J. SAMUEL AND OTHERS.
v.
GATTU MAHESH AND OTHERS
(Civil Appeal No. 561 of 2012)

JANUARY 16, 2012

[P. SATHASIVAM AND J. CHELAMESWAR, JJ.]

Code of Civil Procedure, 1908:

Or. VI r. 17 - Amendment of pleadings - Suit for specific performance of contract - Application filed under Or. VI r. 17 seeking amendment of the plaint to incorporate specific pleading in compliance of s. 16(c) of the Specific Relief Act and Form 47, Appendix 'A' CPC on the ground that the same was missed due to typographical error - Application filed by respondents for amendment of plaint after conclusion of the trial and after the matter was reserved for orders of the trial court - Trial court dismissed the application whereas the High Court allowed the respondents to amend the plaint as prayed for - On appeal, held: Proviso inserted in r. 17 clearly states that no amendment shall be allowed after the trial has commenced except when the court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of the trial - Act of neglecting to perform an action which one has an obligation to do cannot be called as a typographical error - On facts, there is a clear lack of 'due diligence' and the mistake committed does not come within the preview of a typographical error - Had the person who prepared the plaint, signed and verified the plaint showed some attention, the omission could have been noticed and rectified there itself - In such circumstances, it cannot be construed that due diligence was adhered to and in any event, omission of mandatory requirement running into 3 to 4 sentences cannot

be a typographical error - Thus, the order passed by the High Court is set aside.

Or. VI r. 17 - Amendment of pleadings - Court's discretion to grant permission for - Held: Lies on two conditions that no injustice must be done to the other side and the amendment must be necessary for the purpose of determining the real question in controversy between the parties - However, to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that no amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

Term 'due diligence' - Meaning and usage of - Held: Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested - It is specifically used in the Code to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial - The term determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit - Party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with.

Term 'typographical error' - Meaning of - Held: Is defined as a mistake made in the printed/typed material during a printing/typing process - Term includes errors due to mechanical failure or slips of the hand or finger, but usually excludes errors of ignorance - Act of neglecting to perform an action which one has an obligation to do cannot be called as a typographical error.

Specific Relief Act, 1963 - s. 16(c) - Personal bars to relief - Enforcement of specific performance of contract - Essential ingredient of s. 16(c) - Held: Specific averments

should be made in the plaint that he has performed and has always been willing to perform the essential terms of the Act which have to be performed by him - In the absence thereof, the decree for specific performance cannot be granted.

Respondents filed a suit for specific performance of the contract for sale. The trial of the suit commenced, the parties adduced evidence, their arguments were heard and completed and the matter was posted for judgment. Subsequently, the respondents filed an application under Order VI, Rule 17 CPC seeking amendment of the plaint to incorporate specific pleading in compliance of Section 16(c) of the Specific Relief Act and Form 47, Appendix 'A' on the ground that the same was missed due to typographical error. The Additional District Judge dismissed the application for amendment. Aggrieved, the respondents filed a revision petition. The High Court allowed the amendment sought for by the respondents. Therefore, the appellants filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1. In the instant case, suit after prolonged trial came to an end in September, 2010. The application for amendment under Order VI Rule 17 CPC was filed on 24.09.2010 that is after the arguments were concluded on 22.09.2010 and the matter was posted for judgment on 04.10.2010. Section 16(c) of the Specific Relief Act contemplates that specific averments have to be made in the plaint that he has performed and has always been willing to perform the essential terms of the Act which have to be performed by him. This is an essential ingredient of Section 16(c) and the form prescribes for the due performance. In other words, in the absence of the said claim that he is always ready and willing to perform his part of the contract, the decree for specific performance cannot be granted by the court. The proviso inserted in Order VI Rule 17 clearly states that no

amendment shall be allowed after the trial has commenced except when the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial, such application for amendment may be allowed. [Para 10] [307-C-F]

1.2. On proper interpretation of proviso to Rule 17 of Order VI, the party has to satisfy the court that he could not have discovered that ground which was pleaded by amendment, in spite of due diligence. No doubt, Rule 17 confers power on the court to amend the pleadings at any stage of the proceedings. However, proviso restricts that power once the trial has commenced. Unless the court satisfies that there is a reasonable cause for allowing the amendment normally the court has to reject such request. An argument was advanced that since in the legal notice sent before filing of the suit, there is reference to readiness and willingness and the plaintiff also led in evidence, nothing precluded the court from entertaining the said application with which it cannot be accepted in the light of Section 16(c) of the Specific Relief Act as well as proviso to Order VI Rule 17. The only reason stated so in the form of an affidavit is omission by "type mistake". Admittedly, it is not an omission to mention a word or an arithmetical number. The omission is with reference to specific plea which is mandated in terms of Section 16(c) of the Specific Relief Act. [Para 11] [307-H; 308-A-D]

1.3. The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their plaints. The court's discretion to grant permission for a

party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However, to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that: no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. [Para 12] [308-E-G]

1.4. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term 'due diligence' is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial. A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit. [Paras 13, 14] [308-H; 309-A-C]

1.5. In the given facts, there is a clear lack of 'due diligence' and the mistake committed certainly does not come within the preview of a typographical error. The term typographical error is defined as a mistake made in the printed/typed material during a printing/typing process. The term includes errors due to mechanical failure or slips of the hand or finger, but usually excludes errors of ignorance. Therefore, the act of neglecting to perform an

action which one has an obligation to do cannot be called as a typographical error. As a consequence the plea of typographical error cannot be entertained in this regard since the situation is of lack of due diligence wherein such amendment is impliedly barred under the Code. [Para 15] [309-D-F]

1.6. The claim of typographical error/mistake is baseless and cannot be accepted. In fact, had the person who prepared the plaint, signed and verified the plaint showed some attention, this omission could have been noticed and rectified there itself. In such circumstances, it cannot be construed that due diligence was adhered to and in any event, omission of mandatory requirement running into 3 to 4 sentences cannot be a typographical error as claimed by the plaintiffs. All these aspects were rightly considered and concluded by the trial court and the High Court committed an error in accepting the explanation that it was a typographical error to mention and it was an accidental slip. The power was upheld in the deserving cases that the Court can allow delayed amendment by compensating the other side by awarding costs. The entire object of the amendment to Order VI Rule 17 as introduced in 2002 is to stall filing of application for amending a pleading subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of other's case. It also helps checking the delays in filing the applications. [Para 16] [309-G-H; 310-A-C]

1.7. The conclusion arrived by the trial court is accepted and not of the High Court. The order passed in the revision petition is set aside. [Para 17] [310-F]

Aniglase Yohannan vs. Ramlatha and Ors. **(2005) 7 SCC 534: 2005 (3) Suppl. SCR 440;** *Ajendraprasadji N. Pandey and Anr. vs. Swami Keshavprakeshdasji N. and Ors. Chander*

Kanta Bansal vs. Rajinder Singh Anand **(2008) 5 SCC 117: 2008 (4) SCR 748;** *Rajkumar Guraward (dead) through LRS. vs. S.K.Sarwagi andCompany Private Limited and Anr.* **(2008) 14 SCC 364: 2008 (8) SCR 700;** *Vidyabai and Ors. vs. Padmalatha and Anr.* **(2009) 2 SCC 409: 2008 (17) SCR 505;** *Man Kaur (dead) By LRS vs. Hartar Singh Sangha* **(2010) 10 SCC 512: 2010 (12) SCR 515 - relied on.**

Case Law Reference:

2005 (3) Suppl. SCR 440	**Relied on.**	**Para 16**
2008 (4) SCR 748	**Relied on.**	**Para 16**
2008 (8) SCR 700	**Relied on.**	**Para 16**
2008 (17) SCR 505	**Relied on.**	**Para 16**
2010 (12) SCR 515	**Relied on.**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 561 of 2012.

From the Judgment & Order dated 8.2.2011 of the High Court of Andhra Pradesh at Hyderabad in Civil Revision Petition No. 5162 of 2010.

A. Subba Rao for the Appellants.

K. Swami, Prabha Swami, P.V. Yogeswaran for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is filed against the final judgment and order dated 08.02.2011 passed by the High Court of Andhra Pradesh at Hyderabad in Civil Revision Petition No. 5162 of 2010 whereby the High Court while setting aside the order dated

20.10.2010 passed by the II Additional District Judge, Karimnagar at Jagtial, allowed the revision petition filed by the respondents herein.

3. **Brief Facts:**

a) The Diocese at Karimnagar was incorporated on 12.03.1978 from its parent Diocese of Dornakal. On 22.08.1985, the Retired Diocesan Treasurer and Property Secretary, Karimnagar, issued a publication in the paper to auction the land bearing Survey No. 43, admeasuring Ac. 3.31 gts. situated at Mission Compound, Dharmapuri Road, Jagtial and the last date to receive the tenders was fixed as 05.09.1985. On 13.09.1985, the sealed tenders were opened and Gattu Mahesh-Respondent No. 1 herein and Kotha Mohan-Respondent No. 2 herein, Managing Partners in M/s Jagath Swapna & Co. put tenders for an amount of Rs. 24,55,569/- along with a DD for an amount of Rs.2,45,556/- which is 10% of the EMD. They being the highest bidders, their tenders were accepted.

b) The contract for sale of property was entered into between the Respondent Nos. 1 and 2 herein with Karimnagar Diocese on 27.09.1985. It was mentioned in the contract that Karimnagar Diocese agreed to receive Rs. 2,50,000/- on or before 08.11.1985 because the land under sale was under dispute and the balance amount was to the paid by the respondents herein only after getting final dropping of the land acquisition proposal by the Municipality, Jagtial and sanction of layout by the Municipality, Jagtial. On 03.04.2003, Respondent Nos. 1 and 2 herein issued a legal notice to Karimnagar Diocese informing that the land acquisition proceedings were dropped on 05.05.1986 and the sanction of layout by the Municipality, Jagtial was completed on 28.12.1989 and to execute and register the sale deed in their favour as per the agreement dated 27.09.1985.

c) In the absence of adequate response from Karimnagar Diocese, Respondent Nos. 1 and 2 filed O.S. No. 9 of 2004 in the Court of II Additional District Judge, Karimnagar at Jagtial for specific performance of the contract of sale and for perpetual injunction. During the pendency of the suit, Karimnagar Diocese filed written statement pointing out the inherent defects, namely, absence of mandatory requirements of Section 16(c) of Specific Relief Act and Form 47, Appendix 'A' of the Code of Civil Procedure, 1908. On 24.09.2010, respondent Nos. 1 and 2 herein filed I.A. No. 1078 of 2010 in O.S. No. 9 of 2004 under Order VI, Rule 17 of the Code seeking amendment of the plaint to incorporate specific pleading in compliance of the above section of the Specific Relief Act and the Code on the ground that the same was missed due to typographical error. On 04.10.2010, Karimnagar Diocese filed counter affidavit resisting the application.

d) By order dated 20.10.2010, the II Additional District Judge dismissed the application for amendment filed by the Respondent Nos. 1 and 2 herein. Aggrieved by the order, the Respondents herein approached the High Court by filing Civil Revision Petition being No. 5162 of 2010. The High Court, by impugned order dated 08.02.2011, allowed the amendment sought for by the Respondent Nos. 1 and 2 herein.

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

4. Heard Mr. A. Subba Rao, learned counsel for the appellants and Mr. K. Swami, learned counsel for the respondents.

5. The only point for consideration in this appeal is whether the High Court is right in allowing the application filed under Order VI Rule 17 CPC for amendment of the plaint which was filed after conclusion of trial and reserving the matter for orders.

6. Based on the agreement dated 27.07.1985 which relates to sale of 3 acres and 31 gunthas of land in Survey No. 43 situate in Mission Compound, Dharmapuri Road at Jagtial for a consideration of Rs.24,55,569/-, the respondents/plaintiffs filed the said suit for specific performance. Since we have already mentioned factual details, there is no need to refer the same excepting the details relating to the petition filed under Order VI Rule 17. After filing written statement by the contesting defendants, the trial of the suit commenced and admittedly both parties adduced the evidence on their behalf and arguments on behalf of both the sides were heard and completed on 22.09.2010. On that day, the Court reserved the matter for orders. Meanwhile, on 24.09.2010, the respondents herein filed a petition praying for amendment of the plaint. In support of the said application, plaintiff No.2 has filed an affidavit stating that in para 11of the plaint he has stated about the legal notice issued on 03.04.2003 to defendant Nos. 1 to 7 for specific performance of agreement of sale dated 27.09.1985 and there was no reply for it. In para 3 of the affidavit, the deponent has stated that by type mistake, the following sentences have missed. After para 11 of the plaint, the following para 12 may be added. *"We are and has been and still is ready and willing specifically to perform the agreement of sale dated 27.09.1985 on our part of which the defendants have, had noticed. I am ready with the balance amount as per agreement of sale dated 27.09.1985.* I submit the para nos. 12-18 of the plaint may be changed as 13 to 19." The only reason given by the plaintiffs praying for amendment and inclusion of the above averment in the plaint is *"type mistake"*. It is also stated that it happened in spite of their due diligence.

7. The above claim was resisted by the appellants herein by filing detailed counter affidavit. Apart from disputing the merits of the claim of the plaintiffs, with regard to the petition under Order VI Rule 17 they specifically stated that after passing several stages in the protracted trial, the final

arguments of the plaintiff in the suit were heard on 20.09.2010. The defendants have also filed their written arguments on 22.09.2010 wherein the inherent defect of plaintiff i.e. absence of averments of mandatory requirements of Section 16(c) Explanation (ii) and Form 47 Appendix A of CPC was pointed out. Even after this, further argument was made by both the parties and the counsel for the plaintiff informed the court that no further time is required and the matter may be posted for judgment. In view of the same, the learned trial Judge posted the matter to 04.10.2010 for judgment. Only at this juncture i.e. on 24.09.2010, plaintiffs came up with the present petition seeking amendment to incorporate specific pleading in compliance with Section 16 (c) of the Specific Relief Act and Form 47 of Appendix A CPC on the ground that the same was missed due to "type mistake" in spite of due diligence. Though the said claim was not acceptable by the trial Court, the High Court allowed the plaintiff to amend the plaint as prayed for.

8. Before considering the acceptability or otherwise of the reasoning of the High Court, it is useful to refer Order VI Rule 17 CPC.

> *"17. Amendment of pleadings.*- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

The said provision was omitted by the Civil Procedure Code (Amendment) Act, 1999. Section 16 of the Amendment Act reads as under:

> "16. Amendment of Order 6 – In the First Schedule, in Order 6,—
>
> ***
>
> (iii) Rules 17 and 18 shall be omitted."

After stiff resistance by the litigants and the members of the bar, again Order VI Rule 17 was re-introduced with proviso appended therein. As per the said proviso, no application for amendment shall be allowed after the trial has commenced. However, there is an exception to the said rule, i.e., if the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial, such application for amendment may be allowed.

9. Before proceeding further, it is also useful to refer Section 16(c) of Specific Relief Act which reads as under:

> *"16. Personal bars to relief.*- Specific performance of a contract cannot be enforced in favour of a person-
>
> (a) xxx
>
> (b) xxx
>
> (c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.
>
> Explanation.- For the purposes of clause (c),-
>
> (i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court;
>
> (ii) the plaintiff must aver performance of, or readiness and

willingness to perform, the contract according to its true construction."

It is clear that in a suit for specific performance of a contract, unless there is a specific averment that he has performed or has always been ready and willing to perform the essential terms of the contract, the suit filed by him is liable to be dismissed. In other words, in the absence of the above said claim that he is always ready and willing to perform his part of the contract, the decree for specific performance cannot be granted by the Court.

10. In this legal background, we have to once again recapitulate the factual details. In the case on hand, Suit O.S. No. 9 of 2004 after prolonged trial came to an end in September, 2010. The application for amendment under Order VI Rule 17 CPC was filed on 24.09.2010 that is after the arguments were concluded on 22.09.2010 and the matter was posted for judgment on 04.10.2010. We have already mentioned that Section 16(c) of the Specific Relief Act contemplates that specific averments have to be made in the plaint that he has performed and has always been willing to perform the essential terms of the Act which have to be performed by him. This is an essential ingredient of Section 16(c) and the form prescribes for the due performance. The proviso inserted in Rule 17 clearly states that no amendment shall be allowed after the trial has commenced except when the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial.

11. As stated earlier, in the present case, the amendment application itself was filed only on 24.09.2010 after the arguments were completed and the matter was posted for judgment on 04.10.2010. On proper interpretation of proviso to Rule 17 of Order VI, the party has to satisfy the Court that he could not have discovered that ground which was pleaded

by amendment, in spite of due diligence. No doubt, Rule 17 confers power on the court to amend the pleadings at any stage of the proceedings. However, proviso restricts that power once the trial has commenced. Unless the Court satisfies that there is a reasonable cause for allowing the amendment normally the court has to reject such request. An argument was advanced that since in the legal notice sent before filing of the suit, there is reference to readiness and willingness and the plaintiff has also led in evidence, nothing precluded the court from entertaining the said application with which we are unable to accept in the light of Section 16(c) of the Specific Relief Act as well as proviso to Order VI Rule 17. The only reason stated so in the form of an affidavit is omission by "type mistake". Admittedly, it is not an omission to mention a word or an arithmetical number. The omission is with reference to specific plea which is mandated in terms of Section 16(c) of the Specific Relief Act.

12. The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their plaints. The Court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that: no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

13. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly

diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term 'Due diligence' is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

14. A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit.

15. In the given facts, there is a clear lack of 'due diligence' and the mistake committed certainly does not come within the preview of a typographical error. The term typographical error is defined as a mistake made in the printed/typed material during a printing/typing process. The term includes errors due to mechanical failure or slips of the hand or finger, but usually excludes errors of ignorance. Therefore the act of neglecting to perform an action which one has an obligation to do cannot be called as a typographical error. As a consequence the plea of typographical error cannot be entertained in this regard since the situation is of lack of due diligence wherein such amendment is impliedly barred under the Code.

16. The claim of typographical error/mistake is baseless and cannot be accepted. In fact, had the person who prepared the plaint, signed and verified the plaint showed some attention, this omission could have been noticed and rectified there itself. In such circumstances, it cannot be construed that due diligence was adhered to and in any event, omission of mandatory requirement running into 3 to 4 sentences cannot be a typographical error as claimed by the plaintiffs. All these aspects have been rightly considered and concluded by the trial

court and the High Court has committed an error in accepting the explanation that it was a typographical error to mention and it was an accidental slip. Though the counsel for the appellants have cited many decisions, on perusal, we are of the view that some of those cases have been decided prior to the insertion of Order VI Rule 17 with proviso or on the peculiar facts of that case. This Court in various decisions upheld the power that in deserving cases, the Court can allow delayed amendment by compensating the other side by awarding costs. The entire object of the amendment to Order VI Rule 17 as introduced in 2002 is to stall filing of application for amending a pleading subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of other's case. It also helps checking the delays in filing the applications. [vide *Aniglase Yohannan vs. Ramlatha and Others,* (2005) 7 SCC 534, *Ajendraprasadji N. Pandey and Another vs. Swami Keshavprakeshdasji N. and Others, Chander Kanta Bansal vs. Rajinder Singh Anand,* (2008) 5 SCC 117, *Rajkumar Guraward (dead) through LRS. vs. S.K.Sarwagi and Company Private Limited and Another,* (2008) 14 SCC 364, *Vidyabai and Others vs. Padmalatha and Another, (2009) 2 SCC 409, Man Kaur (dead) By LRS vs. Hartar Singh Sangha*, (2010) 10 SCC 512.

17. In the light of the above discussion, we are in entire agreement with the conclusion arrived by the Trial Court and unable to accept the reasoning of the High Court. Accordingly, the order dated 08.02.2011 passed in Civil Revision Petition No. 5162 is set aside.

18. The civil appeal is allowed with no order as to costs.

N.J. Appeal allowed.

MAULANA MOHD. AMIR RASHADI
v.
STATE OF U.P. & ANR.
(Criminal Appeal No. 159 of 2012)

JANUARY 16, 2012

[P. SATHASIVAM AND J. CHELAMESWAR, JJ.]

Bail: Conditional bail - Grant of - Allegation against second respondent that he along with his supporters attacked the convoy of the appellant which resulted in death of one person and injury to another - Bail application of the second respondent allowed by the High Court on certain conditions - On appeal, held: The second respondent was a sitting Member of Parliament facing several criminal cases and most of the cases ended in acquittal for want of proper witnesses or were pending trial - As observed by the High Court, merely on the basis of criminal antecedents, the claim of the second respondent cannot be rejected - In other words, it is the duty of the Court to find out the role of the accused in the case in which he has been charged and other circumstances such as possibility of fleeing away from the jurisdiction of the Court - The appellant has already been provided adequate protection - Assurance was given by the State that trial would not be prolonged and would be concluded within a reasonable time - High Court while granting bail also imposed several conditions for strict adherence during the period of bail - In addition to the same, if the appellant receives any fresh threat from the second respondent or from his supporters, he is free to inform the trial Court and in such event the trial Court is free to take appropriate steps as observed by the High Court - Interference with the order of the High Court is not called for - Trial court is directed to complete the trial within a period of

four months from the date of the receipt of copy of this order without unnecessary adjournments.

The allegation against the accused-second respondent was that on 12.8.2009 he along with his supporters attacked the convoy of the appellant which resulted in death of one person and injury to another. The second respondent was arrested. The second respondent filed a bail application before the High Court. The appellant raised objection that he had been receiving threatening calls from the second respondent warning him not to pursue the case. Meanwhile, charge sheet was filed against the second respondent and three other persons under Sections 302, 307 and 325 read with Section 34 IPC. Pending trial, the High Court granted conditional bail to the second respondent.

In the instant appeal, the only point for consideration was whether the High Court was justified in enlarging the second respondent on bail after imposing certain conditions.

Dismissing the appeal, the Court

HELD: It is not in dispute that the second respondent is a sitting Member of Parliament facing several criminal cases. It is also not in dispute that most of the cases ended in acquittal for want of proper witnesses or pending trial. As observed by the High Court, merely on the basis of criminal antecedents, the claim of the second respondent cannot be rejected. In other words, it is the duty of the Court to find out the role of the accused in the case in which he has been charged and other circumstances such as possibility of fleeing away from the jurisdiction of the Court etc. In the instant case, the second respondent was arrested and was in jail since 24.08.2009. Another important aspect was that after filing of charge-sheet on 15.07.2010, prosecution examined

two important witnesses as PWs 1 and 2. This was the position prevailing on 26.07.2010. Even thereafter, now more than a year has rolled. Counsel appearing for the State assured that the trial will not be prolonged at the instance of the prosecution and ready to complete the evidence within a period to be directed by this Court. The other objection of the appellant for grant of bail was that he had received threats from the second respondent and his supporters warning him not to pursue the case against him. The appellant has already been provided adequate protection. Taking note of all these aspects, particularly, the fact that the second respondent was in jail since 24.08.2009, the trial has commenced by examining the two witnesses on the side of the prosecution and the assurance by the State that trial will not be prolonged and conclude within a reasonable time and also of the fact that the High Court while granting bail has imposed several conditions for strict adherence during the period of bail, interference with the order of the High Court is not called for. In fact, in the impugned order itself, the High Court made it clear that in case of breach of any of the conditions, the trial court would have liberty to take steps to send the second respondent to jail again. In addition to the same, if the appellant receives any fresh threat from the second respondent or from his supporters, he is free to inform the trial Court and in such event the trial Court is free to take appropriate steps as observed by the High Court. The trial court is directed to complete the trial within a period of four months from the date of the receipt of copy of this order without unnecessary adjournments. [Paras 6-8] [316-C-H; 317-A-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 159 of 2012.

From the Judgment & Order dated 6.8.2010 of the High

Court of Judicature at Allhabad in Crl. Misc. Bail Application No. 28420 of 2009.

Jaspal Singh, Imtiaz Ahmed, Naghma Imtiaz, Mohd Asad K, Equity Lex Associates for the Appellant.

Basava Prabhu S. Patil, J.P. Tripathi, Asha Upadhyay, R.D. Upadhyay, Manoj K. Mishra, Alka Sinha, Anuvrat Sharma for the Respondents.

The Judgment of the Court was delivered by

P.SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 06.08.2010 passed by the High Court of Judicature at Allahabad in Criminal Misc. Bail Application No. 28420 of 2009 whereby the High Court has granted bail to Mr. Ramakant Yadav - respondent No.2/accused in Case Crime No. 622 of 2009, FIR No.63 of 2009 under Sections 302 and 307 of the Indian Penal Code, 1860 (in short 'IPC'), Police Station Phoolpur, District Azamgarh, U.P.

3. **Brief facts:**

(a) According to the appellant, he is the President of a political party, namely, Rashtriya Ulema Council. On 12.08.2009, a meeting of the Party was to be held at Phoolpur, District Azamgarh, U.P. from 10 a.m. to 4 p.m. and he was to attend the said meeting in the capacity of Chief Guest.

(b) At about 1.45 p.m., the appellant started towards the venue of the meeting and his convoy was being led by 10 to 15 supporters who were riding on motorcycles. At that moment, the second respondent/accused came from behind in the convoy of cars and immediately after crossing the appellant's car and his supporters, the convoy of cars belonging to the second respondent/accused suddenly stopped on the road

without giving any signal and the second respondent/accused came out of his vehicle armed with a gun along with his supporters who were also carrying guns and they started giving kick blows to one of the motorcycle riders who fell down and the pillion riders of the said motorcycles were fired upon by the second respondent and his supporters from their respective guns and thereafter, they ran away from the place. Adbul Rehman-the pillion rider sustained serious fire arm injuries. When he was taken to the hospital at Varanasi, he succumbed to his injuries.

(c) On the basis of a written complaint in the Police Station, Phoolpur, FIR No. 63 of 2009 under Sections 302 and 307 IPC was registered. The second respondent was arrested only on 24.08.2009. It was further stated by the appellant that the accused is a habitual criminal and has a criminal background having more than three dozen cases involving serious offences against him. The second respondent filed a Criminal Bail Application being No. 28420 of 2009 before the High Court praying for his release. The appellant filed his objection. He also highlighted that from 14.08.2009, the appellant started receiving threatening calls from the second respondent warning him not to pursue the case otherwise he shall be eliminated.

(d) On completion of the investigation, charge sheet was filed on 15.07.2010 against respondent No.2 and three other persons under Sections 302, 307 and 325 read with 34 IPC and the trial of the case has been started by examining the injured witness - Farhan as PW-1 on 29.04.2010 and 15.07.2010.

(e) Pending proceeding of the trial, the High Court, by impugned order dated 06.08.2010, granted conditional bail to the second respondent. Questioning the same and of the fact that the appellant had received several threat calls, he filed the present appeal for setting aside the same.

4. Heard Mr. Jaspal Singh, learned senior counsel for the appellant and Mr. Basava Prabhu S. Patil, learned senior counsel for the contesting second respondent.

5. The only point for consideration in this appeal is whether the High Court was justified in enlarging the second respondent on bail after imposing certain conditions.

6. It is not in dispute and highlighted that the second respondent is a sitting Member of Parliament facing several criminal cases. It is also not in dispute that most of the cases ended in acquittal for want of proper witnesses or pending trial. As observed by the High Court, merely on the basis of criminal antecedents, the claim of the second respondent cannot be rejected. In other words, it is the duty of the Court to find out the role of the accused in the case in which he has been charged and other circumstances such as possibility of fleeing away from the jurisdiction of the Court etc.

7. In the case relating to FIR No. 63 of 2009, he was arrested and in jail since 24.08.2009. Another important aspect is that after filing of charge-sheet on 15.07.2010, prosecution examined two important witnesses as PWs 1 and 2. This was the position prevailing on 26.07.2010. Even thereafter, now more than a year has rolled. Counsel appearing for the State assured that the trial will not be prolonged at the instance of the prosecution and ready to complete the evidence within a period to be directed by this Court. The other objection of the appellant for grant of bail is that he had received threats from the second respondent and his supporters warning him not to pursue the case against him. It is brought to our notice that based on the representations of the appellant, adequate protection had already been provided to him.

8. Taking note of all these aspects, particularly, the fact that the second respondent was in jail since 24.08.2009, the trial has commenced by examining the two witnesses on the side

of the prosecution and the assurance by the State that trial will not be prolonged and conclude within a reasonable time and also of the fact that the High Court while granting bail has imposed several conditions for strict adherence during the period of bail, we are not inclined to interfere with the order of the High Court. In fact, in the impugned order itself, the High Court has made it clear that in case of breach of any of the conditions, the trial Court will have liberty to take steps to send the applicant therein (respondent No.2 herein) to jail again. In addition to the same, it is further made clear that if the appellant receives any fresh threat from the second respondent or from his supporters, he is free to inform the trial Court and in such event the trial Court is free to take appropriate steps as observed by the High Court. We also direct the Trial Court to complete the trial within a period of four months from the date of the receipt of copy of this order without unnecessary adjournments.

9. With the above observation, finding no merit for interference with the order of the High Court, the appeal is dismissed.

D.G. Appeal dismissed.

A.V.M. SALES CORPORATION
v.
M/S. ANURADHA CHEMICALS PVT. LTD.
(Special Leave Petition (C) No.10184 of 2008)

JANUARY 17, 2012

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Contract Act, 1872:

ss. 23 and 28 - Two courts having jurisdiction to try a suit - Parties to an agreement mutually agreeing to exclude the jurisdiction of one court in preference to the other - Permissibility of, and if the same is violative of the provisions of ss. 23 and 28 - On facts, contract for supply of goods between the parties and agreement to the effect that dispute between the parties would be subject to jurisdiction at place 'C' - Suit for recovery filed by petitioner at place 'C' - On receiving summons, respondent filed a separate suit at place 'V' - Recovery suit by respondent decreed and upheld by the High Court - On appeal, held: Though the courts at place 'V' along with the courts at place 'C' would have jurisdiction u/s. 20 CPC to entertain and try a suit relating to and arising out of the agreement and the mutual understanding as part of the cause of action of the suit had arisen within the jurisdiction of both the said courts, such jurisdiction of the courts at place 'V' would stand ousted by virtue of the exclusion clause in the agreement - Decree passed by the civil judge at place 'V' and the judgment of the High Court set aside - Trial court at place 'V' directed to return the plaint to the respondent to present the same before the appropriate court at place 'C'.

ss. 23 and 28 - Contract in violation of ss. 23 and 28 - Permissibility of - Held: Parties to an agreement cannot contract against the statutory provisions.

Jurisdiction - Court having no territorial or pecuniary jurisdiction - If parties to an agreement, can confer jurisdiction on such court - Held: Parties cannot confer jurisdiction on a court which has no territorial or pecuniary jurisdiction to entertain a matter.

Cause of action - Meaning of - Held: Comprises a bundle of facts which are relevant for the determination of the lis between the parties.

Parties entered into an agreement at place 'C' for supply of goods by respondent to petitioner. The parties also entered into an agreement that the dispute between the parties would be subject to jurisdiction at place 'C' only. Dispute arose between the parties. The petitioner filed a recovery suit in the High Court at place 'C'. Upon receiving summons, the respondent filed a separate suit at place 'V' and the respondent's suit was decreed. Aggrieved, the petitioner filed a first appeal and the High Court dismissed the same. Therefore, the petitioner filed the instant Special Leave Petition.

Allowing the Special Leave Petition, the Court

HELD: 1.1 Section 23 of the Contract Act, 1872 indicates what considerations and objects are lawful and what are not, including the considerations or objects of an agreement, if forbidden by law. Section 28 of the Act, clearly spells out that any agreement in restraint of legal proceedings is void. Basically, what Section 28 read with Section 23 makes it very clear that if any mutual agreement is intended to restrict or extinguish the right of a party from enforcing his/her right under or in respect of a contract, by the usual legal proceedings in the ordinary Tribunals, such an agreement would to that extent be void. In other words, parties cannot contract against a statute. [Paras 9 and 10] [326-D; 327-D]

A.B.C. Laminart Pvt. Ltd. & Anr. Vs. A.P. Agencies, Salem **AIR 1989 SC 1239: (1989) 2 SCC 163: 1989 (2) SCR 1;** *Angile Insulations vs. Davy Ashmore India Ltd. & Anr.* **(1995) 4 SCC 153: 1995 (3) SCR 443 ;** *Hanil Era Textiles Ltd. Vs. Puromatic Filters (P) Ltd.* **AIR 2004 SC 2432: 2004 (1) Suppl. SCR 333 - referred to.**

1.2. As regards, the question as to whether the parties to an agreement can contract in violation of Sections 23 and 28 of the 1872 Act, the parties cannot contract against the statutory provisions. The question whether the parties to an agreement can confer jurisdiction on a court which has no territorial or pecuniary jurisdiction to entertain a matter, is answered in negative. As regards the question, whether if two courts have jurisdiction to try a suit, can the parties to an agreement mutually agree to exclude the jurisdiction of one court in preference to the other and as to whether the same would amount to violation of the provisions of Sections 23 and 28 of the Contract Act, was answered in the affirmative by the trial court and was upheld by the High Court. [Para 6] [324-F-H; 325-A-B]

1.3. The cause of action comprises a bundle of facts which are relevant for the determination of the lis between the parties. In the instant case, since the invoices for the goods in question were raised at place 'V, the goods were dispatched from 'place 'V and the money was payable to the 'respondent or its nominee at place 'V', the same comprised part of the bundle of facts giving rise to the cause of action for the suit. At the same time, since the petitioner/ defendant in the suit had its place of business at place 'C' and the agreement for supply of the goods was entered into at place 'C' and the goods were to be delivered at place 'C', a part of the cause of action also arose within the jurisdiction of the courts at place 'C' for the purposes of the suit.

