7.2.1986, and the compilation of the instructions pertaining to seniority in the OM dated 3.7.1986, leave no room for any doubt, that the "rotation of quotas" principle, would be fully applicable to the direct recruits in the present controversy. The direct recruits herein will therefore have to be interspaced with promotees of the same recruitment year.

34. In view of the above, the Civil Appeals, the Transferred Case, as well as, the Transfer Case (filed by the direct recruits and the Union of India) are hereby allowed. The claim of the promotees, that the direct recruit Income Tax Inspectors, in the instant case should be assigned seniority with reference to the date of their actual appointment in the Income Tax Department is declined.

K.K.T. Appeals & transferred Cases allowed.