Accordingly, both the courts within the jurisdiction of the courts at place 'C' and 'V' had jurisdiction under Section 20 of the Code of Civil Procedure to try the suit, as part of the cause of action of the suit had arisen within the jurisdiction of both the said courts. [Para 8] [325-F-H; 326-A-B]

1.4. Though the courts at place 'V' would also have jurisdiction, along with the courts at place 'Ç' to entertain and try a suit relating to and arising out of the agreement and the Mutual Understanding, such jurisdiction of the courts at place 'V' would stand ousted by virtue of the exclusion clause in the agreement. [Para 15] [329-B-C]

1.5. The decree passed by the Principal Senior Civil Judge at place 'V' and the impugned judgment of the High Court are set aside. The trial court at place 'V' is directed to return the plaint of the Original Suit to the plaintiff to present the same before the appropriate court at place 'C' having jurisdiction to try the suit. [Para 16] [329-D-E]

Case Law Reference:

1989 (2) SCR 1	**Referred to**	**Para 11**
1995 (3) SCR 443	**Referred to**	**Para 12**
2004 (1) Suppl. SCR 333	**Referred to**	**Para 12**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 10184 of 2008.

From the Judgment & Order dated 18.1.2007 of the High Court of Judicature Andhra Pradesh at Hyderabad in First Appeal No. 1352 of 1999.

Alok Singh, B. Vijayalakshmi Menon for the Petitioner.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. On 23rd December, 1988, the parties to the Special Leave Petition entered into an Agreement at Calcutta for supply of chemicals manufactured by the Respondent to the Petitioner. In continuation of the aforesaid Agreement, the parties arrived at a Mutual Understanding on 15th May, 1989, whereby the Respondent would adjust the advance lying with it and would exclusively supply to the Petitioner its two products, namely, Sodium Chromate and Sodium Dichromate in West Bengal, Bihar, Orissa and Assam. The Understanding between the parties included other terms and conditions as well. The terms of the Understanding entered into between the parties were reduced into writing in an agreement and the same was executed at Calcutta on 5th August, 1989, reiterating the terms of the Understanding and containing an additional clause indicating that *"Any dispute arising out of this agreement will be subject to Calcutta jurisdiction only."* [Emphasis supplied].

2. Since certain differences arose between the parties relating to the supply of goods in question, the Petitioner herein filed Original Suit No.588 of 1991 in the Calcutta High Court on 27th August, 1991, for recovery of its alleged dues from the Respondent, after giving due adjustment of the amount of the Invoices raised by the Respondent and filed its claim only for the balance amount, along with penalties etc. Upon receiving summons of the suit filed by the Petitioner, the Respondent on 12th September, 1991, filed a separate suit against the Petitioner at Vijayawada for recovery of a sum of 3,86,453.05, treating the Purchase Order dated 12th February, 1990, to be independent of the Agreement and also sought recovery of supplies made under the Invoices raised by the Respondent upon the Petitioner.

3. The Petitioner duly contested the Suit filed by the Respondent by filing Written Statement, along with relevant documents, in support of its case. Out of the several issues

raised by the Petitioner, one was the issue relating to the jurisdiction of the Vijayawada Court to entertain the Suit on account of the exclusion clause by which all actions arising out of the Agreement and the Memorandum of Understanding were to be subject to the Calcutta jurisdiction only. The other issue of importance was with regard to adjustment, inasmuch as, the Purchase Order dated 12th February, 1990, was treated as independent of the Understanding and Agreement arrived at between the parties. Rejecting the objection relating to jurisdiction, the Principal Senior Civil Judge, Vijayawada, by his judgment and decree dated 5th March, 1999, decreed the Respondent's Suit (Original Suit No.519 of 1991) with costs for a sum of 3,86,453.05, together with interest at the rate of 12% per annum, from the date of the Suit till realisation of the principal amount of 2,98,267.50. The Petitioner filed First Appeal No.1352 of 1999 before the Andhra Pradesh High Court against the aforesaid judgment and decree dated 5th March, 1999. By judgment and order dated 18th January, 2007, the learned Single Judge of the High Court dismissed the Appeal filed by the Petitioner. It is against the aforesaid judgment of the learned Single Judge of the Andhra Pradesh High Court in the First Appeal preferred by the Petitioner that the present Special Leave Petition has been filed.

4. Apart from the other grounds taken with regard to factual aspect of the matter, grounds have also been taken regarding the exclusive jurisdiction of the Courts at Calcutta agreed to by the parties in the Agreement and whether the same was not binding upon the parties. A further ground has also been taken as to whether in breach of the Agreement, the Respondent was entitled to invoke the jurisdiction of a Court at Vijayawada, whose jurisdiction stood ousted by the Agreement entered into between the parties.

5. On the strength of the pleadings of the parties, five issues were framed by the Trial Court, of which the first issue was whether the Court at Vijayawada had territorial jurisdiction

to entertain the suit. By his judgment and decree dated 5th March, 1999, in O.S. No.519 of 1991, the learned Principal Senior Civil Judge, Vijayawada, held that the Court at Vijayawada had jurisdiction to entertain the Suit as part of the cause of action for the suit arose within its jurisdiction. The learned Trial Judge, accordingly, decreed the Suit, as indicated hereinabove. In the First Appeal, being F.A. No.1352 of 1992, the learned Single Judge of the Andhra Pradesh High Court observed that the main contention of the Appellant before the High Court, who is the Petitioner herein, was that the Principal Senior Civil Judge, Vijayawada, had no jurisdiction to entertain the Suit as no part of the cause of action had arisen at Vijayawada. According to the Petitioner, its place of business was at Calcutta and the Agreement for the supply of the goods in question was also entered into at Calcutta. The goods were to be delivered at Calcutta and payment in respect thereof was to be made at Calcutta and, accordingly, the Court at Vijayawada had no territorial jurisdiction to entertain the Suit under Section 20 of the Code of Civil Procedure as no part of the cause of action had arisen within its jurisdiction. It was also emphasised that in the Agreement which was made Exh.D-5, it has been stipulated in Column 13 that any dispute arising out of the Agreement would be subject to the Calcutta jurisdiction only.

6. The question involved in this Special Leave Petition has several dimensions, including the question as to whether the parties to an agreement can contract in violation of Sections 23 and 28 of the Indian Contract Act, 1872. Obviously, the parties cannot contract against the statutory provisions. A connected question would arise as to whether the parties to an agreement can confer jurisdiction on a Court which has no territorial or pecuniary jurisdiction to entertain a matter? The answer to the second question is also in the negative. However, in this case a slightly different question arises, namely, as to whether if two Courts have jurisdiction to try a suit, can the

parties to an agreement mutually agree to exclude the jurisdiction of one Court in preference to the other and as to whether the same would amount to violation of the provisions of Sections 23 and 28 of the Indian Contract Act? The said question has been answered in the affirmative by the Trial Court and has been upheld by the High Court.

7. The question which has been raised in this Special Leave Petition is not new and has been considered by this Court earlier in several decisions. We are, therefore, required to consider as to whether the cause of action for the Suit filed by the Respondent in Vijayawada arose within the jurisdiction of the Court of the Principal Senior Civil Judge at Vijayawada, exclusively, or whether such cause of action arose both in Vijayawada and also in Calcutta? As has been mentioned hereinbefore on behalf of the Petitioner, it had been urged that the entire cause of action for the Suit had arisen within the jurisdiction of the Calcutta Courts and the Courts at Vijayawada had no jurisdiction whatsoever to entertain a suit pertaining to the Understanding and Agreement arrived at between the parties. However, it was contended on behalf of the Respondent that its Registered Office was situate at Vijayawada, the Invoices for the goods were raised at Vijayawada, the goods were dispatched from Vijayawada and the money was payable to the Plaintiff or its nominee at Vijayawada, by way of Demand Drafts and, accordingly, the Courts at Vijayawada had jurisdiction to entertain the Suit.

8. It has often been stated by this Court that cause of action comprises a bundle of facts which are relevant for the determination of the lis between the parties. In the instant case, since the invoices for the goods in question were raised at Vijayawada, the goods were dispatched from Vijayawada and the money was payable to the Respondent or its nominee at Vijayawada, in our view, the same comprised part of the bundle of facts giving rise to the cause of action for the Suit. At the same time, since the Petitioner/ Defendant in the Suit had its

place of business at Calcutta and the Agreement for supply of the goods was entered into at Calcutta and the goods were to be delivered at Calcutta, a part of the cause of action also arose within the jurisdiction of the Courts at Calcutta for the purposes of the suit. Accordingly, both the Courts within the jurisdiction of Calcutta and Vijayawada had jurisdiction under Section 20 of the Code of Civil Procedure to try the Suit, as part of the cause of action of the Suit had arisen within the jurisdiction of both the said Courts.

9. This leads us to the next question as to whether, if two Courts have jurisdiction to entertain a Suit, whether the parties may by mutual agreement exclude the jurisdiction of one of the Courts, having regard to the provisions of Sections 23 and 28 of the Indian Contract Act, 1872. Section 23 of the aforesaid Act indicates what considerations and objects are lawful and what are not, including the considerations or objects of an agreement, if forbidden by law. Section 28 of the Act, which has a direct bearing on the facts of this case, clearly spells out that any agreement in restraint of legal proceedings is void. For the sake of reference, the same is extracted hereinbelow :

> *"28. Agreements in restrain of legal proceedings, void* – [Every agreement,
>
> (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or
>
> (b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to the extent.]
>
> Exception 1 : *Saving of contract to refer to arbitration*

dispute that may arise.- This section shall not render illegal contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2 : *Saving of contract to refer question that have already arisen.* - Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to reference to arbitration."

10. Basically, what Section 28 read with Section 23 does, is to make it very clear that if any mutual agreement is intended to restrict or extinguish the right of a party from enforcing his/her right under or in respect of a contract, by the usual legal proceedings in the ordinary Tribunals, such an agreement would to that extent be void. In other words, parties cannot contract against a statute.

11. One of the earlier cases in which this question had arisen, was the case of *A.B.C. Laminart Pvt. Ltd. & Anr. Vs. A.P. Agencies, Salem* [AIR 1989 SC 1239 = (1989) 2 SCC 163]. In the said case, the cause of action for the suit had arisen both within the jurisdiction of the Civil Court at Salem in Andhra Pradesh and in the Civil Court of Kaira in the State of Gujarat. The question arose as to whether since by mutual agreement the jurisdiction had been confined only to the Courts within Kaira jurisdiction, the suit filed at Salem was at all maintainable? This Court, inter alia, held that there could be no doubt that an agreement to oust absolutely the jurisdiction of the Court will be unlawful and void, being against public policy. However, such a result would ensue if it is shown that the jurisdiction to which the parties had agreed to submit had nothing to do with the contract. If, on the other hand, it is found that the jurisdiction

agreed would also be a proper jurisdiction in the matter of the contract, it could not be said that it ousted the jurisdiction of the Court. After considering the facts involved in the said case and the submissions made on behalf of the parties, this Court observed as follows :

"Thus it is now a settled principle that where there may be two or more competent Courts which can entertain a suit consequent upon a part of the cause of action having arisen therewithin, if the parties to the contract agreed to vest jurisdiction in one such Court to try the dispute which might arise as between themselves, the agreement would be valid. If such a contract is clear, unambiguous and explicit and not vague, it is not hit by Sections 23 and 28 of the Contract Act and cannot also be understood as parties contracting against the statute."

12.A similar view was taken by this Court in *Angile Insulations vs. Davy Ashmore India Ltd. & Anr.* [(1995) 4 SCC 153], wherein the Hon'ble Judges while referring to the decision of this Court in *A.B.C. Laminart Pvt. Ltd.'s* case (supra), inter alia, held that where two Courts have jurisdiction consequent upon the cause of action or a part thereof arising therein, if the parties agree in clear and unambiguous terms to exclude the jurisdiction of the other, the said decision could not offend the provisions of Section 23 of the Contract Act. In such a case, the suit would lie in the Court to be agreed upon by the parties.

13. This Court has consistently taken the same view in several subsequent cases. We may refer to one such decision of this Court in *Hanil Era Textiles Ltd. Vs. Puromatic Filters (P) Ltd.* [AIR 2004 SC 2432 = (2004) 4 SCC 671], where part of the cause of action arose at both Delhi and Bombay. This Court held that the mutual agreement to exclude the jurisdiction of the Delhi Courts to entertain the suit was not opposed to public policy and was valid.

14. As indicated herein earlier, in this case also the cause of action for the Original Suit No.519 of 1991, filed by the Respondent before the Principal Senior Civil Judge, Vijayawada, arose partly within the jurisdiction of the Calcutta Courts and the Courts at Vijayawada.

15. Having regard to the provisions referred to hereinabove, though the Courts at Vijayawada would also have jurisdiction, along with the Courts at Calcutta, to entertain and try a suit relating to and arising out of the Agreement dated 23rd December, 1988, and the Mutual Understanding dated 15th May, 1989, such jurisdiction of the Courts at Vijayawada would stand ousted by virtue of the exclusion clause in the Agreement.

16. The Special Leave Petition has, therefore, to be allowed. The decree passed by the Principal Senior Civil Judge, Vijayawada in O.S. No.519 of 1991, and the impugned judgment of the High Court dated 18th January, 2007, are set aside. The Trial Court at Vijayawada is directed to return the plaint of the Original Suit No.519 of 1991 to the Plaintiff to present the same before the appropriate Court in Calcutta having jurisdiction to try the suit.

17. The Special Leave Petition is, accordingly, allowed, but there will be no order as to costs.

N.J. Special Leave Petition allowed.

VASANTI DUBEY

v.

STATE OF MADHYA PRADESH

(Criminal Appeal No. 166 of 2012)

JANUARY 17, 2012

[ASOK KUMAR GANGULY AND GYAN SUDHA MISRA, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

ss.190(1)(c) , 200, 202, 156(3) - Complaint case - Closure report - Filing of chargesheet - Case registered against appellant on the basis of the complaint u/ss.7 and 13(1)(d) r/w s. 13(1)(2) of the Prevention of Corruption Act, 1988 - After investigation, closure report submitted before the Special Judge - Special Judge refused to accept the same and directed the police to file chargesheet against the appellant - High Court quashed the order of the Special Judge granting liberty to the Special Judge either to take cognizance u/s.190(c) or order for further investigation - Special Judge ordered for further investigation and in spite of finding no further material to proceed refused to accept the closure report - It, however, recorded a direction to obtain sanction for prosecution of the appellant and thereafter ordered for re-investigation of the complaint for the second time - High Court upheld the order of the Special Judge - On appeal, held: On receipt of a complaint, the Magistrate is not bound to take cognizance but he can without taking cognizance direct investigation by the police u/s.156(3) - Once, however, he takes cognizance he must examine the complainant and his witnesses u/s.200 - Thereafter, if he requires police investigation or judicial enquiry, he must proceed u/s.202 - But in any case he cannot direct the police to straightaway file charge-sheet - Special Judge instead of following the procedure enumerated in the Cr.P.C. rejected the closure

report and in the process consistently committed error of law and jurisdiction not only once, but twice - Special Judge was not competent to proceed in the matter without sanction for prosecution and hence could not have ordered for reinvestigation - This amounted to sheer abuse of process of law resulting into vexatious proceedings and harassment of appellant for more than 10 years without discussing why he disagreed with the closure report.

s.200 - Enquiry under - Necessity for - Discussed.

ss.190, 200 - A case based on police report and a complaint case - Procedure to be followed by the Magistrate - Held: While in a case based on Police report, the Court while taking cognizance will straightaway examine whether a prima facie case is made out or not and will not enter into the correctness of the allegation levelled in the F.I.R., a complaint case requires an enquiry by the Magistrate u/s.200 if he takes cognizance of the complaint - In case he refuses to take cognizance he may either dismiss the complaint or direct the investigating agency to enter into further investigation - In case, he does not exercise either of these two options, he will have to proceed with the enquiry himself as envisaged and enumerated u/s.200 - But, he cannot exercise the option of directing the Police to submit a charge-sheet as such a course is clearly not envisaged under the Cr.P.C. and more so in a complaint case.

The appellant was posted as the Block Development Officer. She awarded the contract to the Sarpanch of village Baroda and made payment to him for execution of the contract. The Sarpanch/contractor filed a complaint against the appellant in the Lokayukta that he had been paid a sum of Rs.40,000/- only with respect to the contract awarded to him and when the balance payment of Rs.10,000/- was demanded by him, an illegal demand for a sum of Rs.3,000/- was made by the appellant. A case was registered against the appellant under Sections 7

and 13(1)(d) read with Section 13(1)(2) of the Prevention of Corruption Act, 1988.

The Lokayukta investigated the matter. In the course of investigation, the complainant resiled from his earlier version and stated that a false complaint was made by him at the instance of someone else whose name he did not divulge. After completion of the investigation, the Lokayukta directed that a closure report should be filed in regard to the complaint lodged against the appellant and appropriate action should be initiated against the complainant for lodging a false complaint. Accordingly, the closure report was submitted before the Special Judge. The Special Judge by order dated 5.8.2002 refused to accept the same and thereafter directed the police to file charge-sheet in the case against the appellant. The State Government filed a criminal revision challenging the order of the Special Judge. The Single Judge of the High Court allowed the revision petition and quashed the order passed by the Special Judge. The Lokayukta thereafter again got the complaint examined in the light of the statement of the witnesses and the evidence and noticed that there were no materials against the appellant to proceed since all payments were already received by the complainant prior to lodging of complaint specially in view of the subsequent version of the complainant that he had lodged a malicious complaint at the instance of a rival of the appellant. On 18.5.2004, the Lokayukta once again filed closure report before the Special Judge but the Special Judge this time again rejected the closure report. The appellant filed a revision petition which was dismissed by the High Court on the ground that the order of the Special Judge who had refused to accept the closure report for the second time did not suffer from any apparent error of jurisdiction.

The questions which arose for determination in the

instant appeal were whether the Magistrate/Special Judge could straightway direct for submission of charge-sheet in case he refused to accept final report/closure report of the police/investigating agency and thereafter direct the police to submit charge-sheet in case he was of the opinion that the case was not fit to be closed and it required to be proceeded further; and that whether the Special Judge could refuse to accept closure report and direct reinvestigation of the case for the second time in order to proceed further although he was confronted with the legal impediment indicating lack of sanction for prosecution in the matter.

Allowing the appeal, the Court

HELD: 1. Even after the police report indicates that no case is made out against the accused, the magistrate can ignore the same and can take cognizance on applying his mind independently to the case. But in that situation, he has two options (i) he may not agree with the police report and direct an enquiry under Section 202, Cr.P.C. and after such enquiry take action under Section 203. He is also entitled to take cognizance under Section 190 Cr.P.C. at once if he disagrees with the adverse police report but even in this circumstance, he cannot straightway direct submission of the charge-sheet by the police. [para 14] [346-D-F]

2. The order dated 18.5.2004 passed by the Special Judge straightway directing the police to submit charge-sheet was quashed by the single Judge of the High Court and liberty was left open to him either to take cognizance under Section 190(c), Cr.P.C. or direct the Lokayukta Police for further investigation. In spite of this order, the Special Judge did not pass an order taking cognizance which he could have done under Section 190(c) of the Cr.P.C. If the Special Judge considered it legal and appropriate to proceed in the matter, he could have taken

cognizance upon the complaint and could have proceeded further as per the provision under Section 200, Cr.P.C. by examining the complainant and if there were sufficient ground for proceeding, he could have issued process for attendance of the accused. However, such process could not have been issued, unless the magistrate found that the evidence led before him was contradictory or completely untrustworthy. Conversely, if he found from such evidence that sufficient ground was not there for proceeding i.e. no prima facie case against the accused was made out, he had to dismiss the complaint, since the complaint did not disclose the commission of any offence. But instead of taking any step either by issuing the process or dismissing the complaint at once, he could have taken immediate step as a third alternative to make an enquiry into the truth or falsehood of the complaint or for an investigation to be made by the police for ascertaining whether there was any prima facie evidence so as to justify the issue of process. In short, on receipt of a complaint, the magistrate is not bound to take cognizance but he can without taking cognizance direct investigation by the police under Section 156(3), Cr.P.C. Once, however, he takes cognizance he must examine the complainant and his witnesses under Section 200. Thereafter, if he requires police investigation or judicial enquiry, he must proceed under Section 202. But in any case he cannot direct the Police to straightaway file charge-sheet which needs to be highlighted as this point is often missed by the Magistrates. [para 15] [346-G-H; 347-A-H; 348-A]

3. The Special Judge instead of following the procedure enumerated in the Cr.P.C. rejected the closure report given by the Lokayukta and in the process consistently committed error of law and jurisdiction not only once, but twice. On the first occasion when the order of the Special Judge was quashed and set aside by the

High Court granting liberty to the Special Judge either to take cognizance under Section 190(c) or order for further investigation as he had committed an error of jurisdiction by directing the police to straightway submit the charge-sheet against the accused-petitioner, the Special Judge did not consider it appropriate to take cognizance but ordered for further investigation by Lokayukta Police and when the matter was reinvestigated by the Lokayukta Office, the Special Judge in spite of the finding of the investigating agency holding that no further material to proceed in the matter was found, refused to accept the closure report and this time it further realized that it could not proceed in the matter as there was no sanction for prosecution, which the Special Judge obviously noticed since he was not in a position to take cognizance directly under Sections 7, 13(1)(d) of the Prevention of Corruption Act in absence of sanction which was a statutory requirement. In spite of this, he refused to accept closure report but recorded a direction to obtain sanction for prosecution of the appellant and thereafter ordered for reinvestigation of the complaint for the second time creating a peculiar and anomalous situation which is not in consonance with the provision of the Code of Criminal Procedure enumerated under the Chapter relating to conditions requisite for initiation of proceedings. [para 16] [348-B-H; 349-A]

4. The enquiry under Section 200 Cr.P.C. cannot be given a go-bye if the Magistrate refuses to accept the closure report submitted by the investigating agency as this enquiry is legally vital to protect the affected party from a frivolous complaint and a vexatious prosecution in complaint cases. The relevance, legal efficacy and vitality of the enquiry enumerated under Section 200 Cr.P.C., therefore, cannot be undermined, ignored or underplayed as non compliance of enquiry under Section 200 Cr.P.C. is of vital importance and necessity as it is at

this stage of the enquiry that the conflict between the finding arrived at by the investigating agency and enquiry by the Magistrate can prima facie justify the filing of the complaint and also offer a plank and a stage where the justification of the order of cognizance will come to the fore. This process of enquiry under Section 200 Cr.P.C. is surely not a decorative piece of legislation but is of great relevance and value to the complainant as well as the accused. [Para 17] [349-B-D]

5. It is no doubt possible to contend that at the stage of taking cognizance or refusing to take cognizance, only prima facie case has to be seen by the Court. But the argument would be fit for rejection since it is nothing but mixing up two different and distinct nature of cases as the principle and procedure applied in a case based on Police report which is registered on the basis of First Information Report cannot be allowed to follow the procedure in a complaint case. A case based on a complaint cannot be allowed to be dealt with and proceeded as if it were a case based on Police report. While in a case based on Police report, the Court while taking cognizance will straightaway examine whether a prima facie case is made out or not and will not enter into the correctness of the allegation levelled in the F.I.R., a complaint case requires an enquiry by the Magistrate under Section 200 Cr.P.C. if he takes cognizance of the complaint. In case he refuses to take cognizance he may either dismiss the complaint or direct the investigating agency to enter into further investigation. In case, he does not exercise either of these two options, he will have to proceed with the enquiry himself as envisaged and enumerated under Section 200 Cr.P.C. But, he cannot exercise the fourth option of directing the Police to submit a charge-sheet as such a course is clearly not envisaged under the Cr.P.C. and more so in a complaint case. [para 18] [349-E-H; 350-A-B]

6. The instant matter is one such example and is one step ahead wherein the Special Judge was confronted with yet another legal impediment of lack of sanction for prosecution giving rise to a peculiar situation when he noticed and recorded that he could not proceed in the matter under the Prevention of Corruption Act without sanction for prosecution, but in spite of this he directed to obtain sanction, ordered for reinvestigation and consequently refused to accept closure report. Since the Special Judge in the instant matter refused to accept the closure report dated 18.05.2004 without any enquiry or reason why he refused to accept it which was submitted by the Lokayukta after reinvestigation for which reasons had been assigned and there was also lack of sanction for prosecution against the appellant which was necessary for launching prosecution under the Prevention of Corruption Act, the Special Judge clearly committed error of jurisdiction by directing reinvestigation of the matter practically for the third time in spite of his noticing that sanction for prosecution was also lacking, apart from the fact that the Lokayukta after reinvestigation had given its report why the matter was not fit to be proceeded with. The Special Judge in the wake of all these legal flaws as also the fact that the Special Judge under the circumstance was not competent to proceed in the matter without sanction for prosecution, could not have ordered for reinvestigation of the case for the third time by refusing to accept closure report dated 18.05.2004. This amounts to sheer abuse of the process of law resulting into vexatious proceeding and harassment of the appellant for more than 10 years without discussing any reason why he disagreed with the report of the Lokayukta and consequently the closure report which would have emerged if the Special Judge had carefully proceeded in accordance with the procedure enumerated for initiation of proceeding under the Code of Criminal Procedure. The impugned order

passed by the Special Judge refusing to accept the closure report dated 18.05.2004 is set aside and consequently the judgment and order of the High Court by which the order of the Special Judge was upheld, also stands quashed and set aside. [paras 19-22] [350-D-H; 351-A-E]

Abhinandan Jha & Ors. v. Dinesh Mishra **(1967) 3 SCR 668;** *Ram Naresh Prasad v. State of Jharkhand* **(2009) 11 SCC 299: 2009 (2) SCR 369;** *Bains v. State* **1980 (4) SCC 631: 1981 (1) SCR 935 - relied on.**

Case Law Reference:

(1967) 3 SCR 668	**relied on**	**Paras 9, 13**
2009 (2) SCR 369	**relied on**	**Para 13**
1981 (1) SCR 935	**relied on**	**Para13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 166 of 2012.

From the Judgment & Order dated 24.01.2011 of the High Court of Madhya Pradesh at Jabalpur in Criminal Revision No. 839 of 2004.

Ravindra Shrivastava, Kunal Verma, Anup Jain, A. Verma for the Appellant.

Vibha Datta Makhija for the Respondent.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. Leave granted.

2. The appellant herein has challenged the order dated 24.1.2011 passed by the High Court of Judicature at Jabalpur by which the Criminal Revision Petition No. 839/2004 was dismissed holding therein that the impugned order passed by

the Special Judge (under the Prevention of Corruption Act, 1988) District Narsinghpur did not suffer from any apparent error of jurisdiction.

3. In the backdrop of the facts and circumstances of the case to be related hereinafter, the question inter alia which falls for determination by this Court is whether the Magistrate/ Special Judge could straightway direct for submission of charge-sheet in case he refused to accept final report/closure report of the police/investigating agency and thereafter direct the police to submit charge-sheet in case he was of the opinion that the case was not fit to be closed and it required to be proceeded further. The question which also requires consideration is whether the Special Judge could refuse to accept closure report and direct reinvestigation of the case for the second time in order to proceed further although he was confronted with the legal impediment indicating lack of sanction for prosecution in the matter.

4. However, the question for determination is not a new or an extra-ordinary one as the question has cropped up time and again before this Court as to what course is left open for a Magistrate in a situation when the police submits final report under Section 173, Cr.P.C. or closure report is submitted by any other investigating agency stating that the case is not made out on account of lack of evidence or for any other reason.

5. But before we proceed to deal with the question involved herein, it is essential to state the salient facts and circumstances of this matter which has reached upto this Court by way of this special leave petition. On perusal of the materials on record, it emerges that the appellant – Smt. Vasanti Dubey was posted as the Block Development Officer, Janpad Panchayat, Gotegon, Narsinghpur (M.P.) and in that capacity was competent to award a contract for constructing concrete road in the village Baroda. The contract was awarded to one Dinesh Kumar Patel who was the Sarpanch of village Baroda

for constructing the concrete road in the village and was initially paid a sum of Rs.15,000/- vide cheque No. 101626 dated 27.2.2001 for execution of the contract. He was further paid a sum of Rs.15,000/- vide cheque No.101629 dated 8.5.2001 for execution of the contract which was awarded to him. The awardee Sarpanch - Dinesh Kumar Patel was still further paid Rs.10,000/- vide cheque No.101635 dated 23.5.2001 and the balance payment of Rs. 10,000/- was also finally paid to him vide cheque No.319586 dated 1.8.2001 towards full and final settlement of the consideration for the above mentioned contract. Admittedly, all the afore-mentioned payments were made to the Sarpanch contractor - Dinesh Kumar Patel which were due to be paid to him and the cheques were duly encashed.

6. However, the Sarpanch/contractor after several days of receipt of the final payment, filed a complaint against the appellant/BDO – Smt. Vasanti Dubey in the Special Police Establishment, Lokayukta Office, Jabalpur stating *inter-alia* that the complainant - Dinesh Kumar Patel had been paid a sum of Rs.40,000/- only with respect to the contract awarded to him and when the balance payment of Rs.10,000/- was demanded by him, the appellant demanded a sum of Rs.3,000/- as commission. The complainant's further case is that he although paid a sum of Rs.500/-, he felt aggrieved and hence did not pay any further amount to the appellant but preferred to lodge a complaint on 7.8.2001 in regard to the illegal demand made by her. Since the alleged incident was falling within the jurisdiction of the Special Police Establishment, Lokayukta Office, Bhopal, a case was registered against the appellant on the basis of the complaint on the same date i.e. 7.8.2001 under Sections 7 and 13(1)(d) read with Section 13(1)(2) of the Prevention of Corruption Act, 1988.

7. The Special Police Establishment, Lokayukta Office, proceeded to investigate the matter and carried out detailed investigation and also recorded statements of various persons

including that of the complainant on 26.3.2002. In course of investigation, the complainant resiled from his earlier version and stated that he had made a false complaint at the instance of someone else whose name he did not divulge. Further statement of one Shankar Singh was also recorded that the complainant had paid Rs.2,500/- to the appellant when she had gone to the bathroom and the money thereafter was recovered from her. The police also seized various documents from the office of the BDO located in the office of Janpad Gotegaon which included the files containing the details of the cheques from which payment had been made to the complainant. After completion of the investigation by the Office of Lokayukta who was competent to get the matter investigated by the police and in view of the statement of the complainant that he made false complaint at the instance of someone else as also on account of the fact that the entire payment except Rs. 10,000/- had been made by the appellant - Smt. Vasanti Dubey to the complainant prior to the date on which the complaint was filed, it was inferred that the complaint did not disclose commission of any offence and hence the Lokayukta directed that a closure report be filed in regard to the complaint lodged against Vasanti Dubey and appropriate action be initiated against the complainant for lodging a false complaint.

8. Accordingly, the closure report was submitted before the Special Judge, Narsinghpur but by order dated 5.8.2002, the Special Judge refused to accept the same. He thus rejected the closure report and thereafter directed the police to file charge-sheet in the case against the appellant against which the State Government filed a criminal revision bearing Criminal Revision No. 1206/2002 in the High Court challenging the order of the Special Judge who refused to accept the closure report and issued direction for submission of the charge-sheet against the appellant.

9. The learned single Judge of the High Court by order dated 14.1.2003 was pleased to allow the Revision Petition

and quashed the order passed by the Special Judge who had refused to accept the closure report and had directed submission of charge-sheet against the appellant on the ground that there is no power expressly or impliedly conferred under the Code on a magistrate to call upon the police to submit a charge-sheet when police had sent a report under Section 169 of the Code stating that there is no case made out for sending up an accused for a trial. The learned single Judge took this view relying upon the ratio of the authoritative pronouncement of this Court delivered in the matter of *Abhinandan Jha & Ors*. Vs. *Dinesh Mishra*[1] wherein it was observed that the functions of the magistrate and the police are entirely different and though the magistrate may or may not accept the report and take action according to law, he cannot impinge upon the jurisdiction of the police by compelling them to change their opinion so as to accord with his view. The learned Judge also took notice of the observation of the Supreme Court which had further been pleased to hold therein that the magistrate however, while disagreeing with a final report/closure report of a case can take cognizance under Section 190(1)(c) or order further investigation under Section 156(3) of the Code of Criminal Procedure but cannot straightaway direct for submission of charge-sheet to the police. Applying the aforesaid test as laid down by this Court in the case of *Abhinandan Jha* (supra), the impugned order passed by the Special Judge, Narsinghpur was held to be illegal and without jurisdiction and consequently was quashed. However, the learned single Judge had added an observation in the judgment and order that if the learned Special Judge thinks it fit and appropriate to take cognizance, the same can be taken under Section 190(c) of the Code of Criminal Procedure or he may direct the Lokayukta police for further investigation. As already stated the revision accordingly was allowed and the impugned order of the Special Judge dated 5.8.2002 was quashed.

1. AIR 1968 SC 117 = (1967) 3 SCR 668.

10. The Special Police Establishment, Lokayukta Office, Jabalpur, thereafter again got the complaint examined in the light of the statement of the witnesses and the evidence and noticed that there were no materials against the appellant to proceed as she had made all payments from 27.2.2001 up to 2.8.2001 yet a complaint dated 7.8.2001 was subsequently filed by the complainant - Dinesh Kumar Patel alleging that the appellant had demanded commission/bribe of Rs.2,500/- from the complainant in order to clear his bills which complaint was found to be untrustworthy and hence unacceptable since all payments had already been received by the complainant prior to the lodgement of complaint specially in view of the subsequent version of the complainant that he had lodged a malicious complaint at the instance of a rival of the appellant.

11. The Special Police Establishment, Lokayukta Office, therefore, once again filed an application/closure report before the Special Judge, Narsinghpur but the Special Judge, Narsinghpur this time again rejected the closure report by order dated 18.5.2004 observing therein that it had been clarified by order dated 5.8.2002 that there is sufficient basis to take cognizance against the appellant - Smt. Vasanti Dubey and there is no change in the circumstance on the basis of which closure report can be accepted clearly overlooking that the High Court had already quashed the order dated 5.8.2002 passed by the Special Judge as it had held that the Special Judge had no jurisdiction to direct the police to submit charge sheet in case he refuses to accept closure report although he could take cognizance under Section 190(C) of the Cr.P.C. or direct further investigation of the case. In pursuance of this, further investigation was done by the Special Police Establishment, Lokayukta Office and closure report was submitted after completion of reinvestigation. On this occasion, when the Special Judge refused to accept closure report, it was his statutory and legal duty to either pass a fresh order taking cognizance if he refused to dismiss the complaint and proceed

with the enquiry under Section 200 Cr.P.C. by examining the complainant after which he had to record reasons why he disagreed with the closure report. But the Special Judge did not discharge this legal obligation and simply in a mechanical manner directed the investigating agency to obtain sanction to prosecute the appellant despite the fact that the investigating agency had consistently reported that sufficient evidence was not there to justify prosecution of the appellant. At this stage, if the Special Judge found that there were sufficient ground to proceed, it could have taken cognizance but having been confronted with the legal impediment that it could not proceed without sanction for prosecution, the Special Judge directed to reinvestigate the matter once again for the second time and also directed the investigating agency to obtain sanction for prosecution.

12. Hence, the appellant assailed the order of the Special Judge dated 18.5.2004 by filing a criminal revision petition No. 839/2004 but the High Court on this occasion dismissed the revision petition and was pleased to hold that the order of the Special Judge who had refused to accept the closure report for the second time did not suffer from any apparent error of jurisdiction. The learned single Judge while dismissing the revision petition observed that it shall still be open to the appellant to raise all such pleas as are available to her under the law in case charge-sheet is filed against her.

13. However, the learned single Judge completely missed the ratio laid down in the case of *Abhinandan Jha* (supra) which had been relied upon by the learned single Judge of the High Court on an earlier occasion also when the order of the Special Judge refusing to accept closure report and directing submission of charge-sheet was quashed and the entire legal position was summed up in unequivocal terms as follows:-

> "There is no power, expressly or impliedly conferred under the Code, on a Magistrate to call upon the police to submit

a charge-sheet, when they have sent a report under Section 169 of the Code, that there is no case made out for sending up an accused for trial. The functions of the magistrate and the police are entirely different, and though, the Magistrate may or may not accept the report, and take suitable action according to law, he cannot impinge upon the jurisdiction of the police, by compelling them to change their opinion so as to accord with his view."

This position has been further reiterated and reinforced in a recent judgment of this Court delivered in the matter of *Ram Naresh Prasad vs. State of Jharkhand*[2], wherein it has been held that when the police submitted a final report of investigation of the case which in colloquial term is called closure report, the magistrate cannot direct the police to submit the charge-sheet. However, on the basis of the material in the charge-sheet, he may take cognizance or direct further investigation. In fact, this position is clearly laid down under Section 190 read with Section 156 of the Cr.P.C. itself and the legal position has been time and again clarified by this Court in several pronouncements viz. in the matter of *Bains vs. State*[3], wherein their lordships have summarised the position as follows:-

"1. When a Magistrate receives a complaint, he may, instead of taking cognizance at once under Section 190(1)(a) direct a police investigation under Section 156(3) ante;

2. Where, after completion of the investigation, the police sends an adverse report under Section 173(1), the Magistrate may take any of the following steps :

"i. If he agrees with police report, and finds that there is no sufficient ground for proceeding further, he may drop the proceeding and dismiss the complaint.

2. (2009) 11 SCC 299.

3. AIR 1980 SC 1883 = 1980 (4) SCC 631.

ii. He may not agree with the police report and may take cognizance of the offence on the basis of the original complaint, under Section 190(1)(a) and proceed to examine the complainant under Section 200.

iii. Even if he disagrees with the police report, he may either take cognizance at once upon the complaint, direct an enquiry under Section 202 and after such enquiry take action under Section 203. However, when the police submits a final report or closure report in regard to a case which has been lodged by the informant or complainant, the magistrate cannot direct the police to straightway submit the charge-sheet as was the view expressed in the matter of *Abhinandan Jha* (supra) which was relied upon in the matter of *Ram Naresh Prasad* (supra)."

14. Thus it is undoubtedly true that even after the police report indicates that no case is made out against the accused, the magistrate can ignore the same and can take cognizance on applying his mind independently to the case. But in that situation, he has two options (i) he may not agree with the police report and direct an enquiry under Section 202 and after such enquiry take action under Section 203. He is also entitled to take cognizance under Section 190 Cr.P.C. at once if he disagrees with the adverse police report but even in this circumstance, he cannot straightway direct submission of the charge-sheet by the police.

15. In the light of the aforesaid legal position, when we examined the merit of the instant matter, we noticed that the order dated 18.5.2004 passed earlier by the Special Judge straightway directing the police to submit charge-sheet was quashed by the learned single Judge of the High Court and liberty was left open to him either to take cognizance under Section 190(c) of the Cr.P.C. or direct the Lokayukta Police

for further investigation. In spite of this order, the Special Judge did not pass an order taking cognizance which he could have done under Section 190(c) of the Cr.P.C. However, he chose to direct office of the Lokayukta to enter into further investigation which after further investigation assigned reasons given out hereinbefore, stating that in view of the statement of the complainant that he had complained at the instance of a rival of the accused as also the fact that entire payment had already been made by the complainant prior to the lodgement of complaint, no case was made out against the complainant. In spite of this, if the Special Judge considered it legal and appropriate to proceed in the matter, he could have taken cognizance upon the complaint and could have proceeded further as per the provision under Section 200 of the Cr.P.C. by examining the complainant and if there were sufficient ground for proceeding, he could have issued process for attendance of the accused. However, such process could not have been issued, unless the magistrate found that the evidence led before him was contradictory or completely untrustworthy. Conversely, if he found from such evidence that sufficient ground was not there for proceeding i.e. no prima facie case against the accused was made out, he had to dismiss the complaint, since the complaint did not disclose the commission of any offence. But instead of taking any step either by issuing the process or dismissing the complaint at once, he could have taken immediate step as a third alternative to make an enquiry into the truth or falsehood of the complaint or for an investigation to be made by the police for ascertaining whether there was any prima facie evidence so as to justify the issue of process. In short, on receipt of a complaint, the magistrate is not bound to take cognizance but he can without taking cognizance direct investigation by the police under Section 156(3) of Cr.P.C. Once, however, he takes cognizance he must examine the complainant and his witnesses under Section 200. Thereafter, if he requires police investigation or judicial enquiry, he must proceed under Section 202. But in any case he cannot

direct the Police to straightaway file charge-sheet which needs to be highlighted as this point is often missed by the Magistrates in spite of a series of decisions of this Court including the case of *Abhinandan Jha* (supra) and *Ram Naresh Prasad* (supra) referred to hereinbefore.

16. When the facts of the instant matter is further tested on the anvil of the aforesaid legal position, we find that the Special Judge instead of following the procedure enumerated in the Cr.P.C. appeared to insist on rejecting the closure report given by the Special Police Establishment, Lokayukta Office and in the process consistently committed error of law and jurisdiction not only once, but twice. On the first occasion when the order of the Special Judge was quashed and set aside by the High Court granting liberty to the Special Judge either to take cognizance under Section 190(c) or order for further investigation as he had committed an error of jurisdiction by directing the police to straightway submit the charge-sheet against the accused-petitioner, the Special Judge did not consider it appropriate to take cognizance but ordered for further investigation by Lokayukta Police and when the matter was reinvestigated by the Special Police Establishment of the Lokayukta Office, the Special Judge in spite of the finding of the investigating agency holding that no further material to proceed in the matter was found, refused to accept the closure report and this time it further realized that it could not proceed in the matter as there was no sanction for prosecution, which the Special Judge obviously noticed since he was not in a position to take cognizance directly under Sections 7, 13(1)(d) of the Prevention of Corruption Act in absence of sanction which was a statutory requirement. In spite of this, he refused to accept closure report but recorded a direction to obtain sanction for prosecution of the appellant and thereafter ordered for reinvestigation of the complaint for the second time creating a peculiar and anomalous situation which is not in consonance with the provision of the Code of Criminal Procedure

enumerated under the Chapter relating to conditions requisite for initiation of proceedings.

17. It may be worthwhile to highlight at this stage that the enquiry under Section 200 Cr.P.C. cannot be given a go-bye if the Magistrate refuses to accept the closure report submitted by the investigating agency as this enquiry is legally vital to protect the affected party from a frivolous complaint and a vexatious prosecution in complaint cases. The relevance, legal efficacy and vitality of the enquiry enumerated under Section 200 Cr.P.C., therefore, cannot be undermined, ignored or underplayed as non compliance of enquiry under Section 200 Cr.P.C. is of vital importance and necessity as it is at this stage of the enquiry that the conflict between the finding arrived at by the investigating agency and enquiry by the Magistrate can prima facie justify the filing of the complaint and also offer a plank and a stage where the justification of the order of cognizance will come to the fore. This process of enquiry under Section 200 Cr.P.C. is surely not a decorative piece of legislation but is of great relevance and value to the complainant as well as the accused.

18. It is no doubt possible to contend that at the stage of taking cognizance or refusing to take cognizance, only prima facie case has to be seen by the Court. But the argument would be fit for rejection since it is nothing but mixing up two different and distinct nature of cases as the principle and procedure applied in a case based on Police report which is registered on the basis of First Information Report cannot be allowed to follow the procedure in a complaint case. A case based on a complaint cannot be allowed to be dealt with and proceeded as if it were a case based on Police report. While in a case based on Police report, the Court while taking cognizance will straightaway examine whether a prima facie case is made out or not and will not enter into the correctness of the allegation levelled in the F.I.R., a complaint case requires an enquiry by the Magistrate under Section 200 Cr.P.C. if he takes

cognizance of the complaint. In case he refuses to take cognizance he may either dismiss the complaint or direct the investigating agency to enter into further investigation. In case, he does not exercise either of these two options, he will have to proceed with the enquiry himself as envisaged and enumerated under Section 200 Cr.P.C. But, he cannot exercise the fourth option of directing the Police to submit a charge-sheet as such a course is clearly not envisaged under the Cr.P.C. and more so in a complaint case. As already stated, this position can be clearly deduced from the catena of decisions including those referred to hereinbefore but needs to be reinstated as time and again this magisterial error reaches up to this Court for rectification by judicial intervention.

19. The instant matter is one such example and is one step ahead wherein the Special Judge was confronted with yet another legal impediment of lack of sanction for prosecution giving rise to a peculiar situation when he noticed and recorded that he could not proceed in the matter under the Prevention of Corruption Act without sanction for prosecution, but in spite of this he directed to obtain sanction, ordered for reinvestigation and consequently refused to accept closure report.

20. Since the Special Judge in the instant matter refused to accept the closure report dated 18.05.2004 without any enquiry or reason why he refused to accept it which was submitted by the Special Police Establishment, Lokayukta Office, Jabalpur after reinvestigation for which reasons had been assigned and there was also lack of sanction for prosecution against the appellant which was necessary for launching prosecution under the Prevention of Corruption Act, we deem it just and appropriate to hold that the Special Judge clearly committed error of jurisdiction by directing reinvestigation of the matter practically for the third time in spite of his noticing that sanction for prosecution was also lacking, apart from the fact that the Special Police Establishment,

Lokayukta Office, after reinvestigation had given its report why the matter was not fit to be proceeded with.

21. We are therefore of the considered view that the Special Judge in the wake of all these legal flaws as also the fact that the Special Judge under the circumstance was not competent to proceed in the matter without sanction for prosecution, could not have ordered for reinvestigation of the case for the third time by refusing to accept closure report dated 18.05.2004. This amounts to sheer abuse of the process of law resulting into vexatious proceeding and harassment of the appellant for more than 10 years without discussing any reason why he disagreed with the report of the Lokayukta and consequently the closure report which would have emerged if the Special Judge had carefully proceeded in accordance with the procedure enumerated for initiation of proceeding under the Code of Criminal Procedure.

22. In view of the aforesaid discussion based on the existing facts and circumstances, we deem it just and appropriate to set aside the impugned order passed by the Special Judge refusing to accept the closure report dated 18.05.2004 and consequently the judgment and order of the High Court by which the order of the Special Judge was upheld, also stands quashed and set aside. Accordingly, the appeal is allowed.

D.G. Appeal allowed.

WEST U.P. SUGAR MILLS ASSOCIATION & ORS.
v.
STATE OF UTTAR PRADESH & ORS.
(Civil Appeal No. 7508 of 2005)

JANUARY 17, 2012

[DALVEER BHANDARI, T.S. THAKUR AND DIPAK MISRA, JJ.]

U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 - s. 16 - Fixation of State Advised Price (SAP) for sugarcane, over and above the minimum price fixed by the Central Government - Power of the State Government - Conflicting judgments by the Constitution Bench of five judges of the Court - Instant matter before a Bench of three judges - Since conflicting judgments have been delivered by the Bench of five judges, matter referred to a larger Bench of at least seven judges - However, certain directions issued to the sugar factories to pay the balance outstanding principal amount to cane growers or to the co-operative societies according to the SAP of the relevant crushing seasons.

The question which arose for consideration in these matters was whether the State of Uttar Pradesh has the authority to fix the State Advised Price (SAP) which is required to be paid over and above the minimum price fixed by the Central Government.

The appellant contended that in the Constitution Bench judgment in **Tika Ramji's* **case it was held that there was no power to fix a price for sugarcane under the U.P. Sugar Cane (Regulation of Supply and Purchase) Act, 1953 or Rules and orders made thereunder and the same was contrary to the majority judgment in the later Constitution bench judgment of 2004 in **U.P. Co-operative Cane Unions Federation's case; and as such**

the cases may be referred to a larger bench.as regards the power to fix a price for sugarcane.

Referring the matter to the larger Bench, the Court

HELD: 1.1. Ordinarily a Bench of three Judges should refer the matter to a Bench of five Judges, but, in the instant case since both the conflicting judgments *Ch. Tika Ramji and others etc. v. State of Uttar Pradesh and Others and **U.P. Cooperative Cane Unions Federations v. West U.P. Sugar Mills Association and Others have been delivered by the Constitution Benches of five Judges of this Court and thus, this controversy can be finally resolved only by a larger Bench of at least seven Judges of this Court, the matters are referred to the larger Bench. [Para 10] [360-F-G]

Ch. Tika Ramji and others etc. v. State of Uttar Pradesh and others* **(1956) SCR 393; ***U.P. Cooperative Cane Unions Federations v. West U.P. Sugar Mills Association and others* **(2004) 5 SCC 430: 2004 (2) Suppl. SCR 238 and** *Mineral Area Development Authority and others v. Steel Authority of India and others* **(2011) 4 SCC 450: 2011 (4) SCR 19 - referred to.**

1.2. In the peculiar facts and circumstances of the instant cases, the sugar factories are directed to pay the balance outstanding principal amount to the cane growers or to the co-operative societies according to the SAP of the relevant crushing seasons. In other words, in all those cases where the sugar factories and other buyers have not paid the balance outstanding principal amount to the cane growers or to the co-operative societies because of the stay orders obtained by them from this Court or from the High Court, they are now directed to pay the balance outstanding principal amount according to the SAP as fixed by the State Government from time to time. All the stay orders granted by this Court

or by the High Court are modified/vacated in the aforesaid terms. The balance outstanding principal amount are to be paid by the sugar factories within the stipulated period otherwise, buyers would be liable to pay interest at the rate of 18% per annum on the delayed payment to the cane growers or to the co-operative societies, as the case may be. [Para 13 and 14] [361-F-H; 362-A-B]

1.3. It is made clear that the payment of the balance outstanding principal amount by the sugar factories is of course without prejudice to the main submissions advanced by them (sugar factories) that the State Government lack legislative competence to impose the SAP. [Para 15] [362-C-D]

1.4. The SAP has been continuously increasing every year. In all those cases, where for any reason, the SAP was not fixed in a particular year, then, the sugar factories/buyers would be liable to pay the balance outstanding principal amount to the cane growers at the rate of the SAP of the previous year. [Para 17] [362-E-F]

Case Law Reference:

(1956) SCR 393	**Referred to**	**Para 6, 7**
2004 (2) Suppl. SCR 238	**Referred to**	**Para 6, 7**
2011 (4) SCR 19	**Referred to**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7508 of 2005.

From the Judgment & Order dated 07.10.2004 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 26291 of 2004.

WITH

Civil Appeal Nos. 7509-7510 of 2005, 150, 2664 of 2007, 4026, 4024, 4025. 4014-4023 of 2009.

Contempt Petition (C) No. 169 of 2006 in C.A. No. 7508 of 2005, Contempt Petition (C) No. 253 of 2007 in C.A. No. 7508 of 2005, Contempt Petition (C) No. 254 of 2007 in C.A. No. 7508 of 2005.

Civil Appeal Nos. 3911-3912, 3925, 3996-3997 of 2009.

Contempt Petition (C) NOs. 263-264 of 2008 in C.A. Nos. 3996-3997of 2009, Contempt Petition (C) Nos. 265-266 of 2008 in C.A. Nos. 3996-3997 of 2009, Contempt Petition (C) Nos. 267-268 of 2008 in C.A. Nos. 3996-3997 of 2009.

Civil Appeal No. 4764/2009

SLP (C) Nos. 21576-21581, 21585-21587, 18681, 19183, 20205, 20206. 23202, 26026 of 2008.

P.P. Malhotra, ASG, Mukul Rohtagi, Sudhir Chandra, Jayant Bhushan, Indu Malhotra, Rajiv Dutta, J.S. Attri, Ashok H. Desai, M.L. Verma, Dr. Rajeev Dhawan, Shail Kumar Dwivedi, AAG, Mahesh Agarwal, Narinder Kumar Verma, Gaurav Goel, Kush Chaturvedi, J.K. Sethi, Vansh Deep Dalmia, Vikas Mehta, Syed Shahid Hussain Rizvi, Sanjeev Kumar Singh, Uday Kumar, Rajesh Tiwari, Parijat Sinha, Sanjeev K. Singh, Uday Singh, Ruby Singh Ahuja, Abeer Kumar, Ishan Gaur, Bhagwati Prasad Padhy (for Karanjawala & Co.), V.M. Singh, Prashant Kumar, Anurag Sharma (for AJ & J Chambers), Manik Karanjawala, E.C. Agrawala, Vishwajit Singh, Praveen Kumar, Umesh Kumar Khaitan, Kritika Mehra, Bhumika Manan, Vishnu Sharma, P.N. Gupta, Indira Sawhney, Gaurav Sharma, Binu Tamta, Sushma Suri, Anil Katiyar (for V.K. Verma), Ravi P. Mehrotra, Vibhu Tiwari, Shantanu Krishna, Ajay Singh, Mukesh Verma, Vandana Mishra, S.S. Shamshery, Jatinder Kumar Bhatia, Abhishek Attrey, V.D. Khanna, Parvesh Sharma, Bimal Roy Jad, Rajeev K. Bharti, Nopni Gopal Dev, Manvendra Verma, K.R. Sasiprabhu, Punit D. Tyagi, Sidharth Chowdhray, Bina Gupta, Pradeep Mishra, Gunnam Venkateswara Rao, Ajay Kumar Talesara, T. Mahipal, Ritesh Agrawal, Ajay Choudhary, Ambhoj Kumar Sinha for the appearing parties.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. The crucial issue involved in this group of matters is whether the State of Uttar Pradesh has the authority to fix the State Advised Price (for short, 'SAP'), which is required to be paid over and above the minimum price fixed by the Central Government?

2. It is submitted by the appellants that the power to regulate distribution, sale or purchase of cane under Section 16 of the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 (hereinafter referred to as the 'U.P. Sugarcane Act') does not include the power to fix a price. According to the appellants, this aspect has been comprehensively dealt with by the Constitution Bench judgment of this court in *Ch. Tika Ramji and others etc. v. State of Uttar Pradesh and others* (1956) SCR 393. In this case this Court enumerated the legislative history of laws relating to sugar and sugarcane of both Centre and States. This Court came to the specific conclusion that the power reserved to the State Government to fix the minimum price of sugarcane which existed in U.P. Act 1 of 1938 was deleted from the U.P. Sugarcane Act since that power was being exercised by the Centre under Clause 3 of the Sugar and Gur Control Order, 1950. The relevant paragraphs from pages 422, 433 and 434 of the *Tika Ramji's* case are reproduced as under:

> "... ... ...*Even the power reserved to the State Government to fix minimum prices of sugarcane under Chapter V of U.P. Act I of 1938 was deleted from the impugned Act the same being exercised by the Centre under clause 3 of Sugar and Gur Control Order, 1950, issued by it in exercise of the powers conferred under Section 3 of Act XXIV of 1946. The prices fixed by the Centre were adopted by the State Government required under rule 94 was that the occupier of a factory or the purchasing agent should cause to be put up at each*

purchasing centre a notice showing the minimum price of cane fixed by the Government meaning thereby the Centre. The State Government also incorporated these prices which were notified by the Centre from time to time in the forms of the agreements which were to be entered between the cane growers, the cane growers cooperative societies… … …"

… … … …

"… … …*As we have noted above, the U.P. State Government did not at all provide for the fixation of minimum prices for sugarcane nor did it provide for the regulation of movement of sugarcane as was done by the Central Government in clauses (3) and (4) of the Sugarcane Control Order, 1955. The impugned Act did not make any provision for the same and the only provision in regard to the price of sugarcane which was to be found in the U.P. Sugarcane Rules, 1954, was contained in Rule 94 which provided that a notice of suitable size in clear bold lines showing the minimum price of cane fixed by the Government and the rates at which the cane is being purchased by the centre was to be put up by an occupier of a factory or the purchasing agent as the case may be at each purchasing centre. The price of cane fixed by Government here only meant the price fixed by the appropriate Government which would be the Central Government, under clause 3 of the Sugarcane Control Order, 1955, because in fact the U.P. State Government never fixed the price of sugarcane to be purchased by the factories. Even the provisions in behalf of the agreements contained in clauses 3 and 4 of the U.P. Sugarcane Regulation of Supply and Purchase Order, 1954, provided that the price was to be the minimum price to be notified by the Government subject to such deductions, if any, as may be notified by the Government from time to time meaning thereby the*

Central Government, the State Government not having made any provision in that behalf at any time whatever. … … …"

3. It has been specifically held in *Tika Ramji's case* that there was no power to fix a price for sugarcane under the U.P. Sugarcane Act or rules and orders made thereunder.

4. It is also submitted by the appellants that even if such a power had existed under Section 16 of the U.P. Sugarcane Act, even then such power would be totally repugnant to the power of the Central Government to fix the minimum price under clause 3 of the Sugarcane Control Order, 1955. This Court in *Tika Ramji's* case has not commented on whether such a power with the State Government would be repugnant to the Central legislation, since it found no such power with the State Government, however, the majority judgment in the later Constitution Bench judgment of 2004 in *U.P. Cooperative Cane Unions Federations v. West U.P. Sugar Mills Association and others* (2004) 5 SCC 430 held as under:

"The inconsistency or repugnancy will arise if the State Government fixed a price which is lower than that fixed by the Central Government. But, if the price fixed by the State Government is higher than that fixed by the Central Government, there will be no occasion for any inconsistency or repugnancy as it is possible for both the orders to operate simultaneously and to comply with both of them. A higher price fixed by the State Government would automatically comply with the provisions of sub clause (2) of clause 3 of the 1966 Order. Therefore, any price fixed by the State Government which is higher than that fixed by the Central Government cannot lead to any kind of repugnancy."

5. According to the appellants, the aforementioned conclusion of the *U.P. Cooperative Cane Unions Federations* is contrary to *Tika Ramji's* case.

6. We have heard learned counsel for the parties at length. We have also carefully perused and analysed both the aforementioned judgments delivered by the two Constitution Benches of this Court in *Tika Ramji and U.P. Cooperative Cane Unions Federations's* cases.

7. In our considered view, there is a clear conflict in the aforementioned judgments of the Constitution Benches. It may be pertinent to mention that almost every year a spate of petitions are filed before the Allahabad High Court and thereafter before this Court on similar issues and questions of law. Therefore, in the interest of justice, it is imperative that the conflict between these judgments be resolved or decided by an authoritative judgment of a larger Bench of this Court.

8. The learned counsel for the appellants in one voice asserted that these cases be referred to a larger Bench so that at least in future the parties would have benefit of a clearer enunciation of law by an authoritative judgment of a larger Bench.

9. Following questions of law may be considered by a larger Bench of this Court:

(1) Whether by virtue of Article 246 read with Entry 33 of List III to the Seventh Schedule of the Constitution the field is occupied by the Central legislation and hence the Central Government has the exclusive power to fix the price of sugarcane?

(2) Whether Section 16 or any other provision of the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 confers any power upon the State Government to fix the price at which sugarcane can be bought or sold?

(3) If the answer to this question is in the affirmative, then whether Section 16 or the said provision of the

U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 is repugnant to Section 3(2)(c) of the Essential Commodities Act, 1955 and Clause 3 of the Sugarcane (Control) Order, 1966? and if so, the provisions of the Central enactments will prevail over the provisions of the State enactment and the State enactment to that extent would be void under Article 254 of the Constitution of India.

(4) Whether the SAP fixed by the State Government in exercise of powers under Section 16 of the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 is arbitrary, without any application of mind or rational basis and is therefore, invalid and illegal?

(5) Does the State Advisory Price (for short 'SAP') constitute a statutory fixation of price? If so, is it within the legislative competence for the State?

(6) Whether the power to fix the price of sugarcane is without any guidelines and suffers from conferment of arbitrary and uncanalised power which is violative of Articles 14 and 19 (1) (g) of the Constitution of India?

10. We are conscious of the fact that ordinarily a Bench of three Judges should refer the matter to a Bench of five Judges, but, in the instant case since both the aforementioned conflicting judgments have been delivered by the Constitution Benches of five Judges of this Court and hence this controversy can be finally resolved only by a larger Bench of at least seven Judges of this Court.

11. Recently, a three-Judge Bench of this court in *Mineral Area Development Authority and others v. Steel Authority of India and others* (2011) 4 SCC 450 dealt with somewhat

similar situation and this Court in para 2 of the said judgment observed as under:

> "Before concluding, we may clarify that normally the Bench of five learned Judges in case of doubt has to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger coram than the Bench whose decision has come up for consideration (see *Central Board of Dawoodi Bohra Community v. State of Maharashtra* (2005) 2 SCC 673). However, in the present case, since prima facie there appears *to be some* conflict between the decision of this Court in *State of W.B. v. Kesoram Industries Ltd.* (2004) 10 SCC 201 which decision has been delivered by a Bench of five Judges of this Court and the decision delivered by a seven-Judge Bench of this Court in *India Cement Ltd. v. State of T.N.* (1990) 1 SCC 12*,* reference to the Bench of nine Judges is requested. The office is directed to place the matter on the administrative side before the Chief Justice for appropriate orders."

12. Reference of these matters to a larger Bench is made so that the controversy which arises almost every year is settled by an authoritative judgment of a larger Bench of this Court.

13. However, in the peculiar facts and circumstances of these cases, we direct the sugar factories to pay the balance outstanding principal amount to the cane growers or to the cooperative societies according to the SAP of the relevant crushing seasons. In other words, in all those cases where the sugar factories and other buyers have not paid the balance outstanding principal amount to the cane growers or to the cooperative societies because of the stay orders obtained by them from this Court or from the High Court, they are now directed to pay the balance outstanding principal amount according to the SAP as fixed by the State Government from time to time. All the stay orders granted by this court or by the

High Court are modified/vacated in the aforesaid terms. Let the balance outstanding principal amount be paid by the sugar factories within three months from the date of this judgment.

14. In case the balance outstanding principal amount, as directed by this Court, is not paid within three months from the date of this judgment then the sugar factories/buyers would be liable to pay interest at the rate of 18% per annum on the delayed payment to the cane growers or to the cooperative societies, as the case may be.

15. It is made clear that the payment of the balance outstanding principal amount by the sugar factories is of course without prejudice to the main submissions advanced by them (sugar factories) that the State Government lack legislative competence to impose the SAP.

16. It may be pertinent to mention that all these cases are covered by separate individual agreements where the sugar factories had undertaken to pay the SAP to the cane growers. We are not examining the veracity of these agreements.

17. It may be relevant to note that the SAP has been continuously increasing every year. In all those cases, where for any reason, the SAP was not fixed in a particular year, then, the sugar factories/buyers would be liable to pay the balance outstanding principal amount to the cane growers at the rate of the SAP of the previous year. On consideration of all the facts and circumstances of these cases, we request Hon'ble the Chief Justice of India to refer these matters to a larger Bench, preferably to a Bench consisting of seven Judges.

18. All these Civil Appeals and other petitions are accordingly referred to a larger Bench.

N.J. Matter referred to Larger Bench.

REGIONAL PROVIDENT FUND COMMISSIONER
v.
THE HOOGHLY MILLS CO. LTD. & ORS.
(Civil Appeal No. 655 of 2012)

JANUARY 18, 2012

[ASOK KUMAR GANGULY AND T.S. THAKUR, JJ.]

Employees' Provident fund and Miscellaneous Provisions Act, 1952:

ss. 17(1A)(a) and 14-B - Exempted establishment - Defaults in payment of contributions to the Fund - Power to recover damages - Held: In a case of default by the employer of an exempted establishment, in making its contribution to the Provident fund, s.14B of the Act will be applicable - If there is a default in payment of contribution to the scheme, it amounts to contravention of s.14-B and damages can be levied.

Constitution of India, 1950:

Articles 226 and 136 - Writ petition filed without availing of statutory remedy - Order of Regional Provident Fund Commissioner challenged by exempted established in writ petition - Held: Normally, the statutory remedy of appeal should be availed of - However, in view of peculiar facts of the case, it would not be correct exercise of judicial discretion to se nd the matter back to the remedy of appeal - Employees' Provident Fund and Miscellaneous Provisions Act, 1952 - s.71 - Appeal.

Interpretation of Statutes:

Purposive construction - Social Welfare legislation - Held: The normal canon of interpretation is that a social welfare legislation or a remedial statute receives liberal

construction and if there is any doubt, the same is resolved in favour of the class of persons for whose benefit the statute is enacted - Further, a purposive approach is to be adopted which promotes the purposes of the Act - Employees' Provident Fund and Miscellaneous Provisions Act, 1951 - ss. 14-B and 17(1A)(a).

The respondent-Company was granted exemption from the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 subject to the conditions mentioned in the exemption notification and the Explanation to sub-s. (1) of s.17 of the Act. As there were defaults on the part of the respondent-Company in making timely payment of dues towards the provident fund, proceedings were initiated against it and, ultimately, the Regional Provident Fund Commissioner directed the respondent-company to remit the specified amount by way of damages to the respective accounts, failing which further action as provided under the Act would be initiated. The respondent-Company without filing the statutory appeal u/s 71 of the Act, filed a writ petition before the High Court. The single Judge of the High Court allowed the writ petition holding that in view of the expression, "so far as may be" u/s 17(1A)(a) of the Act, the provisions in ss. 6, 7A, 8 and 14-B could not be applied in their entirety. In appeal, the Division Bench of the High Court held that ss. 6,7A, 8 and 14B would not be attracted to the defaulting 'exempted establishment'. Aggrieved, the Regional Provident Fund Commissioner filed the appeal.

Allowing the appeal, the Court

HELD: 1. Normally, the statutory remedy of appeal should be availed of in a situation like this. However, in the peculiar facts of the case and specially having regard to the nature of the proceedings, the impugned order having been passed in the year 2004 and thereafter the

writ petition entertained by the two Benches of the High Court and after that the matter remained pending before the Supreme Court, at this distance of time, to send the matter back to the remedy of appeal would not be a correct exercise of judicial discretion. [para 21] [378-C-E]

2.1. The Employees' Provident Fund and Miscellaneous Provisions Act, 1952 is a social welfare legislation and is one of the earliest Acts after the Constitution came into existence. It effectuates the economic message of the Constitution as articulated in the Directive Principles of State Policy. The normal canon of interpretation is that a social welfare legislation or a remedial statute receives liberal construction and if there is any doubt, the same is resolved in favour of the class of persons for whose benefit the statute is enacted. [paras 22, 24 and 25] [378-F; 379-G; 380-B]

Regional Provident Fund Commissioner v. S.D. College, Hoshiarpur and others **1996 (8) Suppl. SCR 27 = (1997) 1 SCC 241 - relied on**

2.2. The opening words of s.14B of the 1952 Act are, "where an employer makes a default in the payment of contribution to the fund". The object, as is evident from the Objects and Reasons of Amending Act 37 of 1953 was to remedy the defect. Similarly, s.17(1A), Clause (a), which makes s.14B applicable to an exempted establishment also came by way of an amendment, namely, by Amending Act 33 of 1988. The Statement of Objects and Reasons of Act 33 of 1988 makes it clear that one of the objects of such amendment was to check the defaults on the part of the exempted establishments also. It is well known that an interpretation which harmonizes with avowed object of the enactment is always to be accepted than the one which dilutes it. It is not uncommon to find legislature sometime using words by way of abundant caution. Therefore, the entire scheme of the Act is to be

considered at the time of interpretation. While construing the statute where there may be some doubt the court has to consider the statute as a whole - its design, its purpose and the remedy which it seeks to achieve. In the instant case, for construing the provisions of ss.14B and 17(1A)(a), a purposive approach is to be adopted which promotes the purposes of the Act. [paras 27-29, 35,37 and 56] [380-A-B; E-H; 381-A-C; 382-G-H; 383-A-F; 388-G-H; 389-A-B]

S.C. Advocates-on-Record Association & Ors., v. Union of India **1993 Suppl. (2) SCR 659 = 1993 (4) SCC 441; and** *State of West Bengal v. Union of India* **1964 SCR 371 = AIR 1963 SC 1241 at 1245 - relied on**

Towne v. Eisner **245 US 418;** *I.R. Commissioner v. Dowdall O'Mahoney & Co.* **(1952) 1 All E.R. 531;** *Re, Bidie (deceased),* **(1948) 2 All ER 995;** *Jones v. Wrotham Park Settled Estates* **(1980) AC 74; and** *Seaford Court Estates Ltd. v. Asher* **- (1949) 2 All E.R. 155 (CA) - referred to.**

Sixth Annual Benjamin N. Cardozo Lecture by Justice Felix Frankfurter, 47 Columbia Law Review 527 (1947); "The Loom of Language" by Friedrich Bodmer; and Bennion on Statutory Interpretation (Fifth Edition) - referred to.

2.3. Section 17(1A)(a) provides that when an exemption has been granted to an establishment under Clause (a) of sub-s. (1), the provision of ss. 6, 7, 8 and 14B of the Act shall, "so far as may be" apply to the employer of the exempted establishment in addition to such other condition as may be specified in the notification granting such exemption. Sub-clause (a) of s.17(1A) is divided in two parts. The second part is more specific in as much as it has been clearly stated that where an employer contravenes and makes default in compliance with any of the said conditions and provisions or any other

provisions of the Act, (this would obviously include s.14B), he shall be punishable u/s 14 as if the said establishment had not been exempted under clause (a). Therefore, there is a deeming provision giving clear indication of application of s. 14B of the Act to the 'employer' of an 'exempted establishment'. Thus, the sweep of the second part of clause (a) of s. 17(1A) which is preceded by the word 'and' is very wide. Section 14B may also be considered in this connection. Section 14B is attracted where an 'employer' makes a default in the payment of any contribution to the fund. In the instant case, admittedly default has taken place. [para 43-46] [385-B-G]

2.4. The expression 'fund' has been defined u/s 2(h) of the Act to mean the provident fund as established under a Scheme. Though the word 'scheme' has been defined u/s 2(l) to mean the employees provident fund scheme framed u/s 5, this Court in N.K. Jain has held that the definition of the word 'fund' would apply to a scheme operating in an establishment exempted u/s 17; and, "consequently if there is a default in payment of the contribution to such a scheme it amounts to contravention of s.6 punishable u/s 14(1A)". Following the same parity of reasoning, it is held, if there is a default in payment of contribution to such a scheme it amounts to contravention of s.14B and damages can be levied. [para 47-48] [385-F-G]

N.K. Jain and others v. C.K. Shah and others **1991 (1) SCR 938 = (1991) 2 SCC 495;** *National Buildings Construction Corporation v. Pritam Singh Gill* **1973 (1) SCR 40 = (1972) 2 SCC 1;** *Surendra Kumar Berma and others v. Central Government Industrial Tribunal-cum-Labour Court, New Delhi and Anr.* **1981 (1) SCR 789 = 1980 (4) SCC 443 - relied on**

Knightsbridge Estates Trust Ltd. v. Byrne **(1940) 2 All E.R. 401 (Ch.D); and** *Prakash Cotton Mills (P) Ltd. v. State of Bombay* **(1957) 2 LLJ 490 - referred to.**

Dr. Pratap Singh and another v. Director of Enforcement, Foreign Exchange Regulation Act and others **1985 (3) SCR 969 =AIR 1985 SC 989 - distinguished.**

Dr. M. Ismail Faruqui etc. v. Union of India and others **1994 (5) Suppl. SCR 1 =AIR 1995 SC 605 - held inapplicable.**

2.5. It is, therefore, held that in a case of default by the employer of an exempted establishment, in making its contribution to the Provident Fund, s.14B of the Act will be applicable. [para 58] [389-D]

Case Law Reference:

1994 (5) Suppl. SCR 1	held inapplicable	para 10 and 55
1996 (8) Suppl. SCR 27	relied on	para 22
1993 (2) Suppl. SCR 659	relied on	para 33
245 US 418	referred to	para 33
1964 SCR 371	relied on	para 35
(1948) 2 All ER 995	referred to	Para 36
(1980) AC 74	referred to	para 38
1991 (1) SCR 938	relied on	para 39
(1949) 2 All E.R. 155 (CA)	referred to	para 41
(1940) 2 All E.R. 401 (Ch.D)	referred to	para 47
1985 (3) SCR 969	distinguished	para 49
(1957) 2 LLJ 490	referred to.	Para 51

1981 (1) SCR 789	**relied on**	**para 53**
(1952) 1 All E.R. 531	**referred to.**	**Para 56**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 655 of 2012.

From the Judgment & Order dated 26.09.2008 of the High Court at Calcutta in MAT No. 1944 of 2006.

Aparna Bhat, Aruna Gupta for the Appellant.

Pradeep Ghosh, Rana Mukherjee, Indranil Ghosh, Vikramjit Banerjit, Samiron Borkataky, Sudeshna Bagchi (for Victor Moses & Associates) for the Respondent.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. The question which falls for consideration before this Court in this case is whether the employer of an establishment which is an 'exempted establishment' under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter, 'the Act') is subject to the provisions of Section 14B of the said Act whereby in cases of default in the payment of contribution to the provident fund, proceedings for recovery of damages can be initiated against the employer of such an 'exempted establishment'.

3. The question was raised by the respondent before the High Court and both the Single Bench and the Division Bench of the High Court have recorded a finding in favour of the respondent and held that the respondent being an 'exempted establishment' cannot be subjected to the provisions of Section 14(B) of the Act.

4. The material facts of case are not much in dispute.

5. By notification dated 23.11.1967, the Central Government in exercise of its power under Section 17(1) (a) of the Act granted exemption to the respondent, which is a company registered under the Companies Act subject to the provisions specified in Schedule II annexed to the said notification. The material part of the said notification is as follows:

> "S.O. Whereas, in the opinion of the Central Government:
>
> (1) The Rules of the provident fund of the establishment mentioned in Schedule I (hereto annexed and (hereinafter referred to as the said establishments), with the respect to the employees therein then those specified in section 6 of the employees' Provident Fund Act, 1952 (10 of 1952); and
>
> (2) The Employees in the said establishments are also in enjoyment of other provident fund benefits which on the whole are not less favourable to the employees than the benefits provided under the Employees' Provident Funds Scheme 1952 (hereinafter referred to as the said School) in relation to the employees in any other establishment of a similar character.
>
> Now, thereafter, in exercise of the powers conferred by clause (a) of sub-section (i) of section 17 of the Employees' Provident Fund Act 1952 (19 of 1952), the Central Government, hereby exempt the said establishments with effect from dates mentioned against each of them, respectively from the operation of all the provisions of the said scheme, subject to the conditions specified in scheme hereto annexed, which are in addition to the conditions mentioned in the explanation to sub-section (1) of the said section 17."

6. The respondent company comes under Item No. 5 of the notification. Initially the case of the respondent company is

that after the grant of exemption it framed a scheme and created a Trust and appointed a Board of Trustees from the Management of the said Trust fund and was thus enjoying exemption under Section 17(1A) (a) of the Act. It is also common ground that there were defaults on the part of the respondent company in making timely payment of dues towards provident fund for the period between October 1999 to October 2000 and then again from November 2000 to July 2002. In view of such admitted defaults, proceedings were initiated against the respondent company and by notices dated 10.9.2003 and 11.10.2003 enclosing therewith the detailed statement of delayed remittance of provident fund and allied dues. As contemplated under Section 14(B) of the Act, respondent was offered an opportunity to represent their case on several dates by the authorities under the Act and their case was listed for hearing but nobody appeared on their behalf on several dates. Thereafter, on the basis of some representation on their behalf the matter was heard and the Regional Provident Fund Commissioner II, Sikkim and Andaman & Nicobar Islands by a detailed order directed the respondent company to remit an amount of Rs.32,62,153/- by way of damages to the respective accounts, failing which, it was stated that further action as provided under the Act and the Schemes framed thereunder shall be initiated.

7. It is not in dispute that the said order dated 9.6.2004 is an appealable order under the provisions of Section 7I of the Act. However, without filing any appeal the respondent company filed a writ petition before the learned Single Judge of the High Court which ultimately upheld the contention of the respondent company and, inter alia, came to following finding:

> "Under such circumstances, this court holds that the impugned order cannot be sustained in law as the concerned authority demanded damages from the petitioners not only on account of delayed payment of contribution to the trust fund but also on account of delayed payment of the contribution to the pension fund and insurance fund.
>
> The impugned order, thus, stands set aside.
>
> The Provident Fund Authority may, however, ascertain damages under Section 14B of the said Act afresh for delayed payment of contribution to the pension fund as well as the insurance fund.
>
> The writ petition, thus, stands allowed with the above observation."

8. The learned Single Judge while allowing the writ petition proceeded on the basis that the expression "so far as may be" in Section 17(1A)(a) of the Act will have to be given its proper meaning. If such meaning is given then the provision in Sections 6, 7A, 8 and 14B of the Act cannot be applied in their entirety. The learned Single Judge held that the expression "so far as may be" cannot be treated as a surplusage.

9. The learned judge further held that the said expression "so far as may be" used in Section 17(1A)(a) of the said Act is for the purpose of restraining the application of provisions in Sections 6, 7A, 8 and 14B to the exempted establishment. The learned Judge also held that the damages which are recoverable under Section 14B of the said Act could not go to the hand of the individual affected employee. In case of delayed payment, loss of the individual affected employee is compensated by payment of interest under Section 7Q of the said Act. Since the damages which are recovered are not paid for compensating the losses of the individual employee, the expression "so far as may be" used in Section 17(1A)(a) of the said Act, does not require liberal interpretation. The said finding was given by the learned Single Judge in the context of the argument made on behalf of the appellant that the Act being social welfare legislation, needs to be liberally construed.

10. The learned Judge ultimately accepted the meaning of the expression "so far as may be" given by the Constitution Bench of this Court in the case of *Dr. M. Ismail Faruqui etc. v. Union of India and others* – AIR 1995 SC 605.

11. Thereafter, an appeal was taken to the Division Bench of the High Court by the appellant. The Appellate Court also came to the conclusion that Sections 6, 7A, 8 and 14B of the Act would not be attracted to the defaulting 'exempted establishment'.

12. In view of the fact that Section 17(1A)(a) makes it clear that those Sections would be applicable "so far as may be", the Appellate Court accepted the reasoning given by the Writ Court and affirmed the judgment.

13. It is against such a concurrent finding and interpretation of the aforesaid provision of the Act, we heard learned counsel for the parties.

14. For a proper appreciation on the point at issue, it would be better to set out some of the relevant provisions of the Act.

15. Section 2(e) & 2(fff) define 'employer' and 'exempted establishment'. Those definitions are as under:

"2 (e) "employer" means—

(i) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and, where a person has been named as a manager of the factory under clause (f) of sub-section (1) of section 7 of the Factories Act, 1948 (63 of 1948), the person so named; and

(ii) in relation to any other establishment, the person who, or the authority which, has the ultimate control over the

affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent;"

"2 (fff) "exempted establishment" means an establishment in respect of which an exemption has been granted under section 17 from the operation of all or any of the provisions of any Scheme or the Insurance Scheme, as the case may be, whether such exemption has been granted to the establishment as such or to any person or class of persons employed therein."

16. Section 14(B) of the Act which provides for recovery of damages reads as under:

"Section 14B - Power to recover damages - Where an employer makes default in the payment of any contribution to the Fund, the Pension Fund or the Insurance Fund or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 or sub-section (5) of section 17 or in the payment of any charges payable under any other provision of this Act or of any Scheme or Insurance Scheme or under any of the conditions specified under section 17, the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf] may recover from the employer such damages, not exceedings the amount of arrears, as it may thinks fit to impose:

Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard:

Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and

in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme."

17. Section 17(1A) which deals with power to grant exemption reads as under:

"17 Power to exempt - (1) The appropriate Government may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt, whether prospectively or retrospectively, from the operation of all or any of the provisions of any Scheme.

(a) any establishment to which this Act applies if, in the opinion of the appropriate Government, the rules of its provident fund with respect to the rates of contribution are not less favourable than those specified in Section 6 and the employees are also in enjoyment of other provident fund benefits which on the whole are not less favourable to the employees than the benefits provided under this Act or any Scheme in relation to the employees in any other establishment of a similar character; or

(b) any establishment if the employees of such establishment are in enjoyment of benefits in the nature of provident fund, pension or gratuity and the appropriate Government is of opinion that such benefits, separately or jointly, are on the whole not less favourable to such employees than the benefits provided under this Act or any Scheme in relation to employees in any other establishment of a similar character.

Provided that no such exemption shall be made except after consultation with the Central Board which on such consultation shall forward its views on exemptions to the

appropriate Government within such time limit as may be specified in the Scheme.

(1A) Where an exemption has been granted to an establishment under Clause (a) of Sub-section (1),

(a) the provisions of Section 6, Section 7A, Section 8 and 14B shall, so far as may be, apply to the employer of the exempted establishment in addition to such other conditions as may be specified in the notification granting such exemption, and where such employer contravenes, or makes default in complying with any of the said provisions or conditions or any other provision of this Act, he shall be punishable under Section 14 as if the said establishment had not been exempted under the said Clause (a);

(b) the employer shall establish a Board of Trustees for the administration of the provident fund consisting of such number of members as may be specified in the Scheme;

(c) the terms and conditions of service of members of the Board of Trustees shall be such as may be specified in the Scheme;

(d) the Board of Trustees constituted under Clause (b) shall -

(i) maintain detailed accounts to show the contributions credited, withdrawals made and interest accrued in respect of each employee;

(ii) submit such returns to the Regional Provident Fund Commissioner or any other officer as the Central Government may direct from time to time;

(iii) invest the provident fund monies in accordance with the directions issued by the Central Government from time to time;

(iv) transfer, where necessary, the provident fund account of any employee; and

(v) perform such other duties as may be specified in the Scheme.

18. Learned counsel for both the parties strenuously urged before us that in this case we are only concerned with the liability of the respondent company in so far as provident fund is concerned. Mr. Prdeep Ghosh, learned senior counsel for the respondent company has very fairly submitted that there are three accounts, namely, provident fund contribution, pension fund contribution and the Insurance fund contribution. The respondent company does not enjoy any exemption in respect of pension fund and insurance fund. Learned counsel further submitted that Section 14B makes a distinction among these three funds namely, provident fund contribution, pension fund contribution and the insurance fund contribution.

19. Ms. Aparna Bhat, learned counsel for the appellant argued that both the Courts i.e. the writ court and the appellate Bench of the High Court placed an erroneous interpretation with regard to application of Section 14B to an 'exempted establishment' by misconstruing the expression "so far as may be". Learned counsel also submitted that while construing the provisions of a social welfare legislation, like the Act, the High Court has not given any reason why it should not follow the well known principles of liberal interpretation.

20. Learned counsel also urged that in the judgment of the High Court there is no reason why despite the fact that there exists an efficacious remedy of appeal, the writ petition by the respondent company was entertained. The High Court has come to a finding that the grievance of the respondent company that it was not given adequate opportunity of hearing by the statutory authority is not correct on facts. Therefore, the learned counsel submitted that when an adequate opportunity of

hearing was given, but the same was not availed of by the respondent company before the authority which passed the order dated 9.6.2004, it was not open to the respondent company to invoke the extraordinary writ jurisdiction of the High Court. Learned counsel for the respondent company however urged that since the matter rested on an interpretation of various Sections of the Act, an appeal to statutory authority created under the said Act would not be an efficacious remedy.

21. In the peculiar facts of the case and specially having regard to the nature of the proceedings, we do not wish to decide the controversy raised in this case on the question of non-availability of a statutory remedy. The impugned order was passed in the year 2004 and thereafter the writ petition was entertained by the two Benches of the High court and after that the matter is pending before us. Now we are in 2012. To dismiss the order of the two Benches of the High Court inter alia on the ground that the writ petition was entertained despite the existence of a statutory remedy and then send it back to the remedy of appeal after a period of eight years, would not, in our judgment, be a correct exercise of judicial discretion. However, we are of the opinion that normally the statutory remedy of appeal should be availed of in a situation like this.

22. From the aforesaid discussion it is clear that this case calls for interpretation of certain statutory provisions. It is not disputed, and possibly cannot be disputed, that the Act is a social welfare legislation. The Act is one of the earliest Acts after the Constitution came into existence. Prior to its enactment, the requirement of having a suitable legislation for compulsory institutional and contributory provident fund in industrial undertakings was discussed several times at various tripartite meetings in which representatives of the Central and State Governments and employees and workers took part. Initially a non-official Bill on the subject was introduced in the Central Legislature in 1948 and was withdrawn with the assurance that the Government would consider the introduction

of a comprehensive Bill. Finally, the proposed legislation was endorsed by the conference of Provincial Labour Ministers in January, 1952 and later on the same was introduced in 1952. This Court had occasion to expressly hold that the said Act is a beneficial social welfare legislation to ensure benefits to the employees. In the case of *Regional Provident Fund Commissioner v. S.D. College, Hoshiarpur and others* reported in (1997) 1 SCC 241, this Court while interpreting Section 14B of the Act held that the Act envisages the imposition of damages for delayed payment (paragraph 10 at page 244 of the report). This Court also held that the Act is a beneficial social legislation to ensure health and other benefits of the employees and the employer under the Act is under a statutory obligation to make the deposit. In paragraph 11, it has also been held that in the event of any default committed in this behalf Section 14B steps in and calls upon the employer to pay damages.

23. If we look at the modern legislative trend we will discern that there is a large volume of legislation enacted with the purpose of introducing social reform by improving the conditions of certain class of persons who might not have been fairly treated in the past. These statutes are normally called remedial statutes or social welfare legislation, whereas penal statutes are sometime enacted providing for penalties for disobedience of laws making those who disobey, liable to imprisonment, fine, forfeiture or other penalty.

24. The normal canon of interpretation is that a remedial statute receives liberal construction whereas a penal statute calls for strict construction. In the cases of remedial statutes, if there is any doubt, the same is resolved in favour of the class of persons for whose benefit the statute is enacted, but in cases of penal statutes if there is any doubt the same is normally resolved in favour of the alleged offender.

25. It is no doubt true that the said Act effectuates the

economic message of the Constitution as articulated in the Directive Principles of State Policy.

26. Under the Directive Principles the State has the obligation for securing just and humane conditions of work which includes a living wage and decent standard of life. The said Act obviously seeks to promote those goals. Therefore, interpretation of the said Act must not only be liberal but it must be informed by the values of Directive Principles. Therefore, an awareness of the social perspective of the Act must guide the interpretative process of the legislative device.

27. Keeping those broad principles in mind, if we look at the Objects and Reasons in respect of the relevant Section it will be easier for this court to appreciate the statutory intent. The opening words of Section 14B are, "where an employer makes a default in the payment of contribution to the fund". This was incorporated by way of an amendment, vide Amending Act 37 of 1953. In this connection, the excerpts from the Statement of Objects and Reasons of Act 37 of 1953 are very pertinent. Relevant excerpts are:-

> "There are also certain administrative difficulties to be set right. There is no provision for inspection of exempted factories; nor is there any provision for the recovery of dues from such factories. An employer can delay payment of provident fund dues without any additional financial liability. No punishment has been laid down for contravention of some of the provisions of the Act.
>
> This Bill seeks primarily to remedy these defects'. – S.O.R., Gazette of India, 1953, Extra, Pt.II, Sec.2, p.910."

28. Similarly, in respect of Section 17(1A), clause (a) which makes Section 14B applicable to an exempted establishment also came by way of an amendment, namely, by Act 33 of 1988. Here also if we look at the relevant portion of the Statement of Objects and Reasons of Act 33 of 1988 we will find that they

are based on certain recommendations of the High level committee to review the working of the Act. Various recommendations were incorporated in the Objects and Reasons and one of the objects of such amendment is as follows:-

> "(viii) the existing legal and penal provisions, as applicable to unexempted establishments, are being made applicable to exempted establishments, so as to check the defaults on their part;"

29. It is well known that an interpretation of the statute which harmonizes with its avowed object is always to be accepted than the one which dilutes it.

30. The problem of statutory interpretation has been a matter of considerable judicial debate in almost all common law jurisdictions.

31. Justice Felix Frankfurter dealt with this problem rather comprehensively in his *Sixth Annual Benjamin N. Cardozo Lecture* [See 47 Columbia Law Review 527 (1947)]. The learned Judge opined:-

> "Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. They are symbols of meaning."

32. About what the words connote, there is a very illuminating discussion by Friedrich Bodmer, a Swiss Philologist in his treaties *"The Loom of Language"*. Bodmer, who was a Professor in the Massachusetts Institute of Technology, said:-

> "Words are not passive agents meaning the same thing and carrying the same value at all times and in all contexts. They do not come in standard shapes and sizes like coins

> from the mint, nor do they go forth with a degree to all the world that they shall mean only so much, no more and no less. Through its own particular personality each word has a penumbra of meaning which no draftsman can entirely cut away. It refuses to be used as a mathematical symbol."

33. The aforesaid formulation by Professor Bodmer was cited with approval by the Constitution Bench of this Court in *S.C. Advocates-on-Record Association & ors., v. Union of India* reported in 1993 (4) SCC 441 at page 553. Justice Holmes in *Towne v. Eisner* [245 US 418] thought in the same way by saying:

> "a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used."

34. Therefore, about the problem of interpretation we may again go back to what Justice Frankfurter said in the aforesaid article. This is of considerable importance. The learned Judge said:

> "…The process of construction, therefore, is not an exercise in logic or dialetic: The aids of formal reasoning are not irrelevant; they may simply be inadequate. The purpose of construction being the ascertainment of meaning, every consideration brought to bear for the solution of that problem must be devoted to that end alone…"

35. Therefore, while construing the statute where there may be some doubt the Court has to consider the statute as a whole – its design, its purpose and the remedy which it seeks to achieve. Chief Justice Sinha of this Court, in *State of West Bengal v. Union of India* reported in AIR 1963 SC 1241 at 1245, emphasized the importance of construing the statute as a whole. In the words of Chief Justice:-

"The Court must ascertain the intention of the Legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs".

36. Lord Greene, Master of Rolls, also gave the same direction in *Re, Bidie (deceased),* [(1948) 2 All ER 995, page 998]. In the words of Master of Rolls the technique should be:-

"to read the statue as a whole and ask oneself the question: 'In this state, in this context, relating to this subject-matter, what is the true meaning of that word'?"

37. Therefore, what is required to be done in the instant case for construing the provisions of Section 14B and 17(1A)(a) is to adopt a purposive approach, an approach which promotes the purposes of the Act which have been discussed above. About the development of purposive approach, *Bennion on Statutory Interpretation* (Fifth Edition) has traced its origin:-

"General judicial adoption of the term 'purposive construction' is recent, but the concept is not new. Viscount Dilhorne, citing Coke, said that while it is now fashionable to talk of a purposive construction of a statute the need for such a construction bas been recognised since the seventeenth century. In fact the recognition goes considerably further back than that."

38. In this connection, the opinion of Lord Diplock in *Jones v. Wrotham Park Settled Estates* [(1980) AC 74] is very pertinent. At page 105 of the report the learned Law Lord said:-

"I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction,

even where this involves reading into the Act words which are not expressly included in it."

39. This Court has already decided in *N.K. Jain and others v. C.K. Shah and others* reported in (1991) 2 SCC 495 that for construing the provision of this very Act a purposive approach should be adopted.

40. In *N.K. Jain* (supra) the question was whether criminal proceedings can be instituted under Section 14 of the Act in respect of an establishment which is exempted under Section 17 thereof, for contravention of the provisions of Section 6 of the Act.

41. Answering the question affirmatively the Court held in paragraph 13:

"…legislative purpose must be noted and the statute must be read as a whole. In our view taking into consideration the object underlying the Act and on reading Sections 14 and 17 in full, it becomes clear that cancellation of the exemption granted does not amount to a penalty within the meaning of Section 14(2A). As already noted these provisions which form part of the Act, which is a welfare legislation are meant to ensure the employees the continuance of the benefits of the provident fund. They should be interpreted in such a way so that the purpose of the legislation is allowed to be achieved."

42. In coming to the aforesaid conclusion the learned Judges relied on the famous dictum of Lord Denning in *Seaford Court Estates Ltd. v. Asher* – (1949) 2 All E.R. 155 (CA) wherein the learned Judge stated the position thus:

"…A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do so as they would have done. A judge must

not alter the material of which the Act is woven, but he can and should iron out the creases."

43. In view of the interpretation of the Act in *N.K. Jain* (supra) there is no difficulty in construing the provision of Section 17(1A)(a) where it is provided that when an exemption has been granted to an establishment under Clause (a) of sub-section (1), the provision of Sections 6, 7, 8 and 14B of the Act shall, "so far as may be" apply to the employer of the exempted establishment in addition to such other condition as may be specified in the notification granting such exemption.

44. If we look at sub-section (a) which has been set out hereinbefore, we will find that sub-clause (a) of Section 17(1A) is divided in two parts. The second part is more specific in as much as it has been clearly stated that where an employer contravenes and makes default in compliance with any of the said conditions and provisions or any other provisions of this Act, (this would obviously include Section 14B), he shall be punishable under Section 14 as if the said establishment had not been exempted under clause (a). Therefore, there is a deeming provision giving clear indication of application of Section 14B of the Act to the 'employer' of an 'exempted establishment'.

45. Thus, the sweep of the second part of clause (a) of Section 17(1A) which is preceded by the word 'and' is very wide.

46. Section 14B may also be considered in this connection. Section 14B is attracted where an 'employer' makes a default in the payment of any contribution to the fund. In the instant case admittedly default has taken place.

47. The expression 'fund' has been defined under Section 2(h) of the Act to mean the provident fund as established under a Scheme. Though the word 'scheme' has been defined under Section 2(l) to mean the employees provident fund scheme

framed under Section 5, this Court in *N.K. Jain* (supra) held the definition of the word 'fund' would apply to a scheme operating in an establishment exempted under Section 17. In that case it was urged on behalf of the respondent that the expression 'fund' and 'scheme' must be given a wide interpretation to include fund under a private scheme. Such submission on behalf of the respondent was noted in paragraph 16 at page 518 of the report. In para 17 at page 518 of the report, this Court on consideration of the ratio in the case of *Knightsbridge Estates Trust Ltd. v. Byrne* – (1940) 2 All E.R. 401 (Ch.D) and the decision of this Court in *National Buildings Construction Corporation v. Pritam Singh Gill* reported in (1972) 2 SCC 1 and also various other decisions accepted the said construction. Applying these principles, decided in the aforesaid cases, this Court has held "consequently if there is a default in payment of the contribution to such a scheme it amounts to contravention of Section 6 punishable under Section 14(1A)". (See page 517 of the report)

48. Following the same parity of reasoning, we hold if there is a default in payment of contribution to such a scheme it amounts to contravention of Section 14B and damages can be levied. The High Court, with great respect, erred by coming to a contrary conclusion.

49. Apart from that the High Court's interpretation of the expression "so far as may be" as limiting the ambit and width of Section 17(1A)(a) of the Act, in our judgment, cannot be accepted for two reasons as well.

50. The High Court is guided in the interpretation of the word "so far as may be" on the basis of the principle that statutes does not waste words. The High Court has also relied on the interpretation given to "so far as may be" in the case of *Dr. Pratap Singh and another v. Director of Enforcement, Foreign Exchange Regulation Act and others* reported in AIR 1985 SC 989. It goes without saying that Foreign Exchange Regulation

Act is a fiscal statute dealing with penal provisions whereas the aforesaid expression is to be construed in this Act which is eminently a social welfare legislation. Therefore, the parameters of interpretation cannot be the same. Even then in *Pratap Singh* (supra) this Court while construing "so far as may be" held "if a deviation becomes necessary to carry out the purposes of the Act…… it would be permissible". Of course the Court held that if such deviation is challenged before a Court of law it has to be justified.

51. In the instant case, the High Court failed to discern the correct principle of interpretation of a social welfare legislation. In this connection we may profitably refer to what was said by Chief Justice Chagla about interpretation of a social welfare or labour legislation in *Prakash Cotton Mills (P) Ltd. v. State of Bombay* reported in (1957) 2 LLJ 490. Justice Chagla unerringly laid down:

> "no labour legislation, no social legislation, no economic legislation, can be considered by a court without applying the principles of social justice in interpreting the provisions of these laws. Social justice is an objective which is embodied and enshrined in our Constitution……it would indeed be startling for anyone to suggest that the court should shut its eyes to social justice and consider and interpret a law as if our country had not pledged itself to bringing about social justice."

52. We endorse the same view. In fact this has been endorsed by this Court in *N.K. Jain* (supra).

53. Reference in this connection may be made to what was said by Justice Krishna Iyyer in the same vein in the decision of *Surendra Kumar Berma and others v. Central Government Industrial Tribunal-cum-Labour Court, New Delhi and Anr.,* reported in 1980 (4) SCC 443. The learned judge held that semantic luxuries are misplaced in the interpretation of 'bread and butter' statutes.

54. Unfortunately, the High Court missed this well settled principle of interpretation of social welfare legislation while construing the expression "so far as may be" in interpreting the provision of Section 17 (1A)(a) of the Act and unduly restricted its application to the employer of an exempted establishment.

55. The interpretation of the expression "so far as may be" by this Court in its Constitution Bench decision in *M. Ismail Faruqui* (supra) was given in a totally different context. The said judgment on a Presidential Reference was rendered in the context of the well known Ram Janam Bhumi Babri Masjid controversy where a special Act, namely, Acquisition of Certain Area at Ayodhya Act was enacted and sub-section (3) of Section 6 of the said Act provides that the provisions of Sections 4, 5 & 7 shall "so far as may be" apply in relation to such authority or body or trustees as they apply in relation to the Central Government. In that context this Court held that the expression "so far as may be" is indicative of the fact that all or any of these provisions may or may not be applicable to the transferee under sub-section (1). The objects behind the said enactment are totally unique and the same was a special law. Apart from this, this Court did not lay down any general principle of interpretation in the application of the expression "so far as may be". Their being vast conceptual difference in the legal questions in that case, the interpretation of "so far as may be" in *M. Ismail Faruqui* (supra) cannot be applied to the interpretation of "so far as may be" in the present case.

56. The High Court's interpretation also was in error for not considering another well settled principle of interpretation. It is not uncommon to find legislature sometime using words by way of abundant caution. To find out whether the words are used by way of abundant caution the entire scheme of the Act is to be considered at the time of interpretation. In this connection we may remember the observation of Lord Reid in *I.R. Commissioner v. Dowdall O'Mahoney & Co.* reported in (1952) 1 All E.R. 531 at page 537, wherein the learned Law

Lord said that it is not uncommon to find that legislature is inserting superfluous provisions under the influence of what may be abundant caution. The same principle has been accepted by this Court in many cases. The High Court by adopting, if we may say so, a rather strait jacket formula in the interpretation of the expression "so far as may be" has in our judgment, misinterpreted the intent and scope and the purpose of the Act.

57. For the reasons aforesaid, we are not inclined to accept the interpretation of the High Court and we are constrained to overrule the judgment of the Single Bench as also of the Division Bench.

58. We hold that in a case of default by the employer by an exempted establishment, in making its contribution to the Provident Fund Section 14B of the Act will be applicable.

59. The appeal is allowed. However, parties are left to bear their own costs.

R.P. Appeal allowed.

BURDWAN CENTRAL COOPERATIVE BANK LTD. & ANR.
v.
ASIM CHATTERJEE & ORS.
(Civil Appeal No. 657 of 2012)

JANUARY 18, 2012

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Service Law:

Disciplinary proceedings - Central Co-operative Bank taking disciplinary action against its employee for financial irregularities committed by him during his previous employment with the affiliated Society - Held: At the relevant point of time the delinquent was employed in the Primary Co-operative Society which was affiliated to the appellant-Bank and in view of this link, even though the delinquent was not under the administrative control of the appellant-Bank when he allegedly committed various financial irregularities, it was still entitled to commence disciplinary proceedings against him in view of his past conduct.

Dismissal of employee of Central Co-operative Bank - Held: The order of punishment had been passed against the delinquent on allegations of financial irregularities - The allegation would require serious consideration as to whether such an employee should be retained in the service of the Bank - Since a Bank acts in a fiduciary capacity in regard to people's investments, the very legitimacy of the banking system depends on the complete integrity of its employees - Order of the Bank upheld.

Constitution of India, 1950:

Article 311(2) - Dismissal of employee of Central

Cooperative Bank - Opportunity of hearing - Held: Since no prejudice has been caused to the delinquent by the non-supply of the enquiry report or the second show cause notice under Art. 311(2), it cannot be said that the disciplinary proceedings had been vitiated on account of such non-supply.

Respondent no.1, an employee of Krishi Unnayan Samity, which was a cooperative society affiliated to the Burdwan Central Cooperative Bank (appellant-Bank), was appointed as a Grade III Staff of the appellant-Bank on 8.9.1997. While he was serving in the appellant-Bank, he was issued a charge-sheet by the appellant-Bank for various financial irregularities committed by him in maintaining the accounts of the Samity. Respondent No.1 was found guilty of the charges and an order dismissing him from service was passed. Respondent No.1 filed a writ petition which was allowed by the Single Judge of the High Court holding that the dismissal order had been passed by the Bank with the mala fide intention of getting rid of respondent no.1, and the appellant-Bank had no authority to proceed against him on the allegation of defalcation of the funds of the Samity at a point of time when he was not an employee of the Bank. It was further held that the order of the Disciplinary Authority was vitiated as respondent no.1 was not served with a copy of the enquiry report, nor was any opportunity given to him by way of a second show-cause notice to offer his explanation thereto. The Division Bench of the High Court declined to interfere.

In the instant appeal filed by the Central Co-operative Bank, the question for consideration before the Court was: whether an employer can take disciplinary action against an employee in regard to acts purported to have been done by him in his previous employment in an affiliated society.

Allowing the appeal, the Court

HELD: 1.1. The appellant-Bank appointed respondent no.1 against the quota reserved for the employees of Primary Cooperative Societies affiliated to it in terms of r. 69(2)(b) of the West Bengal Co-operative Societies Rules, 1987. In view of this link between the Primary Cooperative Society and the appellant-Bank, even though respondent no.1 was not under the administrative control of the appellant-Bank when he allegedly committed various financial irregularities, it was still entitled to commence disciplinary proceedings against him in view of his past conduct. In the instant case, since the question of integrity in managing the accounts of the Samity is in question, it was but natural for the Bank to proceed departmentally against respondent no.1 after coming to learn of the allegations which have been made against him. [para 16 and 18] [399-E-G; 402-A-B]

S. Govinda Menon vs. Union of India **(1967) 2 SCR 566 - relied on.**

1.2. This is, in fact, a case where the order of punishment had been passed against respondent no.1 on allegations of financial irregularities. The allegation would require serious consideration as to whether such an employee should be retained in the service of the Bank. Since a Bank acts in a fiduciary capacity in regard to people's investments, the very legitimacy of the banking system depends on the complete integrity of its employees. [para 17] [400-F-H; 401-A]

1.3. Since no prejudice has been caused to respondent no.1 by the non-supply of the Inquiry Officer's report or the second show cause notice under Article 311(2) of the Constitution, it cannot be said that the disciplinary proceedings had been vitiated on account of such non-supply. [para 17] [401-D-E]

Managing Director, E.C.I.L. vs. B. Karunakar **1993 (2) Suppl. SCR 576 = (1993) 4 SCC 727 - referred to.**

1.4. Both the Single Judge and the Division Bench of the High Court were not justified in interfering with the action taken by the disciplinary authorities of the Bank. The orders of the Single Judge and the Division Bench of the High Court, are set aside. The decision taken by the Bank in dismissing respondent No.1 from service is restored. [para 19] [402-C-D]

Case Law Reference:

1993 (2) Suppl. SCR 576	**referred to**	**para 9**
(1967) 2 SCR 566	**relied on**	**para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 657 of 2012.

From the Judgment and Order dated 07.08.2007 of the Division Bench of the High Court of Calcutta in FMA No. 301 of 2005.

Tarun Kr. Ray, Soumya Chakraborty and P. Narasimhan for the Appellants.

R.K. Gupta, S.K. Gupta, M.K. Singh, B.K. Shahi, Shekhar Kumar and H.K. Puri for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. The short point for decision in this Appeal is whether an employer can take disciplinary action against an employee in regard to acts purported to have been done by him in his previous employment in an affiliated society.

3. The Respondent No.1 herein was an employee of

Raipur Krishi Unnayan Samity (hereinafter referred to as "the Samity"), a cooperative society affiliated to the Burdwan Central Cooperative Bank, the Appellant herein. Under its Recruitment Rules, the Bank was entitled to recruit people from the affiliated societies through a regular recruitment process. In the recruitment process held in 1997, the Bank appointed the Respondent No.1 as a Grade III Staff of the Bank by an appointment letter dated 8th September, 1997. On being offered the said appointment, the Respondent No.1 left the services of the Samity where he was working and joined the Bank pursuant to the appointment letter issued to him.

4. While the Respondent No.1 was serving in the Bank, the Assistant Registrar, Cooperative Societies, Burdwan-I, lodged a complaint with the Bank that during an enquiry conducted by the Registrar of Cooperative Societies, it had transpired that the Respondent No.1 had committed various financial irregularities in maintaining the accounts of the Samity. In view of the above, the Assistant Registrar recommended that action be taken against him.

5. On the basis of the said complaint, the Bank issued a charge-sheet to the Respondent No.1 on 2nd February, 2000. Although, according to the Bank, the said Respondent admitted his guilt in his reply to the charge-sheet, a full-fledged enquiry was held by the Bank by appointing an Enquiry Officer and affording the Respondent No.1 adequate opportunity to defend himself, since according to him, he had been forced to sign a letter of confession. On conclusion of the disciplinary proceedings, the Enquiry Officer found the Respondent No.1 guilty of the charges brought against him. On the basis of the Enquiry Report, the Bank through its Chief Executive Officer, being the Disciplinary Authority of the Respondent No.1, passed an order of dismissal on 8th May, 2000. It appears that neither a copy of the Enquiry Report nor the second show-cause notice was served upon the Respondent No.1.

6. Aggrieved by the order of the Disciplinary Authority, the Respondent No.1 filed a Writ Petition challenging the order of dismissal. The learned Single Judge who heard the matter, allowed the Writ Petition by holding that the dismissal order had been passed by the Bank with the mala fide intention of getting rid of the Respondent No.1. The learned Judge held that the Bank had no authority to proceed against the Respondent No.1 on the allegation of defalcation of the funds of the Samity at a point of time when he was not an employee of the Bank. In addition, the learned Judge held that the order of the Disciplinary Authority was vitiated as the Respondent No.1 was not served with a copy of the Enquiry Report, nor was any opportunity given to him by way of a second show-cause notice to offer his explanation thereto.

7. The Bank preferred First Misc. Appeal No.301 of 2005 against the aforesaid order, wherein the attention of the Division Bench was drawn to the provisions of the West Bengal Cooperative Rules, 1987, wherein it has been stipulated that any mis-appropriation of the employer's business or property would come within the mischief of "misconduct". It was urged on behalf of the Bank that since the Samity was affiliated to the Bank, defalcation of the funds of the Samity would attract the definition of "misconduct" and the Respondent No.1 had been rightly proceeded with departmentally. It was, however, admitted before the Division Bench that the Bank had dismissed the Respondent No.1 without affording him an adequate opportunity of explaining his version on the findings of the enquiry by serving him a copy of the Enquiry Report as well as the second show-cause notice.

8. On the submissions made on behalf of the parties, the Division Bench affirmed the view expressed by the learned Single Judge that the Bank could not have proceeded against the Respondent No.1 in respect of an illegality and/or misconduct which had allegedly been committed when he was not an employee of the Bank. Accordingly, without commenting

on the findings of the learned Single Judge with regard to the allegations of mala fide and/or biased attitude on the part of the Bank, the Division Bench held that the Bank was not entitled to proceed against the Respondent No.1 in law and disposed of the Appeal accordingly.

9. As indicated hereinbefore, the present Appeal is directed against the said judgment and order of the Calcutta High Court.

10. Mr. Tarun Kumar Ray, learned senior advocate appearing for the Appellant-Bank, urged that the Respondent No.1 had not been prejudiced in any way on account of non-supply of the report of the Enquiry Officer or in the absence of a second show-cause notice, as was earlier envisaged under Article 311(2) of the Constitution prior to its amendment by the 42nd Constitutional Amendment Act, 1976. Mr. Ray submitted that as had been held by this Court in *Managing Director, E.C.I.L. vs. B. Karunakar* [(1993) 4 SCC 727], the order of reinstatement for non-furnishing of Enquiry Report to the concerned employee would depend on the extent of prejudice caused to him and could not be ordered as a matter of course. It was, however, mentioned that a copy of the Enquiry Report, if not served earlier, should be provided to the employee before arguments were allowed to be advanced and thereafter the court should apply its judicial mind before setting aside the punishment on a finding that prejudice has been caused to the concerned employee. The Court held further that this was the minimum compliance of the rules of natural justice while awarding major penalties.

11. In support of his contention that even though the Respondent No.1 was not under the administrative control of the Appellant when the alleged irregularity was perpetrated, the Appellant-Bank was still entitled to commence disciplinary proceedings against him, Mr. Ray referred to the decision of this Court in *S. Govinda Menon vs. Union of India* [(1967) 2

SCR 566]. In the said decision this Court had held that even if an employee was not subject to the administrative control of the Government when he was functioning as Commissioner, his acts or omissions as Commissioner could form the subject matter of disciplinary proceedings, provided the act or omission reflected on his reputation for integrity or devotion to duty as a member of the service.

12. Mr. Ray urged that in the instant case there was no prejudice caused to the Respondent No.1 either by the non-service of the report of the Enquiry Officer or by the non-issuance of a second show-cause notice, which merited interference by the High Court with the decision to terminate the services of Respondent No.1. Mr. Ray submitted that in *B. Karunakar's* case (supra) it had been held that the failure to provide the Enquiry Report was not fatal to the disciplinary proceedings which could be re-commenced from the stage prior to arguments, after supply of a copy of the Enquiry Officer's report which resulted in the termination of the services of the Respondent No.1. Mr. Ray further submitted that since no prejudice had been caused to the Respondent, in the above-mentioned circumstances the decision of the High Court to set aside the said Respondent's order of termination was not warranted in law and the judgments of both the learned Single Judge and the Division Bench were, therefore, liable to be set aside.

13. On the other hand, Mr. Gupta appearing for the Respondent No. 1 submitted that the learned Single Judge had rightly arrived at the conclusion that the dismissal of the Respondent No.1 was tainted with malafides on the part of the Bank to get rid of him. Mr. Gupta also contended that the High Court had rightly held that the dismissal of the Respondent on the basis of an allegation of defalcation of the funds of the Samity, when he was not even an employee of the Bank, was wholly without jurisdiction, as he was not answerable to the Bank for whatever allegations that may have been made against him

in his previous employment under the Raipur Krishi Unnayan Samity, which was a co-operative society affiliated to the Appellant-Bank. Mr. Gupta further submitted that in the absence of employer-employee relationship at the time when the alleged defalcation is said to have been committed, the Appellant co-operative Bank ought not to have proceeded against the Respondent No.1 in disciplinary proceedings, and, thereafter, dismissed him from service. Mr.Gupta submitted that the order of the learned Single Judge, as well as that of the Division Bench, was based on a correct appreciation of the law and did not merit interference in the appeal.

14. Having carefully considered the submissions made on behalf of the respective parties and having regard to the fact that the Respondent No.1 was an employee of the Samity, which was a cooperative society affiliated to the Appellant Cooperative Bank herein, there was a link between the previous employment of the Respondent No.1 and his subsequent appointment under the Appellant-Bank. It has to be kept in mind that under its Recruitment Rules, the Appellant-Bank was entitled to recruit people from the affiliated societies through a regular recruitment process. Accordingly, even though the Respondent No.1 was employed by a different Cooperative Society, the same had a link with the Appellant-Cooperative Bank on the basis whereof the Respondent No.1 was appointed by the Appellant-Bank on 8th September, 1997.

15. There is no denial of the fact that the Respondent No.1 came to be appointed by the Appellant-Bank on a temporary basis as a Grade-III employee in the quota reserved for the employees of Primary Cooperative Societies affiliated to the District Central Cooperative Bank in terms of Rule 69(2)(b) of the West Bengal Co-operative Societies Rules, 1987. The provisions of Rule 69(2)(b) of the 1987 Rules, which are relevant in this case, provides as follows :

"**69. Minimum paid staff to be employed by a co-operative society, their respective essential qualifications and procedure of their employment and the conditions of their service –**

(1) xxx xxx xxx xxx

(2) The posts shall be filled up in the following manner :-

(a) ……;

(b) not more than twenty-five percent of the sanctioned posts in the establishment of an apex or central society shall be filled up by promotion of fit and suitable employees of the societies affiliated to it;

(c) ……;

(d) ……;

(e) ……"

16. In keeping with the above, the Appellant-Bank appointed the Respondent No.1 against the quota reserved for the employees of Primary Cooperative Societies affiliated to the Respondent-Bank in terms of Rule 69(2)(b) of the 1987 Rules. Mr. Ray appears to be correct in his contention that in view of the above link between the Primary Cooperative Society and the Appellant-Bank, even though the Respondent No.1 was not under the administrative control of the Appellant-Bank when he allegedly committed various financial irregularities, the Appellant-Bank was still entitled to commence disciplinary proceedings against him in view of his past conduct. The decision of this Court in *S. Govinda Menon's* case (supra), cited by Mr. Ray, also has a direct bearing on the facts of this case, where, although the Respondent No.1 was not under the administrative control of the Appellant-Bank, prior to his service with the Bank, his previous conduct was a blot on

his integrity and devotion to duty as a member of the service. Since no prejudice had been caused to the Respondent No.1 by the non-supply of the Enquiry Officer's report or the second show-cause notice under Article 311(2) of the Constitution, the Respondent No.1 had little scope to contend that the principles of natural justice had been violated which had vitiated the proceedings.

17. However, there is one aspect of the matter which cannot be ignored. In *B. Karunakar's* case (supra), despite holding that non-supply of a copy of the report of the Inquiry Officer to the employee facing a disciplinary proceeding, amounts to denial of natural justice, in the later part of the judgment it was observed that whether in fact, prejudice has been caused to the employee on account of non-furnishing of a copy of the inquiry report has to be considered in the facts of each case. It was observed that where the furnishing of the inquiry report would not make any difference to the ultimate outcome of the matter, it would be a perversion of justice to allow the concerned employee to resume his duties and to get all consequential benefits. It was also observed that in the event the Inquiry Officer's report had not been furnished to the employee in the disciplinary proceedings, a copy of the same should be made available to him to enable him to explain as to what prejudice had been caused to him on account of non-supply of the report. It was held that the order of punishment should not be set aside mechanically on the ground that the copy of the inquiry report had not been supplied to the employee. This is, in fact, a case where the order of punishment had been passed against the Respondent No.1 on allegations of financial irregularity. Such an allegation would require serious consideration as to whether the services of an employee against whom such allegations have been raised should be retained in the service of the Bank. Since a Bank acts in a fiduciary capacity in regard to people's investments, the very legitimacy of the banking system depends on the complete

integrity of its employees. As indicated hereinbefore, there is a live-link between the Respondent No.1's performance as an employee of the Samity, which was affiliated to the Bank, and if the Bank was of the view that his services could not be retained on account of his previous misdemeanor, it is then that the second part of *B. Karunakar's* case (supra) becomes attracted and it becomes necessary for the court to examine whether any prejudice has been caused to the employee or not before punishment is awarded to him. It is not as if the Bank with an ulterior motive or a hidden agenda dismissed the Respondent No.1 from service, in fact, he was selected and appointed in the Appellant-Bank on account of his merit and performance at the time of interview. It cannot be said that the Bank harboured any ill-feeling towards the Respondent No.1 which ultimately resulted in the order of dismissal passed on 8th May, 2010. We, therefore, repeat that since no prejudice has been caused to the Respondent No.1 by the non-supply of the Inquiry Officer's report, the said Respondent had little scope to contend that the disciplinary proceedings had been vitiated on account of such non-supply.

18. In the above circumstances, we cannot agree with the view taken by the learned Single Judge, as affirmed by the Division Bench of the High Court, that the Appellant-Bank had no jurisdiction to proceed against the Respondent No.1 by way of disciplinary proceedings in regard to the allegations of defalcation made against him while he was employed under the Co-operative Samity which was an affiliate of the Appellant-Bank. The other decision cited by Mr. Ray in *S. Govinda Menon's* case (supra) also makes it abundantly clear that even though the Respondent No.1 may not have been under the direct administrative control of the Bank at the relevant point of time when the defalcation is alleged to have taken place, on account of the affiliation of the Samity with the Bank under the provisions of the West Bengal Co-operative Societies Rules, 1987, the Appellant-Bank had jurisdiction over the Respondent

No.1 after he joined the employment of the Appellant-Bank. In the instant case, since the question of integrity in managing the accounts of the Samity is in question, it was but natural for the Bank to proceed departmentally against the Respondent No.1 after coming to learn of the allegations which have been made against him.

19. In our view, both the learned Single Judge and the Division Bench of the High Court were not justified in interfering with the action taken by the disciplinary authorities of the Bank and their findings are liable to be set aside. The appeal, therefore, succeeds and is allowed. The orders of the learned Single Judge and the Division Bench of the High Court, are set aside. The decision taken by the Bank in dismissing the Respondent No.1 from service is restored.

20. There will be no order as to costs.

R.P. Appeal allowed.

ASSAM URBAN WATER SUPPLY & SEW. BOARD

v.

SUBASH PROJECTS & MARKETING LTD.

(Civil Appeal No(s). 2014 of 2006)

JANUARY 19, 2012.

[R.M. LODHA AND H.L. GOKHALE, JJ.)

ARBITRATION AND CONCILIATION ACT, 1996:

ss. 34(1), (3) and (4)of 1996 Act r/w ss. 2 (j) and 4 of Limitation Act - Applications u/s 34 for setting aside arbitration awards filed after extended period of 30 days claiming benefit of s. 4 of Limitation Act for the intervening Christmas holidays - Held: s. 2(j) of the 1963 Act when read in the context of s. 34(3) of the 1996 Act, makes it amply clear that the prescribed period for making an application for setting aside arbitral award is three months - The period of 30 days beyond three months which the court may extend on sufficient cause being shown under the proviso appended to sub-s (3) of s. 34 of the 1996 Act, being not the 'period of limitation' or the 'prescribed period', s. 4 of the 1963 Act is not, at all, attracted to the facts of the instant case - Thus, the applications made by the appellants for setting aside the arbitral award have rightly been dismissed by the District Judge as time barred - Limitation Act, 1963 - ss. 2 (j) and 4.

The appellants filed two applications u/s 34 of the Arbitration and Conciliation Act, 1996 (1996 Act) on 2.1.2004 for setting aside the awards dated 22.8.2003, copies whereof were received by them on 26.8.2003. The District Judge dismissed the said applications on the ground of limitation. The High Court declined to interfere.

In the instant appeal, the question for consideration of the Court was: whether the appellants were entitled to

extension of time u/s 4 of the Limitation Act, 1963 Act.

Dismissing the appeal, the Court

HELD: 1.1. Section 4 of the Limitation Act, 1963 enables a party to institute a suit, prefer an appeal or make an application on the day court reopens where the prescribed period for any suit, appeal or application expires on the day when the court is closed. The crucial words in s. 4 of the 1963 Act are 'prescribed period'. Section 2(j) of the 1963 Act defines 'period of limitation' which means the period of limitation prescribed for any suit, appeal or application by the Schedule, and 'prescribed period' means the period of limitation computed in accordance with the provisions of this Act. [para 13] [409-F-G]

1.2. Section 2(j) of the 1963 Act when read in the context of s. 34(3) of the Arbitration and Conciliation Act, 1996, makes it amply clear that the prescribed period for making an application for setting aside arbitral award is three months. The period of 30 days mentioned in the proviso that follows sub-s. (3) of s. 34 of the 1996 Act is not the 'period of limitation' and, therefore, not 'prescribed period' for the purposes of making the application for setting aside the arbitral award. The period of 30 days beyond three months which the court may extend on sufficient cause being shown under the proviso appended to sub-s (3) of s. 34 of the 1996 Act being not the 'period of limitation' or the 'prescribed period', s. 4 of the 1963 Act is not, at all, attracted to the facts of the instant case. [para 13] [409-H; 410-A-C]

1.3. In the instant case, the arbitral awards were received by the appellants on 26-8-2003. No application for setting aside the arbitral awards was made by the appellants before elapse of three months from the receipt thereof. As a matter of fact, three months from the date

of the receipt of the arbitral award by the appellants expired on 26-11-2003. The District Court had Christmas vacation for the period from 25-12-2003 to 1-1-2004. On reopening of the court, i.e., on 2-1-2004, admittedly, the appellants made applications for setting aside those awards u/s 34 of the 1996 Act. Thus, the applications made by the appellants on 2-1-2004, for setting aside the arbitral award dated 26-8-2003 have rightly been dismissed by the District Judge as time barred. [para 11 and 14] [408-F-H; 409-A; 410-D]

Union of India vs. Popular Construction Co. **2001 (3) Suppl. SCR 619 = (2001) 8 SCC 470; and** *State of Maharashtra vs. Hindustan Construction Company Limited* **2010 (4) SCR 46 = (2010) 4 SCC 518, relied on.**

Case Law Reference:

2001 (3) Suppl. SCR 619	**relied on**	**para 5**
2010 (4) SCR 46	**relied on**	**para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2014 of 2006.

From the Judgment and Order dated 15.02.2005 of the High Court of Gauhati in Arbitration Appeal Nos. 6 and 7 of 2004.

Bijendra Singh and Anupam Mishra (for Ambar Qamaruddin) for the Appellant.

Shyam Divan, Puneet Jain and Pradeep Gupta (for Sushil Kumar Jain) for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Two contracts were entered into between the appellants and the respondents - (i) for construction of Tezpur Town Water Supply Scheme and (ii) for

construction of Tinsukia Town Water Supply Scheme. Certain disputes arose between the parties concerning these contracts and to resolve such disputes, sole arbitrator was appointed by the Chief Justice of Gauhati High Court on March 26, 2002 under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, '1996 Act'). On May 10, 2002 the appellants filed application under Section 16 of the 1996 Act questioning the jurisdiction of the sole arbitrator as according to the appellants there was no arbitration clause in the agreement. This application came to be rejected by the sole arbitrator.

2. Thereafter, the sole arbitrator proceeded with the arbitration and passed two awards in relation to the above contracts in favour of the respondents on August 22, 2003. The awards were received by the appellants on August 26, 2003. On January 2, 2004, the appellants made two applications for setting aside the awards dated August 22, 2003 under Section 34 of the 1996 Act. These applications were accompanied by two separate applications for extension of time under Section 34(3) of the 1996 Act.

3. The District Judge, Kamrup, Guwahati, dismissed the appellants' applications under Section 34 of the 1996 Act on June 1, 2004 and June 5, 2004 on the ground of limitation.

4. The appellants challenged the above orders of the Districted Judge, Kamrup, Guwahati, in the Gauhati High Court in two separate Arbitration Appeals, being Arbitration Appeal Nos. 6 of 2004 and 7 of 2004. The Division Bench of that Court upheld the view of the District Judge, Kamrup, Guwahati and dismissed the above Arbitration Appeals.

5. Mr. Bijender Singh, learned counsel for the appellants, submitted that the Division Bench gravely erred in applying the decision of this Court in *Union of India Vs. Popular Construction Co.*[1] to the facts of the present case. He submitted

1. (2001) 8 SCC 470.

that the judgment of this Court in *Popular Construction Co.* (supra) was rendered on the question of applicability of Section 5 of the Limitation Act, 1963 (for short, '1963 Act') and has no application to the peculiar facts of the present case where extension was sought by the appellants under Section 4 of the 1963 Act. In support of his argument, Mr. Bijender Singh, learned counsel, referred to Section 2(j) of the 1963 Act that defines 'period of limitation' and Section 43 of the 1996 Act that makes the 1963 Act applicable to arbitration matters.

6. Mr. Shyam Divan, learned senior counsel for the respondents, on the other hand, submitted that the High Court did not commit any error in upholding the view of the District Judge, Kamarup, Guwahati. According to the learned senior counsel, the High Court's view is consistent with Section 34(3) of the 1996 Act, particularly proviso (3) thereof.

7. Section 34(3) of the 1996 Act provides that an application for setting aside an award may be made within three months of the receipt of the arbitral award. The proviso that follows sub-section (3) of Section 34 provides that on sufficient cause being shown, the court may entertain the application for setting aside the award after the period of three months and within a further period of 30 days but not thereafter.

8. In *Popular Construction Co.* (supra), this Court has held that an application for setting aside an award filed beyond the period mentioned in Section 34(3) would not be an application "in accordance with sub-section (3) as required under Section 34(1) of the 1996 Act" and Section 5 of the 1963 Act has no application to such application. In para 12 of the report, it was held in *Popular Construction Co.* (supra) thus:-

> "12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of the Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result".

9. Recently, in the *State of Maharashtra Vs. Hindustan Construction Company Limited*[2], a two Judge Bench of this Court speaking through one of us (R.M. Lodha, J.) emphasised the mandatory nature of the limit to the extension of the period provided in proviso to Section 34(3) and held that an application for setting aside arbitral award under Section 34 of the 1996 Act has to be made within the time prescribed under sub-section (3) of Section 34, i.e., within three months and a further period of 30 days on sufficient cause being shown and not thereafter.

10. Section 43(1) of the 1996 Act provides that the 1963 Act shall apply to arbitrations as it applies to proceedings in court. The 1963 Act is thus applicable to the matters of arbitration covered by the 1996 Act save and except to the extent its applicability has been excluded by virtue of the express provision contained in Section 34(3) of the 1996 Act.

11. The facts in the present case are peculiar. The arbitral awards were received by the appellants on August 26, 2003. No application for setting aside the arbitral awards was made by the appellants before elapse of three months from the receipt thereof. As a matter of fact, three months from the date of the receipt of the arbitral award by the appellants expired on November 26, 2003. The District Court had Christmas vacation for the period from December 25, 2003 to January 1, 2004. On reopening of the court, i.e., on January 2, 2004, admittedly, the appellants made applications for setting aside

2. (2010) 4 SCC 518.

those awards under Section 34 of the 1996 Act. If the period during which the District Court, Kamrup, Guwahati, remained closed during Christmas vacation, 2003 is extended and the appellants get benefit of that period over and above the cap of thirty days as provided in Section 34(3), then the view of the High Court and the District Judge cannot be sustained. But this would depend on the applicability of Section 4 of the 1963 Act. The question, therefore, that falls for our determination is – whether the appellants are entitled to extension of time under Section 4 of the 1963 Act in the above facts.

12. Section 4 of the 1963 Act reads as under :-

> "4. Expiry of prescribed period when court is closed.- Where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court reopens.
>
> *Explanation*.-A court shall be deemed to be closed on any day within the meaning of this section if during any part of its normal working hours it remains closed on that day."

13. The above Section enables a party to institute a suit, prefer an appeal or make an application on the day court reopens where the prescribed period for any suit, appeal or application expires on the day when the court is closed. The crucial words in Section 4 of the 1963 Act are 'prescribed period'. What is the meaning of these words? Section 2(j) of the 1963 Act defines 'period of limitation' which means the period of limitation prescribed for any suit, appeal or application by the Schedule, and 'prescribed period' means the period of limitation computed in accordance with the provisions of this Act. Section 2(j) of the 1963 Act when read in the context of Section 34(3) of the 1996 Act, it becomes amply clear that the prescribed period for making an application for setting

aside arbitral award is three months. The period of 30 days mentioned in proviso that follows sub-section (3) of Section 34 of the 1996 Act is not the 'period of limitation' and, therefore, not 'prescribed period' for the purposes of making the application for setting aside the arbitral award. The period of 30 days beyond three months which the court may extend on sufficient cause being shown under the proviso appended to sub-section (3) of Section 34 of the 1996 Act being not the 'period of limitation' or, in other words, 'prescribed period', in our opinion, Section 4 of the 1963 Act is not, at all, attracted to the facts of the present case.

14. Seen thus, the applications made by the appellants on January 2, 2004, for setting aside the arbitral award dated August 26, 2003 were liable to be dismissed and have rightly been dismissed by the District Judge, Kamrup, Guwahati, as time barred.

15. The dismissal of the Arbitration Appeals (6 of 2004 and 7 of 2004) by the High Court, thus, cannot be legally flawed for the reasons we have indicated above.

16. The Appeal has no force and is dismissed with no order as to costs.

R.P. Appeal dismissed.

SHANMUGHAN

v.

STATE OF KERALA

(Criminal Appeal No. 1157 of 2007)

JANUARY 19, 2012

[ASOK KUMAR GANGULY AND T.S. THAKUR, JJ.]

Penal Code, 1860 - ss. 323/302 - Conviction and sentence under - Death of appellant's wife as a result of poisoning on having been administered cyanide - Conviction of appellant u/ss. 323/302 alongwith imposition of life imprisonment by courts below - Interference with - Held: Not called for - Prosecution succeeded in proving the motive of the appellant - Entire chain of circumstances is consistent with the guilt of the appellant - There were clear injuries on the deceased which show that some force was used while administering the poison - Without any force these injuries could not be there in a case of suicidal poisoning - Evidence of doctor who conducted post mortem confirmed the same - Appellant and the deceased admittedly slept together on the night of occurrence inside a bed room and no third person was there to apply force on the victim - Administration of poison took place inside the bed room which could only be administered by the appellant - Thus, prosecution rightly proved that it was a case of murder.

'R'-wife of appellant died as a result of poisoning on having been administered cyanide. The relationship between 'R' and the appellant were strained. There was evidence of mal-treatment of 'R' by the appellant. Also few weeks prior to the death of 'R', there was some quarrel between the parties. The trial court convicted the appellant under Sections 323/302 IPC and sentenced him to life imprisonment. The High Court upheld the order of

the trial court. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 When a case is sought to be proved by the prosecution on the basis of circumstantial evidence, the burden on the prosecution is that it must prove each circumstance in such a way as to complete the chain and at the same time it should be consistent with the guilt of the accused. Any reasonable doubt in proving the circumstances must be resolved in favour of the accused. The accused must be given the benefit of any fact or circumstance which is consistent with his innocence, which is to be presumed, unless the contrary is proved by chain of circumstances. In the instant case, the prosecution succeeded in proving the motive of the appellant and the entire chain of circumstances is consistent with the guilt of the appellant. On the fateful night, admittedly nobody was present in the bed room where the appellant and the deceased were sleeping as husband and wife. The victim admittedly screamed at about 2 a.m. This attracted the inmates of the house to rush to the bed room to find the victim dead as a result of administering of poison. This is not disputed. [Paras 7, 8 and 9] [417-A-E]

1.2. It is the case of the prosecution that the victim died of cyanide poison which is a highly corrosive poison and is obtained by distilling potassium cyanide or potassium ferrocyanide with dilute sulphuric acid. The post mortem examination in cases of death by administering such corrosive poison,would show that the mouth, lips, skin and mucous membrane are corroded in patches and in acute cases, the same may be charred. [Paras 10 and 11] [417-F-G; 418-A]

Medical Jurisprudence and Toxicology **by Modi 24th**

Edition Year 2011 Page 260, Chapter 12, Section 2 - referred to.

1.3. In the instant case, it is found from the injuries that there is presence of lacerated wounds on the lips, contusions in the ear and abrasions in the chest. These injuries clearly show that some force was used while administering the poison. Without any force these injuries could not be there in a case of suicidal poisoning. Apart from the appellant no one was there in bed room to apply force on the victim. That apart the evidence of PW 7, doctor who conducted post mortem also showed that all the injuries were fresh injuries and cannot be sustained by fall on a hard substance. PW 7 also deposed that the injuries could be because of forcible administration of poison. Thus, the prosecution rightly proved that it was a case of murder. [Para 12] [418-B-D]

Sharad Birdhichand Sarda vs. State of Maharashtra **(1984) 4 SCC116: 1985 (1) SCR 88 - referred to.**

1.4. The appellant and the deceased were admittedly sleeping together on the night of occurrence inside a bed room and no third person was there and administration of poison took place inside the bed room. There are clear injuries on the deceased, which cannot be self inflicted. Therefore, poison could only be administered by the accused-appellant. [Paras 15 and 18] [419-C-D; 420-C-D]

Anant Chintaman Lagu vs. The State of Bombay **AIR 1960 SC 500: 1960 SCR 460;** *Bhupinder Singh vs. State of Punjab* **(1988) 3 SCC 513: 1988 (3) SCR 409; *Nirmala Devi vs. State of J & K* (1994) 1 SCC 394 - referred to.**

1.5. At the time of his statement under Section 313 Cr.P.C also, the attention of the accused-appellant was specifically drawn by the trial court to the injuries on the

deceased. To that the appellant did not give any answer. Therefore, taking all these facts and also the concurrent findings of the two courts, interference is not called for. [Para 22 and 23] [421-D-F]

Case Law Reference:

1985 (1) SCR 88	**Referred to.**	**Para 13**
1960 SCR 460	**Referred to.**	**Para 16**
1988 (3) SCR 409	**Referred to.**	**Para 20**
(1994) 1 SCC 394	**Referred to.**	**Para 21**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1157 of 2007.

From the Judgment and Order dated 13.06.2006 of the High Court of Kerala at Ernakulam in Criminal Appeal No. 1303 of 2003.

Venkat Subramonium T.R., Satya Mitra and Romy Chacko for the Appellant.

Liz Mathew, Sama A.R. Khan for the Respondent.

The Judgment of the Court was delivered by

GANGULY, J.

1. This appeal is from the judgment and order of conviction dated 13.6.2006 of the Division Bench of the Kerala High Court in Criminal Appeal No. 1303 of 2003 whereby the High Court confirmed the judgment and order of sentence of the learned Trial Judge. The Sessions Judge, Thrissur in Sessions Case No. 224 of 2002 convicted the appellant under Sections 323/ 302 I.P.C and gave him life imprisonment. No separate sentence was given for Section 323.

2. The material facts as appearing from the judgments are that one Raji, wife of the appellant died as a result of poisoning on having been administered cyanide on the night of 2nd March, 1992. In this case, there are certain admitted facts:

1. The victim Raji was sleeping on the fateful day in the bed room with her husband- the appellant herein.

2. The deceased and the appellant had a love marriage about 14 years prior to the incident.

3. They had three children from the said marriage.

4. There is evidence of mal-treatment of the deceased by the appellant.

5. Their son PW 5 deposed that there were some quarrel between the father – appellant and mother – deceased and with the intervention of neighbours the deceased was sent to her parental home.

3. This happened couple of weeks prior to the death of the deceased. It is also evident from the evidence that the appellant developed suspicion about the character of the deceased and tortured her in the past. There is evidence of the deceased suffering from burn injuries from cigarette buts inflicted by the appellant. Therefore the relationship between the couple was strained.

4. PW 7 Dr. N. Rajaram, Lecturer in Forensic medicine, Medical College, Thrissur who conducted the post mortem examination on the body of the deceased found the following injuries on the body of the deceased. The injuries are set out herein below:

1. Abrasion 0.4x0.1 cm oblique over the back of chest; its lower end 17.5 cm above the hip bone and its upper end 9.5 cm to the right of midline.

2. Crescentic abrasion 0.5x0.1 cm vertical over the back of lower part of chest; its upper end 6.5 cm to the left of midline; its lower end 21.5 above hip.

3. Skin contusion 1x0.6 cm and 1.7x0.8 cm over the front and back of left ear lobule

4. Skin deep irregular wound 1.1x0.3 cm over the back of root of left ear.

5. Lacerated wound 0.3x0.2 cm over the mucosal aspect of upper lip in between the left canine and 1st premolar.

6.Lacerated wound 0.5x0.2 cm over the mucosal aspect of lower lip opposite the lower left canine.

7. Lacerated wound 1.3x0.6 cm over the mucosal aspect of lower lip close to the left angle of mouth and in between injury number 5 and 6.

5. Assailing the concurrent finding of facts, the learned counsel appearing for the appellant made his first submission that the prosecution has not proved that the appellant was in possession of the poison which is said to have been administered on the deceased. The next argument is that the defence suggestion that the deceased committed suicide by taking poison herself cannot be ruled out in view of the fact that the deceased was not going out any where and was simply confined in her house.

6. The next submission of the learned counsel is that there is no direct evidence and the entire case is based on the circumstantial evidence. Since this is a case of circumstantial evidence, the prosecution can only succeed in proving the guilt by the appellant by showing that there is no gap in the chain of circumstances proved by it.

7. We take up for consideration the last submission made

by the learned counsel for the appellant. We are inclined to agree that when a case is sought to be proved by the prosecution on the basis of circumstantial evidence, the burden on the prosecution is that it must prove each circumstance in such a way as to complete the chain and at the same time it should be consistent with the guilt of the accused. Any reasonable doubt in proving the circumstances must be resolved in favour of the accused. The accused must be given the benefit of any fact or circumstance which is consisted with his innocence, which is to be presumed, unless the contrary is proved by chain of circumstances.

8. If we go to the aforesaid principle, we find that in the instant case, the prosecution has succeeded in proving the motive of the appellant and the entire chain of circumstances is consistent with the guilt of the appellant.

9. On the fateful night, admittedly nobody was present in the bed room where the appellant and the deceased were sleeping as husband and wife. The victim admittedly screamed at about 2 a.m. This attracted the inmates of the house to rush to the bed room to find the victim dead as a result of administering of poison. This is not in dispute.

10. The only dispute is who administered the poison, and whether it was a case of suicidal poisoning or homicidal poisoning. The injuries which have been found on the deceased by PW 7 are very vital to answer this question. It is the case of the prosecution that the victim died of cyanide poison which is a highly corrosive poison and is obtained by distilling potassium cyanide or potassium ferrocyanide with dilute sulphuric acid. [See: Modi, a textbook of Medical Jurisprudence and Toxicology 24th Edition Year 2011 Page 260, Chapter 12, Section 2]. As a result of administering such corrosive poison, there is bound to be local and chemical action of corroding and destroying all tissues which come in contact with it. [See: *Modi* (supra) page 31, Chapter 2, Section 2)

11. The post mortem examination in cases of death by administering such corrosive poison,would show that the mouth, lips, skin and mucous membrane are corroded in patches and in acute cases, the same may be charred.[See: *Modi* (supra) pages 33-37, Chapter 2, Section 2).

12. In this case, we find from the injuries discussed above that there is presence of lacerated wounds on the lips, contusions in the ear and abrasions in the chest. These injuries clearly show that some force was used while administering the poison. Without any force these injuries could not be there in a case of suicidal poison. Apart from the appellant no one was there in bed room to apply force on the victim. That apart the evidence of PW 7 also shows that all the injuries were fresh injuries and cannot be sustained by fall on a hard substance. PW 7 also deposed that the injuries could be because of forcible administration of poison. Thus the prosecution has rightly proved that it is a case of murder and there is no reason for our interference.

13. On the next point urged by the learned counsel that as the prosecution has failed to prove that the appellant had the possession of poison, the prosecution's case will be vitiated, we are not accepting the aforesaid proposition. However, in support of the aforesaid submission, learned counsel for the appellant relied upon a three Judge Bench decision of this Court in the case of *Sharad Birdhichand Sarda vs. State of Maharashtra* reported in (1984) 4 SCC 116 and the learned counsel relied upon paragraph 165 at page 188 of the judgment where Justice Fazal Ali, J. formulated certain propositions to indicate that in a case relating to murder by poison, four important circumstances can justify a conviction and His Lordship laid down the following principles:

"1. there is a clear motive for an accused to administer poison to the deceased,

2 that the deceased died of poison said to have been administered,

3. that the accused had the poison in his possession,

4. that he had an opportunity to administer the poison to the deceased"

14. We have gone through the said judgment carefully. We find that in the said case, the learned Judges gave the accused the benefit of doubt in view of the last seen theory.

15. Here the facts are much more loaded against the appellant. In this case, the appellant and the deceased were admittedly sleeping together at the night of occurrence inside a bed room and no third person was there and administration of poison took place inside the bed room. However, it appears that on those principles which have been formulated by Justice Fazal Ali, some doubts were expressed both by Justice Varadarajan and Justice Mukharji, JJ (as His Lordship then was) in paragraphs 199 and 204 of the Judgment. However, the learned Judges agreed with the conclusions reached by Justice Fazal Ali.

16. Another three Judge Bench of this Court in a matter relating to murder by poisoning gave a unanimous verdict formulating different principles. In the case of *Anant Chintaman Lagu vs. The State of Bombay* reported in AIR 1960 SC 500, Justice Hidayatullah (as His Lordship then was) elaborated these principles succinctly in paragraph 58 of the judgment. His Lordship referred to three principles which are necessary to prove in order to return a conviction in a case of murder by poisoning. Those principles are as follows:

a. That death took place by poisoning.

b. That the accused had the poison in his possession and.

c. That the accused had an opportunity to administer the poison to the deceased.

17. At page 520 of report, in paragraph 59, the Learned Judge clarified those principles by saying that *"three propositions must be kept in mind always, the sufficiency of the evidence direct or circumstantial, to establish murder by poisoning will depend on the facts of each case". His Lordship further clarified by saying "If circumstantial evidence, in the absence of direct proof of the three elements, is so decisive that the Court can unhesitatingly hold that the death was a result of administration of poison and that the poison must have been administered by the accused persons, then the conviction can be rested on it"*.

18. In the instant case, there was no third person in the bed room and there are clear injuries on the deceased, which cannot be self inflicted. Therefore, poison could only be administered by the accused – appellant.

19. Reference in this connection can also be made to other judgments of this Court where this Court has taken a view which is consistent with the view taken by the unanimous three Judge Bench of this Court in *Anant Chintaman Lagu* (supra).

20. In *Bhupinder Singh vs. State of Punjab* reported in (1988) 3 SCC 513, this question has been fully answered by this Court in paragraph 25 which reads thus:

"We do not consider that there should be acquittal or the failure of the prosecution to prove the possession of poison with the accused. Murder by poison is invariably committed under the cover and cloak of secrecy. Nobody will administer poison to another in the presence of others. The person who administers poison to another in secrecy will not keep a portion of it for the investigating officer to come and collect it. The person who commits such murder would naturally take care to eliminate and destroy the evidence against him. In such cases, it would be impossible for the prosecution to prove possession of poison with the

accused. The prosecution may, however, establish other circumstances consistent only with the hypothesis of the guilt of the accused. The court then would not be justified in acquitting the accused on the ground that the prosecution has failed to prove possession of the poison with the accused".

21. Similarly, in a subsequent decision of this Court in the case of *Nirmala Devi vs. State of J & K* (1994) 1 SCC 394, this Court again affirmed the aforesaid principles in paragraph 7 by holding as follows:

> ".....Yet another submission of the learned Counsel is that the prosecution has not established as to how the appellant came into possession of arsenic poison. We are of the view that this by itself does not affect the prosecution case when the other evidence is clinching".

22. In the instant case, at the time of his statement under Section 313 Cr.P.C also, the attention of the accused – appellant was specifically drawn by the trial court to the injuries on the deceased. To that the appellant did not give any answer.

23. Therefore, taking all these facts and also the concurrent findings of the two courts, we are not inclined to interfere in this appeal. The appeal is accordingly dismissed. The appellant is to serve out the remaining sentence.

N.J. Appeal dismissed.

STATE OF U.P. & ORS.
v.
AMBRISH TANDON & ANR.
(Civil Appeal No. 735 of 2012)

JANUARY 20, 2012

[P. SATHASIVAM AND J. CHELAMESWAR, JJ.]

Stamp Act, 1899 – s. 47A/33 – Deficiency in stamp duty – Execution of sale deed in favour of purchaser – Surprise inspection by District Magistrate – Deficiency found in payment of stamp duty – Case registered u/s. 47A/33 – Order passed by the Additional Collector demanding differential stamp duty with interest and penalty – Non–payment of the amount – Issuance of demand notice claiming the said amount plus 10% recovery charges – Writ petition – High Court issuing writ in the nature of certiorari quashing the order passed by the Additional Collector and the demand notice – Interference with – Held: Not called for – Though the Collector made a surprise site inspection, no record to show that all the details such as measurement, extent, boundaries were noted in the presence of the purchasers – At the time of execution of the sale deed, the property was used for residential purpose and the stamp duty was paid based on the position and user of the building on the date of the purchase – Mere use of the property for commercial purpose at a later point of time may not be a relevant criterion for assessing the value for the purpose of stamp duty – Nature of user relatable to the date of purchase and relevant for the purpose of calculation of stamp duty – Also, it was the grievance of the purchasers that they were not given adequate opportunity by the Addl. Collector and order was passed on a public holiday – Though the matter could have been considered by the Appellate Authority, since there was no serious objection by the State relating to alternative remedy before the High Court, such objection is not interfered at this juncture.

Respondent purchased a property and on execution of sale deed paid stamp duty. The District Magistrate on spot inspection found that there was deficiency in the payment of stamp duty. The Additional Collector passed an order demanding differential stamp duty with interest and penalty but the respondents failed to pay the same. Thereafter, the Additional Collector issued a demand notice under Section 47A/33 of the Stamp Act, to the respondents claiming the amount due with recovery charges. Aggrieved, the respondents filed a writ petition. The Division Bench of the High Court issued a writ in the nature of certiorari quashing the order passed by the Additional Collector (Finance & Revenue) and the demand notice. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1. A perusal of the proceedings before the High Court show that the State was not serious in raising this objection relating to alternative remedy and allowed the High Court to pass orders on merits, thus, such objection is not entertained at this juncture though it is relevant. In fact, on receipt of the notice from the High Court in 2005, the appellants who are respondents before the High Court could have objected the writ petition filed under Article 226 and sought for dismissal of the same for not availing alternative remedy but the fact remains that unfortunately the State or its officers have not resorted to such recourse. [Para 7] [428-F-H]

1.2. It is the grievance of the respondents-purchasers that they were not given adequate opportunity by the Addl. Collector and order was passed on a public holiday. Before the High Court as well as in this Court, the respondents placed the order sheet which contains the various dates and the date on which the ultimate decision was taken by him. It shows that the matter was heard and

decided on a public holiday. In all fairness, the High Court instead of keeping the writ petition pending and deciding itself after two years could have remitted the matter to the Addl. Collector for fresh orders. However, it had gone into the details as to the area of the plot, nature of the building i.e. whether it is residential or non-residential and based on the revenue records and after finding that at the time of execution of the sale deed, the house was used for residential purpose upheld the stand taken by the respondents and set aside the order dated 27.09.2004 passed by the Addl. Collector. [Para 8, 6] [429-A; 428-B-D]

1.3. Regarding the merits though the Collector, Lucknow made a surprise site inspection, there is no record to show that all the details such as measurement, extent, boundaries were noted in the presence of the respondents who purchased the property. It is also explained that the plot in question is not a corner plot as stated in the impugned order as boundaries of the plot mentioned in the freehold deed executed by Nazool Officer and in the sale deed only on one side there is a road. It is also demonstrated that at the time of execution of the sale deed, the house in question was used for residential purpose and it is asserted that the stamp duty was paid based on the position and user of the building on the date of the purchase. The impugned order of the High Court shows that it was not seriously disputed about the nature and user of the building, namely, residential purpose on the date of the purchase. Merely because the property is being used for commercial purpose at the later point of time may not be a relevant criterion for assessing the value for the purpose of stamp duty. The nature of user is relatable to the date of purchase and it is relevant for the purpose of calculation of stamp duty. Though the matter could have been considered by the Appellate Authority in view of the

reasoning that there was no serious objection and in fact the said alternative remedy was not agitated seriously and in view of the factual details based on which the High Court has quashed the order passed by the Additional District Collector, it is not interfered at this juncture. Under these circumstances, there is no valid ground for interference with the impugned order of the High Court. [Paras 8 and 9] [429-B-H]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 735 of 2012.

From the Judgment and Order dated 25.01.2007 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Writ Petition No. 732 of 2005.

Shail Kumar Dwivedi,A.A.G. Sanjay Visen, Abhinav Srivastava, Vandana Mishra and Gunnam Venkateswara Rao for the Appellants.

K.V. Viswanathan and Mathew for the Respondents.

The Judgment of the Court of was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is filed against the final judgment and order dated 25.01.2007 passed by the Division Bench of the High Court of Judicature at Allahabad in Writ Petition No. 732 (M/B) of 2005 whereby the Division Bench while allowing the petition filed by the respondents herein issued a writ in the nature of certiorari quashing the impugned order dated 27.09.2004 passed by the Additional Collector (Finance & Revenue), Lucknow and the demand notice dated 20.01.2005.

3. **Brief Facts:**

a) A Sale Deed dated 16.04.2003 was executed between Har Charan Singh and the respondents herein in respect of the

property situated at 17/1 Ashok Marg, Lucknow measuring 11,029 sq. ft. and registered as Sale Deed Document No. 5341 of 2003. The total value of the property was computed as Rs. 1,55,28,860/- for the purposes of Stamp Duty and the respondents herein paid Rs. 15,53,000/- as stamp duty.

b) The District Magistrate, Lucknow made a spot inspection of the property in question on 21.07.2003. During inspection, the land has been found having an area of 12,099 sq. ft. with a two storey building having an area of 5,646.3 sq. ft. at ground floor and an area of 5192.3 sq. ft. at the first floor. In the inspection report, the property in question has been valued for Rs. 3,87,74,097/- and the stamp duty on the said property has been calculated by the competent authority as Rs. 38,78,000/-. However, at the time of purchase, respondents herein paid Rs. 15,53,000/- as Stamp duty, hence a deficiency of Rs. 23,50,000/- has been pointed out by the authorities. The District Magistrate, vide report dated 26.07.2003, directed to register a case against the respondents herein

c) On the basis of the aforesaid report, Case No. 653 Stamp-2003 under Sections 47A/33 of the Indian Stamp Act, 1899 (in short 'the Act') was registered. Vide order dated 27.09.2004, the Additional Collector (Finance & Revenue) Lucknow directed the respondents to make good the deficiency in the stamp duty and also imposed a penalty amounting to Rs. 8,46,000/- for such tax evasion. On 20.01.2005, for failure to deposit the aforesaid amount, a demand notice claiming an amount of Rs. 38,30,500/- plus 10% recovery charges was issued and the respondents herein were directed to pay the said amount within a period of seven days.

d) Being aggrieved by the order dated 27.09.2004 and demand notice dated 20.01.2005, the respondent filed a writ petition being No. 732 of 2005 before the High Court. By order dated 25.01.2007, the High Court, while allowing the petition filed by the respondents herein issued a writ in the nature of

certiorari quashing the impugned order dated 27.09.2004 passed by the Additional Collector (Finance & Revenue), Lucknow and the demand notice dated 20.01.2005.

e) Aggrieved by the said decision, the State has preferred this appeal by way of special leave petition before this Court.

4. Heard Mr. Shail Kumar Dwivedi, learned Addl. Advocate General for the appellant-State and Mr. K.V. Viswanathan, learned senior counsel for the respondents.

5. The only question for consideration in this appeal is whether the High Court is justified in interfering with the order dated 27.09.2004 passed by the Additional Collector (Finance and Revenue), Lucknow demanding differential stamp duty with interest and penalty in respect of the sale deed dated 16.04.2003 executed in favour of the respondents herein. According to the respondents, through a registered Sale Deed dated 16.04.2003 they have purchased the house No. 17/1 Ashok Marg, Lucknow for a total sale consideration of Rs.1.5 crores on which required stamp duty of Rs. 15.53 lakhs was paid. When the Additional Collector issued a notice under Section 47A/33 of the Act, the respondents submitted objection dated 29.08.2003 stating that the extent, area and valuation are in accordance with the revenue records and the stamp duty paid by them on the sale deed was proper. It is also stated by the respondents that before passing the order dated 27.09.2004, the Additional Collector (Finance and Revenue) Lucknow has not afforded sufficient opportunity to them and the impugned order was passed in a most arbitrary manner ignoring the objection submitted by them. It is also stated that at the time of sale deed the house was a residential property and in order to avoid unnecessary harassment at the hands of the revenue and for the purpose of stamp duty and registration they had valued the said property at the rate fixed by the Collector, Lucknow treating the land as commercial at the rate of Rs.11,300 per sq. metre. In other words, for the purpose of

stamp duty and registration, according to the respondents, they added additional 10% to the value.

6. In support of the contention that they were not given adequate opportunity by the Addl. Collector and order was passed on a public holiday, before the High Court as well as in this Court, the respondents herein have placed the order sheet which contains the various dates and the date on which the ultimate decision was taken by him. It shows that the matter was heard and decided on a public holiday. In all fairness, the High Court instead of keeping the writ petition pending and deciding itself after two years could have remitted the matter to the Addl. Collector for fresh orders. However, it had gone into the details as to the area of the plot, nature of the building i.e. whether it is residential or non-residential and based on the revenue records and after finding that at the time of execution of the sale deed, the house was used for residential purpose upheld the stand taken by the respondents and set aside the order dated 27.09.2004 passed by the Addl. Collector.

7. Learned counsel appearing for the appellant-State submitted that as per the provisions of the Act and the Rules made therein, there is a provision for appeal and instead of resorting the same, the respondents have straightaway approached the High Court by exercising writ jurisdiction under Article 226 which is not permissible. A perusal of the proceedings before the High Court show that the State was not serious in raising this objection relating to alternative remedy and allowed the High Court to pass orders on merits, hence we are not entertaining such objection at this juncture though it is relevant. In fact, on receipt of the notice from the High Court in 2005, the appellants who are respondents before the High Court could have objected the writ petition filed under Article 226 and sought for dismissal of the same for not availing alternative remedy but the fact remains that unfortunately the State or its officers have not resorted to such recourse.

8. We have already held that it is the grievance of the respondents that the orders were passed by the Additional Collector on a public holiday. Regarding the merits though the Collector, Lucknow made a surprise site inspection, there is no record to show that all the details such as measurement, extent, boundaries were noted in the presence of the respondents who purchased the property. It is also explained that the plot in question is not a corner plot as stated in the impugned order as boundaries of the plot mentioned in the freehold deed executed by Nazool Officer and in the sale deed dated 16.04.2003 only on one side there is a road. It is also demonstrated that at the time of execution of the sale deed, the house in question was used for residential purpose and it is asserted that the stamp duty was paid based on the position and user of the building on the date of the purchase. The impugned order of the High Court shows that it was not seriously disputed about the nature and user of the building, namely, residential purpose on the date of the purchase. Merely because the property is being used for commercial purpose at the later point of time may not be a relevant criterion for assessing the value for the purpose of stamp duty. The nature of user is relatable to the date of purchase and it is relevant for the purpose of calculation of stamp duty. Though the matter could have been considered by the Appellate Authority in view of our reasoning that there was no serious objection and in fact the said alternative remedy was not agitated seriously and in view of the factual details based on which the High Court has quashed the order dated 27.09.2004 passed by the Additional District Collector, we are not inclined to interfere at this juncture.

9. Under these circumstances, we find no valid ground for interference with the impugned order of the High Court. Consequently, the appeal fails and the same is dismissed with no order as to costs.

N.J. Appeal dismissed.

M/S H.D.F.C.
v.
GAUTAM KUMAR NAG & ORS.
(Civil Appeal No. 137 of 2007)

JANUARY 20, 2012

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Contract Act, 1872: s.139 – Liability of the guarantor – Held: Is equal to and co-extensive with the borrower – Guarantor cannot avoid his liability simply on the basis of the promissory note made out or an equitable mortgage created by the borrower in favour of the lender.

According to the appellant Corporation, defendant No.1, the owner of a plot of land was sanctioned loan for constructing a house on the plot. Defendant No.1 executed the Loan Agreement and a promissory note in favour of the appellant. In addition, defendant No.1 also created an equitable mortgage in favour of the appellant by depositing the title deeds of the plot in question. The other two defendants-respondents stood guarantee for repayment of the land and executed the letters of guarantee on December 9, 1997.

The defendants defaulted in payment of the installment amount and as a result, a large sum was outstanding against them. The appellant invoked the guarantees and intimated the respondents that in case of failure to make the payment, legal proceedings would be instituted against them. However, the respondents did not pay the outstanding amount and the appellant instituted the suit for realization of its dues. Defendant No.1 did not appear in the suit despite notice. The respondents, however, appeared before the trial court and filed separate applications under Order 37 Rule 3(5),

CPC for permission to defend the suit. The respondent contended before the trial court that since the plaintiff-appellant had got a promissory note executed in its favour by the borrower-defendant No.1 and had further made the borrower create an equitable mortgage in its favour by depositing of title deeds, they would be absolved of their liability in terms of Section 139 of the Contract Act. The trial court held that none of the pleas raised by the defendants gave rise to any substantial defence against the claim of the appellant and dismissed the petitions of respondents. On appeal, the High Court set aside the order of the trial court and directed it to allow the defendants-respondents to file their written statement and proceed to try the suit from that stage. It further held that the trial court fell into error in holding that Section 139 of the Contract Act had no application to the facts of the case. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. The High Court was completely wrong in holding that the respondents were able to make out a triable issue on the basis of Section 139 of the Contract Act. It is well established that the liability of the guarantor is equal to and co-extensive with the borrower and it is highly doubtful that the guarantor can avoid his liability simply on the basis of the promissory note made out or an equitable mortgage created by the borrower in favour of the lender. However, in the facts of this case, this question did not even arise. A reference to the deed of guarantee executed by the two respondents would have made the position completely clear but unfortunately the attention of the High Court was not drawn to the relevant clauses in the deed of guarantee. In light of the expressed stipulations, in the guarantee, any reliance on Section 139 of the Contract Act was evidently futile and of no avail. Therefore, the impugned judgment of the

High Court is unsustainable and is fit to be set aside. The order and decree passed by the trial court is restored. [Paras 8, 10] [435-C-E; 436-F-G]

M/s Mechelec Engineers & Manufacturers v. *M/s Basic Equipment Corporation*, **1997 (1) SCR 1060: (1976) 4 SCC 687 – referred to**

Case Law Reference:

1997 (1) SCR 1060	**Referred to**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 137 of 2007.

From the Judgment & Order dated 09.08.2005 of the High Court of Delhi at New Delhi in R.F.A. Nos. 513-514 of 2005.

Subramonium Prasad for the Appellant.

Rajiv Nanda for the Respondents.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. This appeal is directed against the judgment and order dated August 9, 2005, of the Delhi High Court by which it allowed the appeals of the two respondents (defendant Nos.2 and 3 respectively before the trial court), set aside the judgment and decree passed by the trial court and permitted the appellants to file their written statements within four weeks from the date of the judgment, directing further that the trial court would then proceed with the suit and dispose it of in accordance with law.

2. The appellant M/s. Housing Development and Finance Corporation (in short "HDFC") instituted a suit under Order XXXVII of the Code of Civil Procedure, 1908, for realisation of its dues against defendant No.1 (the borrower; not before this Court) and the two respondents (defendant Nos.2 & 3) who were the guarantors to the loan. According to the case of the appellant-plaintiff, defendant No.1 who was the owner of a plot

of land approached the appellant-plaintiff for a loan for constructing a house on the plot. The loan was sanctioned on October 29, 1997, and on December 9, 1997, defendant No.1 executed the Loan Agreement and a promissory note in favour of the appellant. In addition, defendant No.1 also created an equitable mortgage in favour of the plaintiff by depositing the title deeds of the plot in question. The other two defendants, respondents before this Court, stood guarantee for repayment of the loan and executed the letters of guarantee on December 9, 1997. On the execution of the necessary documents the loan was disbursed to defendant No.1 in two instalments.

3. The loan amount, along with interest at the rate of 15% per annum was to be repaid in equalised monthly instalments over a period of 180 months and in case of default, according to the terms of the loan, the outstanding would attract additional interest @ 18% per annum.

4. The defendants defaulted in payment of the EMIs and as a result, a large sum was outstanding against them. The defendants did not pay the instalments despite letters and reminders. Hence, the plaintiff invoked the guarantees *vide* letter dated October 22, 1998, and intimated the two respondents that in case of failure to make the payment, legal proceedings would be instituted against them. Despite the aforesaid letter and legal notices sent on behalf of the appellant, the defendants did not pay the outstanding amount of Rs.4,37,350/-, and the plaintiff was thus left with no option but to institute the suit for realisation of its dues.

5. Defendant No.1 did not appear in the suit despite notice. The two defendants-respondents, however, appeared before the trial court and filed separate applications under Order XXXVII Rule 3 sub-rule (5) of the Code of Civil Procedure for permission to defend the suit.

6. The defendants' applications were based on a number of grounds but we may only advert to the one that seems to have weighed with the High Court. It was contended on behalf of the

respondents that since the plaintiff-appellant had got a promissory note executed in its favour by the borrower-defendant No.1 and had further made the borrower create an equitable mortgage in its favour by deposit of title deeds, they would be absolved of their liability in terms of Section 139 of the Contract Act. According to the respondents, their plea gave rise to a triable issue and they, accordingly, sought permission to file their written statements and contest the suit. The trial court by its judgment and order examined all the pleas, including the one based on Section 139 of the Contract Act and found and held that none of the pleas raised by the defendants gave rise to any substantial defence against the claim of the plaintiff. Accordingly, it dismissed the petitions filed by the defendants-respondents by order dated April 29, 2005, and proceeded to decree the suit of the appellant-plaintiff for a sum of Rs.4,54,669/- along with cost and *pendente lite* and future interest @ 10% per annum on the decretal amount from the date of filing of the suit till the date of realization.

7. In appeal the Delhi High Court, as noted above, set aside the order and decree passed by the trial court and directed it to allow the defendants-respondents to file their written statement and proceed to try the suit from that stage. The High Court noted that relying upon Section 139 of the Contract Act, a contention was raised by the respondents that for recovery of its loan from defendant No.1, the principal borrower, the plaintiff should have taken recourse first by either seeking to give effect to the promissory note or by enforcing the equitable mortgage. Neither of these remedies which were open to the plaintiff were taken recourse to and the recovery was sought to be made straightaway from the appellants. The High Court further held that the trial Judge fell into error in holding that Section 139 of the Contract Act had no application to the facts of the case. According to the High Court, this was beyond the scope of deciding an application for leave to defend. The High Court observed that the question was not about the correctness or otherwise of the defence raised by the

appellants and what was required to be looked into by the trial Judge was whether a triable issue was made out or not. If a triable issue was made out, then leave to defend ought to have been granted and thereafter the defence raised by the appellants could have been adjudicated on merits. The correctness of the defence raised by the defendants could not have been looked into by the trial Judge at the time of deciding the application for leave to defend. In support of its view, the High Court relied upon a decision of this Court in *M/s Mechelec Engineers & Manufacturers* v. *M/s Basic Equipment Corporation*, (1976) 4 SCC 687.

8. In our view, the High Court was completely wrong in holding that the respondents were able to make out a triable issue on the basis of Section 139 of the Contract Act. It is well established that the liability of the guarantor is equal to and co-extensive with the borrower and it is highly doubtful that the guarantor can avoid his liability simply on the basis of the promissory note made out or an equitable mortgage created by the borrower in favour of the lender. However, in the facts of this case, this question does not even arise. A reference to the deed of guarantee executed by the two respondents would have made the position completely clear but unfortunately the attention of the High Court was not drawn to the relevant clauses in the deed of guarantee.

9. The two respondents executed identical deeds of guarantee of which clauses (2) and (3) read as follows:-

> "(2) I hereby accord my consent to the terms of the said Loan Agreement and/or any instrument or instruments that may hereafter be executed by the Borrower/s in your favour as aforesaid, being by mutual consent between you and him/them in any respect varied or modified without requiring my consent or approval thereto and I agree that my liability under this Guarantee shall in no manner be affected by such variations and modifications and I expressly give up all my rights as surety under the provisions of the Indian Contract Act, 1872 in that behalf.
>
> (3) You shall have the fullest liberty without in any way affecting this Guarantee and discharging me from my liability thereunder to postpone for any time or from time to time the exercise of any power of (sic.) powers reserved or conferred on you by the said Loan Agreement or any instrument or instruments that may hereafter be executed by the Borrower/s in your favour and to exercise the same at any time and in any manner and either to enforce or forbear to enforce payment of principal or interest or other monies due to you by the Borrower/s or any of the remedies or securities available to you or to grant any indulgence or facility to the Borrower/s AND I SHALL not be released by any exercise by you of you (sic.) liberty with reference to the matters aforesaid or any of them or by reason of time being given to the Borrower/s or of any other forbearance, act or omission on your part or any other indulgence by you to the Borrower/s or by any other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing me AND I hereby waive all suretyship an (sic.) other rights which I might otherwise be entitled to enforce or which but for this provision have the effect of releasing me."
>
> (emphasis added)

10. In light of the expressed stipulations, in the guarantee, any reliance on Section 139 of the Contract Act is evidently futile and of no avail. In our view, therefore, the impugned judgment of the High Court is unsustainable and is fit to be set aside. We, accordingly, set aside the impugned judgment of the High Court and restore the order and decree passed by the trial court.

11. In the result the appeal is allowed but in the facts of the case, there will be no order as to costs.

D.G. Appeal allowed.

A.V. PADMA & ORS.
v.
R. VENUGOPAL & ORS.
(Civil Appeal No. 1095 of 2012)

JANUARY 27, 2012.

[CYRIAC JOSEPH AND T.S. THAKUR, JJ.]

MOTOR VEHICLES ACT, 1988:

Compensation – Disbursement of – Case of Susamma Thomas, explained – Held: Sufficient discretion has been given to the Tribunal not to insist on investment of the compensation amount in long term fixed deposit and to release even the whole amount in the case of literate persons – The guidelines were not to be understood to mean that the Tribunals were to take a rigid stand while considering an application seeking release of the money – The guidelines cast a responsibility on the Tribunals to pass appropriate orders after examining each case on its own merits – The prayer in the application of the appellants for release of the amount invested in long term deposits stands allowed – The entire amount of compensation shall be withdrawn and paid to the appellants.

In a motor accident claim after the wife and two daughters of the deceased were awarded the compensation, they filed an application praying to disburse the entire amount to the decree-holders without insisting on deposit of any portion of the amount in any nationalized bank. The Tribunal rejected the prayer for release of the amount of Rs.2,00,000/- deposited in the nationalized bank. The High Court also dismissed the writ petition observing that the Tribunal had passed the impugned order keeping in mind the law declared by the Supreme Court in the case of *Susamma Thomas.**

Allowing the appeal, the Court

HELD:1.1. In the case of *Susamma Thomas**, **this Court issued certain guidelines in order to "safeguard the feed from being frittered away by the beneficiaries due to ignorance, illiteracy and susceptibility to exploitation". Sufficient discretion has been given to the Tribunal not to insist on investment of the compensation amount in long term fixed deposit and to release even the whole amount in the case of literate persons. However, the Tribunals are often taking a very rigid stand and are mechanically ordering in almost all cases that the amount of compensation shall be invested in long term fixed deposit. It needs to be clarified that the guidelines were issued by this Court only to safeguard the interests of the claimants, particularly, the minors, illiterates and others whose amounts are sought to be withdrawn on some fictitious grounds. The guidelines were not to be understood to mean that the Tribunals were to take a rigid stand, ignoring the object and the spirit of the guidelines issued by this Court and the genuine requirements of the claimants. Even in the case of literate persons, the Tribunals are automatically ordering investment of the amount of compensation in long term fixed deposit. This has resulted in serious injustice and hardship to the claimants. Therefore, a change of attitude and approach on the part of the Tribunals is necessary in the interest of justice. [para 4 and 5] [441-C; 442-C-H; 443-C-D]**

******General Manger, Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas and Others,* **AIR 1994 SC 1631, referred to.**

1.2. In the instant case, neither the Tribunal in its award nor the High Court in its order enhancing compensation had directed to invest the amount of compensation in long term fixed deposit. The Insurance Company deposited the compensation amount in the

Tribunal on 7.1.2008. In the application filed by the appellants seeking withdrawal of the amount without insisting on investment of any portion of it in long term deposit, it was specifically stated that appellant no.1 was an educated lady who retired as a Superintendent of the Karnataka Road Transport; that appellant no. 2 was an M.Sc. degree holder and appellant no. 3 was holding Master Degree both in Commerce and in Philosophy; that they were well versed in managing their lives and finances. Appellant no. 1 was already aged 71 years and her health was not good. She required money for maintenance and also to put up construction on the existing house to provide dwelling house for her second daughter who was a co-owner along with her, but was stated to have been residing in a rented house paying exorbitant rent which she could not afford in view of the spiralling costs. In the facts and circumstances of the case, the Tribunal ought to have allowed the prayer of the appellants. The impugned orders of the Tribunal and the High Court are set aside. The prayer in the application of the appellants for release of the amount invested in long term deposits stands allowed. The entire amount of compensation shall be withdrawn and paid to the appellants without any further delay. [para 6 and 8] [443-E-H; 444-A, F-H]

Case Law Reference:

AIR 1994 SC 1631 referred to para 3

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1095 of 2012.

From the Judgment & Order dated 05.08.2008 of the High Court of Karnataka at Bangalore in Writ Petition No. 10405 of 2008.

Kiran Suri for the Appellants.

Debasis Misra for the Respondents.

The Judgment of the Court was delivered by

CYRIAC JOSEPH, J. 1. Leave granted.

2. The appellants were the petitioners in Writ Petition No. 10405/2008 which was dismissed by the High Court of Karnataka as per order dated 5.8.2008 which is impugned in this appeal. Respondent Nos. 1 to 3 herein were respondent Nos. 1, 2 and 4 in the writ petition.

3. One T.S. Subrahmanyam met with a motor accident on 12.11.1991 and died on 21.7.1993 due to injuries sustained in the accident. Appellant No. 1 is the widow and appellant Nos.2 and 3 are the daughters of the said T.S. Subrahmanyam. In the claim petition filed by the appellants who are the legal heirs of T.S. Subrahmanyam, the Motor Accidents Claims Tribunal-I, Mysore (for short, "the Tribunal") passed an award granting Rs.60,000/- as compensation. In appeal, the High Court of Karnataka vide its order dated 6.7.2006 enhanced the amount of compensation to Rs.4,25,000/-. Respondent No. 3 - United India Insurance Co. Ltd. deposited in the Tribunal an amount of Rs.6,33,038/- on 7.1.2008. On 31.1.2008, the appellants filed an application before the Tribunal praying for release of the amount in deposit in favour of appellant No. 1, A.V. Padma. Appellants Nos. 2 and 3 filed affidavits stating that they had no objection to the payment of the amount to their mother A.V. Padma. However, the Tribunal directed to invest Rs.1,00,000/- each in long term deposits in favour of appellant Nos. 2 and 3 and to disburse only the balance amount to the appellants. The appellants filed a further application dated 19.6.2008 praying to disburse the entire amount to the decree-holders without insisting on deposit of any portion of the amount in any nationalized bank. However, by an order dated 28.6.2008, the Tribunal rejected the prayer for release of the amount of Rs.2,00,000/- deposited in the nationalized bank. Aggrieved by the order of the Tribunal, the appellants filed Writ Petition No. 10405 of 2008 in the High Court of Karnataka. The High Court dismissed the writ petition observing that the Tribunal

had passed the impugned order keeping in mind the law declared by the Supreme Court in *General Manger, Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas and Others,* AIR 1994 SC 1631. According to the High Court, the Tribunal only followed the judgment of the Supreme Court in letter and spirit. Challenging the order of the High Court this appeal has been filed.

4. In the case of *Susamma Thomas* (*supra*), this Court issued certain guidelines in order to "safeguard the feed from being frittered away by the beneficiaries due to ignorance, illiteracy and susceptibility to exploitation". Even as per the guidelines issued by this Court Court, long term fixed deposit of amount of compensation is mandatory only in the case of minors, illiterate claimants and widows. In the case of illiterate claimants, the Tribunal is allowed to consider the request for lumpsum payment for effecting purchase of any movable property such as agricultural implements, rickshaws etc. to earn a living. However, in such cases, the Tribunal shall make sure that the amount is actually spent for the purpose and the demand is not a ruse to withdraw money. In the case of semi-illiterate claimants, the Tribunal should ordinarily invest the amount of compensation in long term fixed deposit. But if the Tribunal is satisfied for reasons to be stated in writing that the whole or part of the amount is required for expanding an existing business or for purchasing some property for earning a livelihood, the Tribunal can release the whole or part of the amount of compensation to the claimant provided the Tribunal will ensure that the amount is invested for the purpose for which it is demanded and paid. In the case of literate persons, it is not mandatory to invest the amount of compensation in long term fixed deposit. The expression used in guideline No. (iv) issued by this Court is that in the case of literate persons also *the Tribunal may* resort to the procedure indicated in guideline No. (i), whereas in the guideline Nos. (i), (ii), (iii) and (v), the expression used is that *the Tribunal should*. Moreover, in the case of literate persons, the Tribunal may resort to the

procedure indicated in guideline No. (i) only if, having regard to the age, fiscal background and strata of the society to which the claimant belongs and such other considerations, the Tribunal thinks that in the larger interest of the claimant and with a view to ensure the safety of the compensation awarded, it is necessary to invest the amount of compensation in long term fixed deposit.

5. Thus, sufficient discretion has been given to the Tribunal not to insist on investment of the compensation amount in long term fixed deposit and to release even the whole amount in the case of literate persons. However, the Tribunals are often taking a very rigid stand and are mechanically ordering in almost all cases that the amount of compensation shall be invested in long term fixed deposit. They are taking such a rigid and mechanical approach without understanding and appreciating the distinction drawn by this Court in the case of minors, illiterate claimants and widows and in the case of semi-literate and literate persons. It needs to be clarified that the above guidelines were issued by this Court only to safeguard the interests of the claimants, particularly the minors, illiterates and others whose amounts are sought to be withdrawn on some fictitious grounds. The guidelines were not to be understood to mean that the Tribunals were to take a rigid stand while considering an application seeking release of the money. The guidelines cast a responsibility on the Tribunals to pass appropriate orders after examining each case on its own merits. However, it is seen that even in cases when there is no possibility or chance of the feed being frittered away by the beneficiary owing to ignorance, illiteracy or susceptibility to exploitation, investment of the amount of compensation in long term fixed deposit is directed by the Tribunals as a matter of course and in a routine manner, ignoring the object and the spirit of the guidelines issued by this Court and the genuine requirements of the claimants. Even in the case of literate persons, the Tribunals are automatically ordering investment of the amount of compensation in long term fixed deposit without

recording that having regard to the age or fiscal background or the strata of the society to which the claimant belongs or such other considerations, the Tribunal thinks it necessary to direct such investment in the larger interests of the claimant and with a view to ensure the safety of the compensation awarded to him. The Tribunals very often dispose of the claimant's application for withdrawal of the amount of compensation in a mechanical manner and without proper application of mind. This has resulted in serious injustice and hardship to the claimants. The Tribunals appear to think that in view of the guidelines issued by this Court, in every case the amount of compensation should be invested in long term fixed deposit and under no circumstances the Tribunal can release the entire amount of compensation to the claimant even if it is required by him. Hence a change of attitude and approach on the part of the Tribunals is necessary in the interest of justice.

6. In this case, the victim of the accident died on 21.7.1993. The award was passed by the Tribunal on 15.2.2002. The amount of compensation was enhanced by the High Court on 6.7.2006. Neither the Tribunal in its award nor the High Court in its order enhancing compensation had directed to invest the amount of compensation in long term fixed deposit. The Insurance Company deposited the compensation amount in the Tribunal on 7.1.2008. In the application filed by the appellants on 19.6.2008 seeking withdrawal of the amount without insisting on investment of any portion of the amount in long term deposit, it was specifically stated that the first appellant is an educated lady who retired as a Superintendent of the Karnataka Road Transport Corporation, Bangalore. It was also stated that the second appellant Poornachandrika is a M.Sc. degree holder and the third appellant Shalini was holding Master Degree both in Commerce and in Philosophy. It was stated that they were well versed in managing their lives and finances. The first appellant was already aged 71 years and her health was not very good. She required money for maintenance and also to put up construction on the existing

house to provide dwelling house for her second daughter who was a co-owner along with her. The second daughter was stated to be residing in a rented house paying exorbitant rent which she could not afford in view of the spiralling costs. It was further stated in the application that the first appellant was obliged to provide a shelter to the first daughter Poornachandrika. It was pointed out that if the money was locked up in a nationalised bank, only the bank would be benefited by the deposit as they give a paltry interest which could not be equated to the costs of materials which were ever increasing. It was further stated that the delay in payment of compensation amount exposed the appellants to serious prejudice and economic ruin. Along with the application, the second and third appellants had filed separate affidavits supporting the prayer in the application and stating that they had no objection to the amount being paid to the first appellant.

7. While rejecting the application of the appellants, the Tribunal did not consider any of the above-mentioned aspects mentioned in the application. Unfortunately, the High Court lost sight of the said aspects and failed to properly consider whether, in the facts and circumstances of the case, there was any need for keeping the compensation amount in long term fixed deposit.

8. Having regard to the facts and circumstances of the case and in view of the uncontroverted averments in the application of the appellants referred to above, we are of the view that the Tribunal ought to have allowed the prayer of the appellants. Hence the impugned orders of the Tribunal and the High Court are set aside. The prayer in the application of the appellants for release of the amount invested in long term deposits stands allowed. The entire amount of compensation shall be withdrawn and paid to the appellants without any further delay. The appeal is allowed in the above terms. There will be no order as to costs.

R.P. Appeal allowed.

ARUP DAS & ORS.

v.

STATE OF ASSAM & ORS.

(Special Leave Petition (C) No.4813-14 of 2012)

JANUARY 27, 2012

[ALTAMAS KABIR AND SURINDER SINGH NIJJAR, JJ.]

SERVICE LAW :

Appointment – Government's refusal to approve the subsequent selection lists recommending the candidates over and above the number of vacancies advertised – Held: It is well-established that an authority cannot make any selection/ appointment beyond the number of posts advertised, even if there were a larger number of posts available than those advertised – A fresh advertisement is required to be published for filling up the remaining number of vacancies after the vacancies advertised are filled up – Constitution of India, 1950 – Arts. 14 and 16.

Consequent upon an advertisement published by the Director of Land Records and Survey, Assam inviting applications for selection and admission in the Assam Survey and Settlement Training Institute in respect of 160 seats, a select list of 160 candidates was published and they were sent for training. Thereafter, the government refused to approve subsequent three more lists. This was challenged before the High Court. The Single Judge dismissed the writ petition. The Division Bench of the High Court declined to interfere.

In the instant petitions, the question for consideration before the Court was: whether appointments could be made in Government service beyond the number of vacancies advertised.

Dismissing the special leave petitions, the Court

HELD: 1. It is well-established that an authority cannot make any selection/appointment beyond the number of posts advertised, even if there were a larger number of posts available than those advertised. The principle behind the said decision is that if that was allowed to be done, such action would be entirely arbitrary and violative of Articles 14 and 16 of the Constitution, since other candidates who had chosen not to apply for the vacant posts which were being sought to be filled, could have also applied if they had known that the other vacancies would also be under consideration for being filled up. [Para 10] [453-D-F]

State of U.P. Vs. Raj Kumar Sharma **2006 (2) SCR 877 = (2006) 3 SCC 330 : and** *Madan Lal Vs. State of J&K* **1995 (1) SCR 908 -(1995) 3 SCC 486 - relied on.**

Prem Singh & Ors. Vs. Haryana State Electricity Board & Ors. **1996 (2) Suppl. SCR 401 = (1996) 4 SCC 319 – explained.**

Union of India Vs. Ishwar Singh Khatri & Ors. **(1992) Supp. 3 SCC 84 – distinguished**

1.2. No extra-ordinary and/or exceptional circumstances exist in the instant case requiring the filling up of the vacant seats available after filling up the 160 seats advertised. A fresh advertisement is required to be published for filling up the remaining number of vacancies after the vacancies advertised are filled up. [Para 12] [455-C-E-F]

Case Law Reference:

(1992) Supp. 3 SCC 84	**distinguished Para 4**
1996 (2) Suppl. SCR 401	**distinguished Para 6**

1995 (1) SCR 908	**relied on**	**Para 7**
2006 (2) SCR 877	**relied on**	**Para 11**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 4813-4814 of 2012.

From the Judgment & Order dated 16.09.2011 of the Gauhati High Court at Guwahati in Writ Appeal No. 132 and 151 of 2011.

Jaydeep Gupta, Helal Uddin Chaudhary, Mohd. Irshad Hanif, Adeel Siddiqui for the Petitioners.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. A short but interesting question of law arises in these Special Leave Petitions, as to whether appointments can be made in Government service beyond the number of vacancies advertised.

2. An advertisement dated 4th November, 2006, was published by the Director of Land Records and Survey, Assam, inviting applications for selection for admission in the Assam Survey and Settlement Training Institute in respect of 160 seats. About 12,000 candidates applied for the said advertised seats and a written test was conducted which was followed by a viva voce examination. The viva voce test was limited to only 560 candidates. The restriction of the vive voce test to only 560 candidates was challenged before the Gauhati High Court in W.P.(C)No.3419 of 2007, which was dismissed and Writ Appeal No.413 of 2007 preferred from the Order of the learned Single Judge was also dismissed. The Director of Land Records and Survey, Assam, published a select list of 160 candidates and sent the candidates for training. Subsequently, the Director sent three more lists, hereinafter referred to as "the second, third and fourth lists", but the same were not approved by the Government. The Government's refusal to approve the

second, third and fourth lists against the seats available, was again challenged in Writ Petition Nos.3812 of 2010 and 2279 of 2011 on the ground that when vacancies were available, there was no bar in the same being filled up from the Select List of 560 candidates.

3. The aforesaid case sought to be made out on behalf of the Petitioners was contested by the Respondents on the ground that even if there were vacant seats available, the same could not have been filled up beyond the number of seats advertised as such action would be contrary to the law laid down by this Court relating to deviation from the contents of the advertisement.

4. The submissions made on behalf of the Writ Petitioners were rejected by the learned Single Judge upon holding that if any appointment was to be made beyond the number of seats advertised, the Director was required to publish a fresh advertisement for selecting the next batch of candidates in accordance with Rule 20 of the Rules in this regard. The learned Single Judge also observed that it was evident from the judgment and order dated 29th January, 2010 passed in W.P. (C) No.3909 of 2009, as well as the order dated 1st December, 2007 passed in Writ Appeal No.413 of 2007, that 560 candidates were called for the viva voce test for the 160 seats which had been advertised and if other candidates from the second, third and fourth lists were to be admitted, it would amount to depriving other candidates, who had not been called for the viva voce test because of the Government's decision to limit the number of candidates in the written test, of an opportunity of being selected. Some of the candidates may have, in the meantime, acquired the eligibility to undergo such training. Relying on the decision of this Court in *Union of India Vs. Ishwar Singh Khatri & Ors.* [(1992) Supp.3 SCC 84] and several other judgments expressing the same view, the learned Single Judge held that filling up of vacancies over and above the number of vacancies advertised would be contrary to the

provisions of Articles 14 and 16 of the Constitution. On the basis of the above, the learned Single Judge dismissed the said Writ Petitions.

5. The decision of the learned Single Judge was challenged by the Writ Petitioners in Writ Appeal No.132 of 2011 before the Division Bench of the Gauhati High Court, along with Writ Appeal No.151 of 2011, which were dismissed by the Division Bench of the Gauhati High Court by the judgment impugned herein dated 16.9.2011. Agreeing with the views expressed by the learned Single Judge, the Division Bench dismissed the Writ Appeals against which these Special Leave Petitions have been filed.

6. Appearing in support of the Special Leave Petitions, Mr. Joydeep Gupta, learned Senior Advocate, submitted that both the learned Single Judge and the Division Bench of the High Court had proceeded on the wrong premise that despite available vacancies, selection could not be made against the seats available beyond those mentioned in the advertisement. Mr. Gupta submitted that the legal position to the contrary had been clarified by this Court in Civil Appeal No.3423 of 1996, *Prem Singh & Ors. Vs. Haryana State Electricity Board & Ors.* [(1996) 4 SCC 319], where the following two questions fell for consideration, namely,

(i) Whether it was open to the Board to prepare a list of as many as 212 candidates and appoint as many as 137 out of that list when the number of posts advertised was only 62?

(ii) Whether the High Court was justified in quashing the selection of all the 212 candidates and appointment of 137?

7. While deciding the matter, this Court referred to various earlier decisions in which the view expressed by this Court that appointments or selections could not be made beyond the

number of posts advertised, was reiterated. One of the decisions which was relied upon was the decision rendered by this Court in *Madan Lal Vs. State of J&K* [(1995) 3 SCC 486], where one of the questions which fell for consideration was whether preparation of a merit list of 20 candidates against 11 advertised vacancies was bad. The learned Judge observed that this Court had held that the said action of the Commission by itself was not bad, but at the time of giving actual appointments, the merit list was to be so operated that only 11 vacancies were filled up. It was further observed that the reason given for such a finding was that as the requisition was for 11 vacancies, the consequent advertisement and recruitment could also be for 11 vacancies and no more. The learned Judges went on to quote a passage from the decision in *Madan Lal's* case (supra) which is extracted hereinbelow :-

> "It is easy to visualise that if requisition is for 11 vacancies and that results in the initiation of recruitment process by way of advertisement, whether the advertisement mentions filling up of 11 vacancies or not, the prospective candidates can easily find out from the Office of the Commission that the requisition for the proposed recruitment is for filling up 11 vacancies. In such a case a given candidate may not like to compete for diverse reasons but if requisition is for larger number of vacancies for which recruitment is initiated, he may like to compete. Consequently the actual appointments to the posts have to be confined to the posts for recruitment to which requisition is sent by the Government. In such an eventuality, candidates in excess of 11 who are lower in the merit list of candidates can only be treated as wait-listed candidates in order of merit to fill only the 11 vacancies for which recruitment has been made, in the event of any higher candidate not being available to fill the 11 vacancies, for any reason. Once the 11 vacancies are filled by candidates taken in order of merit from the select list that list will get exhausted, having served its purpose."

8. Referring to the observations made in the aforesaid extract, the learned Judges went on to state that while making the aforesaid observations, this Court had agreed with the contention that while sending a requisition for recruitment to posts, the Government can keep in view not only actual vacancies then existing, but also anticipated vacancies. Based on its aforesaid findings, the learned Judges went on to observe as follows:-

> "25. From the above discussion of the case-law it becomes clear that the selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. If the requisition and advertisement are for a certain number of posts only the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates. The State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. Even when filling up of more posts than advertised is challenged the court may not, while exercising its extraordinary jurisdiction, invalidate the excess appointments and may mould the relief in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment. What relief should be granted in such cases would depend upon the facts and circumstances of each case.
>
> 26. In the present case, as against the 62 advertised posts the Board made appointments on 138 posts. The selection process was started for 62 clear vacancies and at that time anticipated vacancies were not taken into account. Therefore, strictly speaking, the Board was not justified in making more than 62 appointments pursuant to the advertisement published on 2-11-1991 and the selection

> process which followed thereafter. But as the Board could have taken into account not only the actual vacancies but also vacancies which were likely to arise because of retirement etc. by the time the selection process was completed it would not be just and equitable to invalidate all the appointments made on posts in excess of 62. However, the appointments which were made against future vacancies — in this case on posts which were newly created — must be regarded as invalid. As stated earlier, after the selection process had started 13 posts had become vacant because of retirement and 12 because of deaths. The vacancies which were likely to arise as a result of retirement could have been reasonably anticipated by the Board. The Board through oversight had not taken them into consideration while a requisition was made for filling up 62 posts. Even with respect to the appointments made against vacancies which arose because of deaths, a lenient view can be taken and on consideration of expediency and equity they need not be quashed. Therefore, in view of the special facts and circumstances of this case we do not think it proper to invalidate the appointments made on those 25 additional posts. But the appointments made by the Board on posts beyond 87 are held invalid. Though the High Court was right in the view it has taken, we modify its order to the aforesaid extent. These appeals are allowed accordingly. No order as to costs."

9. Mr. Gupta urged that in view of the fact that this Court had approved the right of the State to deviate from the advertisement published and to make appointments to posts falling vacant thereafter in exceptional circumstances only or in an emergent situation, the Director of Land Records and Survey, Assam, had not committed any illegality in publishing the second, third and fourth lists for the purpose of making appointments therefrom against the total number of known vacancies numbering 690. Mr. Gupta submitted that both the

Single Judge and the Division Bench of the High Court had completely misconstrued the decision in *Prem Singh's* case (supra), although the same had been cited before them. Accordingly, the decisions, both of the Single Judge as well as of the Division Bench, were liable to be set aside with appropriate directions to the State Government and its authorities to take steps to fill up the total number of vacancies from the second, third and fourth lists published by the Director, Land Records and Survey, Assam.

10. Having carefully considered the submissions made on behalf of the Petitioners, we are unable to accept Mr. Gupta's submissions, since the issue raised by him is no longer res integra and has been well settled by a series of decisions of this Court after the decision in *Prem Singh's* case (supra). Even in Prem Singh's case, which has been strongly relied upon by Mr. Gupta, the proposition sought to be advanced by him does not find support. It is well-established that an authority cannot make any selection/appointment beyond the number of posts advertised, even if there were a larger number of posts available than those advertised. The principle behind the said decision is that if that was allowed to be done, such action would be entirely arbitrary and violative of Articles 14 and 16 of the Constitution, since other candidates who had chosen not to apply for the vacant posts which were being sought to be filled, could have also applied if they had known that the other vacancies would also be under consideration for being filled up. In fact, in the decision rendered in *Ishwar Singh Khatri's* case (supra) which was referred to by the High Court, this Court while considering the preparation of panel of 1492 selected candidates as against the 654 actual vacancies notified, recorded the fact that after filling up the notified number of vacancies from the panel, no further appointments were made therefrom and instead fresh advertisement was issued for further appointment. Since a promise had been made in the minutes of the meeting of the Selection Board that the panel would be valid till all the candidates were offered appointments,

this Court held that the Selection Board had taken into consideration anticipated vacancies while preparing the panel. It is on such basis that this Court had observed that it had to be concluded that the Selection Board had prepared the panels containing 1492 candidates, as against the then available vacancies, and, accordingly, the selected candidates had a right to get appointment. It is in such circumstances that further appointments from the published panel of 1492 candidates, as directed by the Tribunal, were upheld.

11. In a recent decision rendered by this Court in *State of U.P. Vs. Raj Kumar Sharma* [(2006) 3 SCC 330], this Court once again had to consider the question of filling up of vacancies over and above the number of vacancies advertised. Referring to the various decisions rendered on this issue, this Court held that filling up of vacancies over and above the number of vacancies advertised would be violative of the fundamental rights guaranteed under Articles 14 and 16 of the Constitution and that selectees could not claim appointments as a matter of right. It was reiterated that mere inclusion of candidates in the Select List does not confer any right to be selected, even if some of the vacancies remained unfilled. This Court went on to observe further that even if in some cases appointments had been made by mistake or wrongly, that did not confer any right of appointment to another person, as Article 14 of the Constitution does not envisage negative equality and if the State had committed a mistake, it cannot be forced to perpetuate the said mistake.

12. Even the decision in *Prem Singh's* case (supra), which had been strongly relied upon by Mr. Joydeep Gupta in support of his claim that the State had a right to deviate from the advertisement published by it, has to be considered in the light of the circumstances in which the same was made. While holding that if the requisition and advertisement are for a certain number of posts only, the State cannot make more appointments than the number of posts, this Court went on to

hold that the State could deviate from the advertisement and make appointments in posts falling vacant thereafter in exceptional cases or in an emergent situation, and, that too, by taking a policy decision in that behalf. The said finding cannot possibly be interpreted in the manner in which it has been done by Mr. Gupta that the advertisement could be deviated from by the State, even in the present circumstances, which, in our view, were neither exceptional nor emergent. The fact that 690 seats were available is not a relevant consideration for application of the aforesaid principle. It is in such situation that a fresh advertisement is required to be published for filling up the remaining number of vacancies after the vacancies advertised are filled up. The latter portion of paragraph 25 of the said decision in *Prem Singh's* case (supra) deals with a situation where posts in excess of those advertised had been filled up in extra-ordinary circumstances. In such a case it was observed that instead of invalidating the excess appointments, the relief could be moulded in such a manner so as to strike a just balance, if it is in the interest of the State and in the interest of the person seeking public employment, to the facts of such case. The facts of that case are different from the facts of the instant case, in that no extra-ordinary and/or exceptional circumstances exist in the present case requiring the filling up of the vacant seats available after filling up the 160 seats advertised. The decision in *Prem Singh's* case (supra) has to be read in such a context and cannot be said to be the rule, but rather the exception.

13. We, therefore, are not inclined to accept Mr. Gupta's submissions, which deal with the exception and not the rule and, accordingly, the Special Leave Petitions are dismissed. Consequently, the application filed by the Petitioner Nos.4 to 58 for permission to file the Special Leave Petition is rejected.

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

R.P. Special Leave Petitions dismissed.

YOGRAJ INFRAS. LTD.
v.
SSANG YONG ENG. & CONSTRN. CO. LTD. & ANR.
(Special Leave Petition (C) No. 24746 of 2010)

JANUARY 31, 2012

[ALTAMAS KABIR AND JASTI CHELAMESWAR, JJ.]

BANK GUARANTEE:

Construction contract – Dispute between parties- Invocation of bank guarantees – Held: Since the petitioner's application u/s 9 of Arbitration and Conciliation Act to restrain the respondent from invoking the bank guarantees was based mainly on allegations of fraud, which have been rejected, and further the partial award has been made by arbitral tribunal, which has not been questioned by the petitioner, the plea relating to special equities, cannot be accepted – Arbitration and Conciliation Act, 1996-s.9.

Pursuant to a construction contract, the petitioner furnished Bank guarantees whereby the bank undertook to pay to respondent no.1 on its first written demand any sum or sums within the limits of the respective bank guarantees. Dispute arose between the parties relating to the performance of the petitioner in completing the work. Respondent no.1 terminated the contract and invoked the bank guarantees. The petitioner made a prayer in an application filed u/s 9 of the Arbitration and Conciliation Act 1996 before the District Judge seeking injunction against the respondent invoking the Bank guarantees. The application was dismissed. The appeal therefrom was also dismissed by the High Court. Aggrieved, the petitioner filed the instant special leave petition alleging fraud on the part of respondent no. 1. Supreme Court stayed invocation of the Bank Guarantees. The petitioner

also filed a criminal complaint against respondent no. 1 making the same allegations which were made in the Special Leave Petition. The complaint was quashed by the High Court. The Special Leave Petition of the petitioner was also dismissed by the Supreme Court. Consequently, respondent No. 1 filed an application for early hearing and disposal of the instant Special Leave Petition.

Disposing of the matters, the Court

HELD: Since the Petitioner's application u/s 9 of the Arbitration and Conciliation Act, 1996, was based mainly on allegations of fraud, which have been rejected, there was no foundation for the stay order passed in these proceedings to continue. Both in the criminal proceedings as also in the proceedings u/s 9 of the Act, the petitioner proved to be unsuccessful, at least up to the High Court stage. In the criminal proceedings, the petitioner was unsuccessful right up to this Court. In the circumstances, the plea urged on behalf of the petitioner relating to special equities cannot be accepted, particularly, in view of the fact that such a point had not been raised earlier. Besides, partial Award has been made by the Arbitral Tribunal which has not been questioned or challenged by the petitioner and respondent No.1 is entitled to the amount awarded in the partial Award. [Para 10-11] [462-G-H; 463-A-C]

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 24746 of 2010.

From the Judgment & Order dated 20.08.2010 of the High Court of Madhya Pradesh, Principal Seat at Jabalpur in Abribtration Appeal No. 8 of 2010.

Gagan Gupta for the Petitioner.

Meenakshi Arora for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. The Special Leave Petition and the application filed on behalf of the Respondents for early hearing and disposal of the Special Leave Petition were taken up together for consideration. The facts on which the Special Leave Petition is based, are set out hereinbelow.

2. By its letter of acceptance No.NHAI/PH 11/NHDP/ADB/GM-11/NS1/746 dated 30th December, 2005, the National Highways Authority of India, hereinafter referred to as 'NHAI', awarded a contract to the Respondent, SSANG YONG Engineering & Construction Co. Ltd., for the National Highways Sector II Project, Package-ADB-II/C-8, which involved the four laning of Jhansi-Lakhadon sector KM 297 to KM 351 of National Highway 26 in the State of Madhya Pradesh. The total contract amount for the aforesaid project was more than 750 crores. An agreement was entered into by the NHAI with the Petitioner on 13th August, 2006. Clause 27 of the Agreement incorporated an arbitration clause stipulating that all disputes and differences arising out of or in connection with the Agreement dated 13th August, 2006, would be referred to arbitration to be conducted in English in Singapore in accordance with the Singapore International Arbitration Centre (SIAC) Rules. For the purpose of reference, Clause 27 of the Agreement relating to arbitration is extracted hereinbelow :

"27. Arbitration

27.1 All disputes, differences arising out of or in connection with the Agreement shall be referred to arbitration. The arbitration proceedings shall be conducted in English in Singapore in accordance with the Ssangyong International Arbitration Centre (SIAC) Rules as in force at the time of signing of this Agreement. The arbitration shall be final and binding.

27.2 The arbitration shall take place in Singapore and be conducted in English language.

27.3 None of the Party shall be entitled to suspend the performance of the Agreement merely by reason of a dispute and/or a dispute referred to arbitration."

3. According to Clause 1 of the Agreement read with the Appendix thereof, the Petitioner was to provide all adequate manpower, material, plant, machinery, construction equipment and all other resources, including finance, which would be required to perform the work Bank Guarantee was furnished by the Petitioner on 31st October, 2006, whereby the Bank undertook to pay to the Respondent on its first written demand and without cavil or argument any sum or sums within the limits of Rs. 6,05,00,000/-, without there being need to prove or give any reasons for the demand for the said sum. The guarantor also waived the necessity of the Respondent Company making a demand for the debt to the contractor/petitioner before presenting the demand. The guarantor also agreed that no change or addition or other modification of the terms of the contract or of the work to be performed thereunder or any of the contract documents, which may be made between the Respondent and the Petitioner, would release the Bank from its liability under the Agreement. Similarly, three Bank Guarantees of Rs. 1 crore each and one Bank Guarantee for Rs. 3 crores were also furnished to secure mobilization advance.

4. Disputes and differences arose between the parties relating to the performance of the Petitioner in completing the work contracted as per the Agreement dated 13th August, 2006. Consequently, since the Petitioner failed to carry out the works entrusted and had allegedly been over-paid to the tune of Rs. 78 crores, the Respondent Company on 22nd September, 2009, terminated the contract under Clause 23.2 of the Agreement dated 13th August, 2006 and invoked the

Bank Guarantees referred to hereinbefore vide its letters dated 25th January, 2010, 27th January, 2010 and 5th March, 2010. The Respondent No.1 also made a subsequent demand for encashment of the Bank Guarantees by its letter dated 6th May, 2010.

5. In the Special Leave Petition, the Petitioner has sought for an order of injunction against the Respondent No.1 on the basis of alleged fraud on the part of the said Respondent. The Petitioner also filed a criminal complaint against the Respondent No.1 alleging fraud and making the same allegations which have been made by it in the present Special Leave Petition. The learned Magistrate took cognizance on the said complaint and issued process on 5th February, 2010.

6. Aggrieved thereby, the Respondent No.1 challenged the said order of the Magistrate dated 5th February, 2010, taking cognizance of the criminal complaint alleging fraud, by filing a petition under Section 482 of the Code of Criminal Procedure in the Jabalpur Bench of the Madhya Pradesh High Court, for quashing of the cognizance taken by the learned Magistrate. The High Court by its order dated 13th October, 2010, quashed the criminal proceedings commenced against the Respondent No.1. Challenging the said order of the High Court, the Petitioner filed Special Leave Petition (Crl) No. Crl. M.P. 2872 of 2011, which was dismissed by this Court on 18th February, 2011. On account of the above, an application for early hearing and disposal of the Special Leave Petition was filed on behalf of the Respondent No.1 urging that since the allegation of fraud had already been decided by this Court, the present Special Leave Petition could be finally disposed of in view of order passed by this Court in Special Leave Petition (Crl) No. Crl. M.P. 2872 of 2011. It is in this background that the present I.A. has been filed for early hearing and disposal of the Special Leave Petition.

7. Appearing for the Special Leave Petitioner, who is the

opposite party in the Interlocutory Application filed on behalf of the Respondent No.1, Mr. Jaideep Gupta, learned Senior Advocate, contended that the stay order passed in these proceedings was liable to be continued in view of the special equities in this case. He submitted that the Petitioner Company had invested large sums of money in the project and upon termination of the contract, the dues of either party were yet to be decided and the same could only be done at the time of the final Award. Mr. Gupta submitted that his main emphasis in the Special Leave Petition was with regard to the special equities which existed and the order of stay granted by this Court restraining the Respondent No.1 Company from invoking the Bank Guarantees was liable to be continued till the passing of the final Award by the learned Arbitrator.

8. Ms. Meenakshi Arora, learned Advocate, who appeared for the Respondent Company, submitted that the prayer made on behalf of the Petitioner in the Section 9 application before the District Court, Narsinghpur, seeking injunction against the Respondent No.1 from invoking the Bank Guarantees, was dismissed by the District Judge on 4th March, 2010, and the Appeal therefrom was dismissed by the Jabalpur Bench of the Madhya Pradesh High Court on 20th August, 2010. However, this Court had stayed the invocation of the Bank Guarantees by the Respondent No.1 Company by an interim order dated 31st August, 2010. Ms. Arora submitted that once the cognizance taken by the magistrate on the petitioner's criminal complaint alleging fraud on the part of the Respondent No.1 was quashed by the Jabalpur Bench of the Madhya Pradesh High Court by its order dated 13th October, 2010, and even the Special Leave Petition preferred therefrom was dismissed by this Court on 18th February, 2011, the very basis for seeking injunction in the proceedings under Section 9 of the Arbitration and Conciliation Act, 1996, stood removed. Ms. Arora submitted that in addition to the above, a partial Award had been made by the Arbitral Tribunal in Singapore on 30th June,

2011, in favour of the Respondent No.1. Ms. Arora submitted that in terms of the agreement between the parties, the Respondent No.1 Company had made huge cash advances to the Petitioner for completion of the project, but the same had not been fully repaid by the Petitioner and that as a result, the Respondent No.1 should be permitted to invoke the Bank Guarantees to realize the outstanding amounts. According to Ms. Arora, the dues of the Respondent No.1 Company were far beyond those claimed by the Petitioner. Ms. Arora submitted that since the partial Award had not been challenged by the Petitioner, the execution thereof could not be stayed and the Respondent No.1 was, therefore, entitled to recover the amount under the partial Award. According to Ms. Arora, the plea taken by the Petitioner in the criminal complaint and the present Special Leave Petition was the same and since the allegation of fraud against the Respondent No.1 by the Petitioner has been negated, the interim order restraining the Respondent No.1 from invoking the Bank Guarantees was liable to be vacated.

9. Ms. Arora submitted that since payment under a Bank Guarantee can normally be stopped only on two grounds and on no other, viz., on grounds of fraud and special equity, and the ground of fraud having been rejected upto this Court, the only other ground available to the Petitioner to stop the invocation of the Bank Guarantees was on account of special equities and in the instant case the Petitioner had failed to indicate any such special equity which entitled the Petitioner to an order of restraint against the Respondent No.1 from invoking the Bank Guarantees in question.

10. Having heard learned counsel for the parties, we are inclined to accept Ms. Meenakshi Arora's submissions that since the Petitioner's application under Section 9 of the Arbitration and Conciliation Act, 1996, was based mainly on allegations of fraud, which have been rejected, there was no foundation for the stay order passed in these proceedings to continue. We cannot lose sight of the fact that both in the

criminal proceedings as also in the proceedings under Section 9 of the aforesaid Act, the Petitioner proved to be unsuccessful, at least upto the High Court stage. In the criminal proceedings, the Petitioner was unsuccessful right upto this Court. In the aforesaid circumstances, we are unable to accept the submissions relating to special equities urged by Mr. Jaideep Gupta, particularly in view of the fact that such a point had not been raised earlier.

11. In addition to the above, we also have to keep in mind the fact that a partial Award has been made by the Arbitral Tribunal which has not been questioned or challenged by the Petitioner and the Respondent No.1 is entitled to the amount awarded in the partial Award.

12. Accordingly, we are not inclined to disturb the order of the High Court and the Special Leave Petition is, therefore, dismissed with cost of Rs. 1 lakh to be paid by the Petitioner Company to the Supreme Court Legal Services Committee. The Interlocutory Application is also disposed of by this order.

R.P. Matters disposed of.

JOSHNA GOUDA

v.

BRUNDABAN GOUDA & ANR.

(Civil Appeal No. 1191 of 2012)

JANUARY 31, 2012

[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]

Orissa Gram Panchayat Act, 1964: s.31 r/w s.34 – Gram Panchayat elections – Election to the post of Sarpanch – Election petition filed u/s.31 r/w s.34 on the ground that the returning candidate was not qualified to contest the election – Election petitioner prayed for setting aside the election of the returning candidate and also prayed that petitioner be declared duly elected – According to petitioner, the returning candidate had not attained the age of 21 years on the relevant date since the date of birth of the appellant was 20.6.1986 and not 7.7.1985 – Courts below held that date of birth of returning candidate was 20.6.1986 – On appeal, held: The fact that returning candidate failed to prove her date of birth to be 7.7.1985 would not automatically lead to conclusion that the assertion of election petitioner that the actual date of birth of returning candidate was 20.6.1986 was proved – Burden to prove that returning candidate was born on 20.6.1986 rested on the election petitioner which he failed to discharge – Although there was inconsistency in the evidence of returning candidate regarding her age, however her statement that she was 10 years old on 10.1.1996 could not be treated as an admission that her date of birth was 20.6.1986 – An admission must be clear and unambiguous in order that such an admission should relieve the opponent of burden of proof of the fact said to have been admitted – Prayer for declaration in favour of election petitioner, therefore did not survive – Evidence – Election laws.

The election to the post of Sarpanch was held in

2007. The appellant and the first respondent contested and the appellant was declared elected. The first respondent filed election petition under Section 31 read with Section 34 of the Orissa Gram Panchayat Act, 1964 on the ground that the appellant was not qualified to contest the election. The first respondent prayed for setting aside the election of the appellant and also prayed that he be declared duly elected. According to the respondent, the appellant had not attained the age of 21 years on the relevant date since the date of birth of the appellant was 20.6.1986 and not 7.7.1985. The election petition was allowed and on appeal upheld by the District Court. The appellant filed a writ petition before the High Court. The High Court dismissed the writ petition on the ground that the trial court had held that date of birth of the appellant was 20.6.1986 mainly on the basis of School Admission Register, Ext.5, the relevant entry of which was Ext.5/A, the Admission Form Ext.6 and the Transfer Certificate of the appellant Ext.7; that although the said documents were admitted in evidence without any objection before the trial court, however, mere proof of the exhibits did not mean that the content of the said exhibits was also proved and that it was the duty of the opposite party to prove the contents of those documents. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. The High Court did not record any conclusive finding regarding the probative value of the contents of exhibits 5, 5A or exhibit 7, but went on to examine the evidence adduced by the appellant and found that the said material did not lend support to the case of the appellant and therefore the entry E.5/A made in Ext. 5 was true. Exts. A to H were documents produced by the appellant in support of her claim that her

actual date of birth was 7.7.1985 but not 20.6.1986, as contended by the first respondent. Exts. A and H were voters lists of the year 2007 and 2008 respectively. The High Court had observed that both the documents were prepared later in point of time to the filing of the nomination papers in the election in question and also they did not reflect the date of birth of the appellant. Similarly, Ext. D was a horoscope alleged to be that of the appellant. The High Court opined that the said document was rightly not relied upon. Ext. E was a certificate of date of birth issued under the provisions of the Registration of Births and Deaths Act showing the date of birth of the appellant as 7.7.1985 but such an entry came to be made pursuant to an application made by the appellant subsequent to the nominations in the election in question. The High Court had refused to place any reliance on the said document on the ground that it was issued by an executive magistrate, who according to the High Court did not have the jurisdiction to issue the same. The High Court rightly refused to believe those documents and, therefore, the appellant failed to prove her date of birth to be 7.7.1985. But that would not automatically lead to the conclusion that the assertion of the respondent No.1 that the actual date of birth of the appellant was 20.6.1986 was proved. Even according to the High Court, the content of the Exs. 5, 5/A and 7 had no probative value. Ex. 5 was proved by PW.2, an assistant teacher of the Basudev High School. Ex. 6 and 7 were proved by PW.2, the headmaster of Basudev High School. PW.2 stated that Exhibit 5/A entry showing the date of birth of the appellant as 20.6.1986 was made on the basis of Ex. 7 which was a transfer certificate issued by the headmaster of Panchayat Upper Primary School where the appellant studied before joining Basudev High School. Ext.6 was an application dated 11.7.1998 for admission of the appellant in Basudev High School made by a cousin of the appellant's father who was admittedly

not examined. There was nothing in the said evidence to indicate that the date of birth of the appellant was 20th June, 1986. At the worst, the said evidence failed to establish that the appellant's date of birth was 7.7.1985. [Paras 8, 12-14] [470-G-H; 472-A-H; 473-A-B, F]

2. The burden to proof the fact that the appellant was born on 20.6.1986 rested squarely on the first respondent. Since the first respondent failed to discharge the burden cast upon him, the election petition must fail. It can be seen from the evidence of the appellant that the appellant stated that she was 13 year old when she took admission in the High School (obviously Basudev High School) and the admission from the evidence of PW.2, was on 11.7.1998. Deducting 13 years from that date would place the year of birth of the appellant in 1985. It is not clear as to the material on the basis of which the High Court recorded that the admission of the appellant in the Panchayat Upper Primary School was on 10.1.1996. There was some basis on record for the finding that the appellant took admission in the Upper Primary School on 10.1.1996. On her own admission she was 10 years old on that date. Then there is an inconsistency in her evidence regarding her age with reference to her admission into the Upper Primary School and Basudev High School. In such a case, her statement that she was 10 year old on 10.1.1996 cannot be treated as an admission that her date of birth is 20th June, 1986. An admission must be clear and unambiguous in order that such an admission should relieve the opponent of the burden of proof of the fact said to have been admitted. Thus, the second question regarding the declaration in favour of the first respondent did not survive. [Paras 15, 16, 18, 19] [473-H; 474-A, E; 475-E-H; 476-A-B]

Robins v. *National Trust & Co. Ltd.*, **1927 A.C. 515 – referred to.**

Case Law Reference:

1927 A.C. 515 referred to Para 16

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1191 of 2012.

From the & Order dated 25.03.2011 of the High Court of Orrisa at Cuttack in Writ Appeal No. 114 of 2011.

Raj Kumar Mehta for the Appellant.

Debasis Misra for the Respondenys.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted.

2. This appeal arises out of a judgment dated 25.03.2011 of the High Court of Orissa in Writ Appeal No.114 of 2011.

3. The factual background of the litigation is as follows:-

(A) Election to the post of Sarpanch of Kulagada Gram Panchayat in the District of Ganjam, Orissa were held in the year 2007. The appellant, the first respondent and two others filed their nominations. The scrutiny of the nominations took place on 16th January, 2007. The returning officer held all the four nominations valid.

(B) Subsequently, except the appellant and the first respondent, the other two candidates withdrew from contest. Election took place on 17th February, 2007, wherein the appellant herein was declared elected.

(C) The first respondent, filed an Election Petition under Section 31 read with Section 34 of the Orissa Gram Panchayat Act, 1964 (for the sake of convenience it is called "the Act"), on the ground that the appellant herein was not eligible to

contest the election in view of Section 11(b) of the Act which declares that no member of 'Gram Sasan' (a defined expression under Section 2(h) of the Act[1]) shall be eligible to contest for the post of Sarpanch if he has not attained the age of 21 years. It is the specific case of the first respondent that the appellant herein was born on 20.06.1986 and had not attained the age of 21 years by the relevant date. The 1st respondent, therefore, sought two reliefs in the election petition that the election of the appellant herein be set aside and also that the 1st respondent be declared to have been duly elected. The appellant contested the election petition. By the judgment dated 29.11.2008 the election petition was allowed. Aggrieved by the decision of the trial Court, the appellant herein carried the matter in an appeal under Section 38(4) of the Act to the District Court, Ganjam. The appeal was dismissed by a judgment dated 14th September, 2009.

(D) Aggrieved by the same, the appellant herein carried the matter by way of a Writ Petition (Civil) No. 14356 of 2009 to the High Court of Orissa which was also dismissed by a Judgment dated 18.2.2011, and the same was challenged in an Intra Court appeal in appeal No. 114 of 2011 without any success. By the Judgment under appeal, the writ appeal was dismissed.

4. It is argued by learned counsel for the appellant that the judgment under appeal cannot be sustained as there is no legally admissible evidence on record to enable the Courts below to reach the conclusion that the appellant was born on 20th June, 1986.

5. It is recorded in the judgment rendered in the writ petition:-

"The trial court held that the date of birth of the petitioner was 20.6.1986 mainly on the basis of School Admission

1. "Gram Sasan" means a Grama Sasan established under Section 4'.

Register, Ext.5, the relevant entry of which is Ext.5/A, the Admission Form Ext.6 and the Transfer Certificate of the petitioner Ext.7, P.W.2, one Asst. Teacher of Basudev High School, Dhaugaon produced the School Admission Register and proved, it which was marked as Ext.5."

6. The question of admissibility of the exhibits 5, 5A and 7 was raised in the writ petition but rejected on the ground that the said documents were admitted in evidence without any objection before the Trial Court. However, the learned judge opined that mere proof of the above-mentioned exhibits does not mean that the content of the said exhibits was also proved.

"Of course, only because those documents were admitted without objection, it cannot be said that the contents thereof were also admitted. It was the duty of the opp.party to prove the contents of those documents particularly, the date of birth of the petitioner entered in Ext.5 and the transfer certificate Ext.7."

7. However at para 7, it was held::

"In the present case the entry as per Ex.5/A was made on the basis of transfer certificate Ext.7 and the application made by Maheswar Gouda, cousin brother of petitioner's father. The trial court held that Maheswar Gouda, being the cousin brother of petitioner's father had special means of knowledge of the date of birth of the petitioner. Admittedly, said Maheswar Gouda has not been examined".

8. Unfortunately, the learned judge did not record any conclusive finding regarding the probative value of the contents of exhibits 5, 5A or exhibit 7, but went on to examine the evidence adduced by the appellant herein and found that the said material does not lend support to the case of the appellant herein and therefore the entry E.5/A made in Ext. 5 is true. A strange procedure indeed! Only matched by the strange decision of the appellant to adduce evidence.

"But father of the petitioner has been examined as O.P.W. No.3. As per the affidavit evidence the date of birth of the petitioner was incorrectly recorded in the school register and school certificate by the teachers, which appears improbable. Furthermore, it transpires from the evidence of the petitioner herself, that when she took admission in Panchayat U.P. School she was 10 years old. She took admission in the said school on 10.1.96. If 10 years is deducted from that date it would come to 9.7.1986. So, the evidence of the petitioner almost allies with the case of opp. party No.1 that the date of birth of the petitioner was 20.6.1986."

9. Thereafter the learned judge elaborately discussed the evidence of the appellant herein and concluded that:- " It would not improve the case of the petitioner as discussed earlier".

10. The Division Bench noted the objection to the admissibility in evidence of the exhibits 5, 5A and 7 in the following words:-

"The ground of attack of the impugned order is that the learned Single Judge having held that the documents relied upon by respondent No.1, namely Exts.5,5/A and 7, which are the only documents from the side of respondent no.1 to establish the date of birth of the appellant are not admissible in evidence under section 35 of the Evidence Act, the learned Single Judge erred in further probing into the matter and dismissing the writ petition. The aforesaid documents on the basis of which the respondent no.1 sought to establish that the appellant was not qualified to file nomination having been found inadmissible, the only alternative was to allow the writ petition."

11. The Division Bench did not record any clear finding either on the admissibility or the probative value of the content of the above-mentioned exhibits but suddenly switched over to the examination of the evidence of the appellant.

12. Exts. A to H are documents produced by the appellant herein in support of her claim that her actual date of birth is 7.7.1985 but not 20.6.1986, as contended by the first respondent. Exts. A and H are voters lists of the year 2007 and 2008 respectively. The Division Bench observed that both the documents were prepared later in point of time to the filing of the nomination papers in the election in question and also they do not reflect the date of birth of the appellant herein. Similarly, Ext. D is a horoscope alleged to be that of the appellant herein. The Division Bench opined that the said document was rightly not relied upon. Ext. E is a certificate of date of birth issued under the provisions of the Registration of Births and Deaths Act showing the date of birth of the appellant as 7.7.1985 but such an entry came to be made pursuant to an application made by the appellant herein subsequent to the nominations in the election in question. The High Court refused to place any reliance on the said document on the ground that it was issued by an executive magistrate, who according to the High Court did not have the jurisdiction to issue the same.

13. We do not propose to examine the correctness of the reasoning adopted by the High Court for refusing to place any reliance on the above-mentioned documents produced by the appellant herein in her bid to prove her actual date of birth as 7.7.1985. For the purpose of the present appeal, we will proceed on the basis that the High Court rightly refused to believe those documents and, therefore, the appellant herein failed to prove her date of birth to be 7.7.1985. But that does not automatically lead to the conclusion that the assertion of the respondent No.1 that the actual date of birth of the appellant herein is 20.6.1986 is proved. Even according to the High Court, the content of the Exs. 5, 5/A and 7 has no probative value. Ex. 5 was proved by PW.2, an assistant teacher of the Basudev High School. Ex. 6 and 7 were proved by PW.2, the headmaster of Basudev High School. It appears from the record that PW.2 stated that Exhibit 5/A entry showing the date

of birth of the appellant herein as 20.6.1986 was made on the basis of Ex. 7 which is a transfer certificate issued by the headmaster of Panchayat Upper Primary School where the appellant herein studied before joining Basudev High School. Ext.6 is an application dated 11.7.1998 for admission of the appellant in Basudev High School made by one Maheswar Gouda, who is said to be a cousin of the appellant's father. The said Maheswar Gouda was admittedly not examined. By the judgment under appeal, the Division Bench rightly held -

> "……..it was the duty of the opposite party (the first respondent herein) to prove the contents of those documents, particularly the date of birth of the petitioner (the appellant herein) entered in Ext.5 and the transfer certificate Ext.7"
>
> [Parenthesis supplied]

Having held so, the Division Bench reached the conclusion –

> "the evidence of the petitioner (the appellant herein) almost allies with the case of the opposite party No.1 (the first respondent) that the date of birth of the petitioner was 20.6.1986."

14. We have already examined the evidence of the appellant herein. There is nothing in the said evidence to indicate that the date of birth of the appellant was 20th June, 1986. At the worst, the said evidence failed to establish that the appellant's date of birth was 7.7.1985.

15. The election of the appellant was challenged on the ground that the appellant was not eligible to contest the election on the ground that the appellant was not 21 years of age on the relevant date because according to the election petition, the appellant was born on 20.6.1986. The burden to proof the fact that the appellant was born on 20.6.1986 rests squarely on the

first respondent. Section 101 of the Indian Evidence Act makes it abundantly clear.

> "**S.101. Burden of proof** – Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists.
>
> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

16. It was held in *Robins Vs. National Trust & Co. Ltd.,* 1927 A.C. 515 –

> "To assert that a man who is alive was born requires no proof. The onus is not on the person making an assertion, because it is self-evident that he had been born. But to assert that he had been born on a certain date, if the date is material, requires proof; the onus is on the person making the assertion."

Since the first respondent failed to discharge the burden cast upon him, the election petition must fail.

17. However, the learned counsel for the first respondent, Shri Debasis Misra, very vehemently submitted that facts admitted need not be proved and the appellant had admitted the fact that the appellant, on her own admission, was 10 years old when she took admission in the Panchayat Upper Primary School on 10.1.1996. Learned counsel relied upon para 7 of the judgment under appeal (which is already extracted in para 8 of this judgment but for the sake of convenience, we reproduce the same):

> "……it transpires from the evidence of the petitioner herself, that when she took admission in Panchayat U.P. School she was 10 years old. She took admission in the

said school on 10.1.96. If 10 years is deducted from that date it would come to 9.7.1986."

18. Learned counsel for the appellant, on the other hand, submitted that such a conclusion came to be recorded on incorrect reading of the evidence of the appellant. A copy of the deposition made by the appellant is placed before us. In the cross examination, the appellant stated as follows:

"When I was five years of old, I joined in the school for the Ist time when I took admission in Dhougan U.P. school, I was ten yeas of old. I left that school in the year 1998. My father Apurba Gouda is an educated man. I can not recollect who had taken me to Dhougan School for admission.

One outsider brought my T.C. from the Dhougan U.P. School and get me admitted in Dhougan High School. I cannot say his name. I was thirteen years of old, when I took admission in Dhougan High School in Class VIII."

It can be seen from the above-extracted portion of the evidence of the appellant that the appellant stated that she was 13 year old when she took admission in the High School (obviously Basudev High School) and the admission, as we have already noticed from the evidence of PW.2, was on 11.7.1998. Deducting 13 years from that date would place the year of birth of the appellant in 1985. It is not clear as to the material on the basis of which the Division Bench recorded that the admission of the appellant in the Panchayat Upper Primary School was on 10.1.1996. We assume for the sake of argument that there is some basis on record for the finding that the appellant took admission in the Upper Primary School on 10.1.1996. On her own admission she was 10 years old on that date. Then there is an inconsistency in her evidence regarding her age with reference to her admission into the Upper Primary School and Basudev High School. In such a case, her statement that she was 10 year old on 10.1.1996, in our opinion, cannot be treated

as an admission that her date of birth is 20th June, 1986. An admission must be clear and unambiguous in order that such an admission should relieve the opponent of the burden of proof of the fact said to have been admitted.

19. For all the above mentioned reasons, we are of the opinion that the judgment under appeal cannot be sustained and the same is set aside. In view of our conclusion, the second question regarding the declaration in favour of the first respondent does not survive.

20. Appeal is allowed.

D.G. Appeal allowed.

ROY FERNANDES
v.
STATE OF GOA AND ORS.
(Criminal Appeal No. 1108 of 2002)

FEBRUARY 1, 2012

[ASOK KUMAR GANGULY AND T.S. THAKUR, JJ.]

Penal Code, 1860: ss. 143, 148, 323, 325 and 302 r/w s.149 – Death by stabbing – Victim-deceased, President of the Chapel and others had gone to the Chapel with tools to put a fence around the Chapel – 'R' raised objection and called appellant whereafter appellant and other accused reached the spot – Appellant gave blow on the face of deceased and as a result the deceased fell down – Accused no.2 took out a knife and gave a stab on the thigh of the deceased which led to profuse bleeding resulting in his death – Trial court convicted all the five accused u/ss.143, 148, 323, 325 and 302 r/w s.149 – High Court upheld the conviction of appellant and accused no.2 while setting aside conviction of other three giving them benefit of doubt – On appeal, held: There was no evidence that the accused persons had come to the place of occurrence with the common object of killing the deceased – They certainly had come to the spot with a view to overawe and prevent the deceased by use of criminal force from putting up the fence – Appellant was totally unarmed – He merely pushed, slapped and boxed those on the spot using his bare hands – There was no evidence to show that the appellant had knowledge that in prosecution of common object of preventing the putting up of the fence, the members of the assembly or any one of them was likely to commit the murder of the deceased nor he had knowledge that accused no.2 was carrying a knife with him, which he could use – The evidence on the contrary was that after stabbing the deceased, accused no.2 had put the knife back

in the cover from where he had drawn it – The conduct of the members of the assembly especially the appellant also did not suggest that they intended to go beyond preventing the laying of the fence, leave alone committing a heinous offence of murder of a person who had fallen on the ground with a simple blow and who was being escorted away from the spot by his companions – Therefore, the courts below fell in error in convicting the appellant for murder with the aid of s.149 – However, the conviction of the appellant for offences punishable u/ss.143, 148, 323 and 325 r/w s.149 was perfectly justified.

Code of Criminal Procedure, 1973: s.357 – Compensation to the victim of crime – Power of court to award compensation – Held: The power to award compensation shall be exercised by the Courts having regard to the nature of the injury or loss suffered by the victim as also the paying capacity of the accused – In the instant case, appellant was found guilty for offences punishable u/ss.143, 148, 323 and 325 r/w s.149 – The incident in question took place as early as in the year 1997 – The appellant faced a prolonged trial and suffered the trauma of uncertainty arising out of his conviction for murder by the courts below– Besides he had no criminal antecedents or involvement in any case, before or after the incident in question – He is running a hotel in Goa and is earning an amount of Rs.10-12 lakhs per year – He is, therefore, directed to deposit a sum of Rs.3,00,000/- towards compensation to be paid to the widow of the deceased, a sum of Rs.1,00,000/- and Rs.50,000 to injured victims.

The prosecution case was that the victim-deceased aged 60 years was the President of a chapel. The Chapel was near the house of one 'R'. On the fateful day, the deceased, his wife PW-1 and PW-4 and her husband PW6 besides few others went to the chapel with tools in order to put a fence around the chapel. While the pits for cement

poles required for fencing were being dug in front of the house of 'R', the daughter of 'R' raised objection and used harsh words against those engaged in digging the pits work. Within minutes, a van arrived on the spot carrying 5 persons including the appellant. The appellant went to Pw-6 and gave him a fist blow on the face. PW-6 started bleeding. The appellant then gave a blow on the face of the deceased and threw him on the ground. While the deceased was being helped by his companions to stand, accused no.2 took out a knife and gave a stab on the left thigh of the deceased. This led to profuse bleeding. The deceased was moved to hospital where he was declared dead.

The trial court found all the five accused guilty of offences punishable under Sections 143, 148, 323, 325 and 302 read with Section 149, IPC and sentenced each one of them to undergo one month's RI under Section 323 and two months' RI for the offence punishable under Section 143, three months' RI under Section 148 and one year RI and a fine of Rs.1000/- each under Section 325 besides imprisonment for life and a fine of Rs.2,000/- for offence punishable under Section 302, IPC.

The High Court upheld the conviction and sentence awarded to the appellant and accused no.2 while setting aside the conviction and sentence awarded to the remaining three accused persons giving them the benefit of doubt. The special leave petition filed by accused no.2 was dismissed. The instant appeal was filed challenging the conviction and sentence awarded to the appellant.

Partly allowing the appeal, the Court

HELD: 1. The incident in question took place on account of a sudden dispute arising out of the proposed fencing of the Chapel property which act was apparently seen by 'R' as an obstruction to the use of the passage/

pathway by her for the beneficial use of the property. There was evidence to suggest that the pending litigation between the villagers on the one hand and 'R' on the other hand embittered the relationship between the parties including that with the deceased. Putting up of fence around the Chapel property thus provided a flash point leading to the unfortunate incident in which a valuable life was lost for no worthwhile reason. It is clear from the deposition of PW1 that after the exchange of hot words between the deceased and his companions on the one hand and 'A', the daughter of 'R' on the other, the latter had made a call to the appellant who had no connection with the property in question or the dispute except that he was engaged to get married to 'A'. As to what transpired over the telephone between the appellant and 'R' is not known. PW1 was not a witness to the telephonic conversation between the two. The sequence of events on the fateful day were that on receiving a telephonic call from 'R', the appellant rushed to the spot alongwith four others to intervene and possibly prevent the putting up of the fence by the deceased and his companions, on account of the pending dispute between the two groups. It is, therefore, reasonable to hold that when the appellant received a telephonic call from 'R' possibly asking for help to prevent the putting up of the fence, the appellant and his companions rushed to the spot to do so. In the absence of any evidence it cannot be held that the accused persons had come to the place of occurrence with the common object of killing the deceased. [Para 6] [488-C-H; 489-A-B]

2.1. The fact that a large number of accused have been acquitted and the remaining who have been convicted are less than five cannot vitiate the conviction under Section 149 read with the substantive offence if – as in this case the court has taken care to find - there are other persons who might not have been identified or

convicted but were party to the crime and together constituted the statutory number. Acquittal of three of the five accused persons comprising the unlawful assembly does not in the light of the settled legal position make any material difference. So long as there were four other persons with the appellant who had the common object of committing an offence the assembly would be unlawful in nature, acquittal of some of those who were members of the unlawful assembly by reason of the benefit of doubt given to them notwithstanding. A plain reading of Section 147 would show that the provision is in two parts. The first part deals with cases in which an offence is committed by any member of the assembly "in prosecution of the common object" of that assembly. The second part deals with cases where the commission of a given offence is not by itself the common object of the unlawful assembly but members of such assembly 'knew that the same is likely to be committed in prosecution of the common object of the assembly'. The commission of the offence of murder of the deceased was itself not the common object of the unlawful assembly in the case at hand. And yet the assembly was unlawful because from the evidence adduced at the trial it is proved that the common object of the persons comprising the assembly certainly was to either commit a mischief or criminal trespass or any other offence within the contemplation of clause (3) of Section 141, IPC. They certainly had come to the spot with a view to overawe and prevent the deceased by use of criminal force from putting up the fence in question. That they actually slapped and boxed the witnesses, one of whom lost his two teeth and another sustained a fracture only proved that point. [Paras 8, 10, 12-13] [489-G; 490-D-E; 491-B-D; 492-A]

Khem Karan & Ors. v. The State of U.P. & Anr. **1974 (4) SCC 603:1974 (3) SCR 863;** *Dharam Pal and Ors. v. State of U.P.* **1975 (2)SCC 596: 1976 (1) SCR 587 – relied on.**

2.2. The question whether the appellant as a member of the unlawful assembly knew that the murder of the deceased was also a likely event in prosecution of the object of preventing him from putting up the fence would depend upon the circumstances in which the incident had taken place and the conduct of the members of the unlawful assembly including the weapons they carried or used on the spot. In the instant case, the appellant was totally unarmed for even according to the prosecution witnesses he had pushed, slapped and boxed those on the spot using his bare hands. Secondly neither the cycle chain nor the belt allegedly carried by two other members of the unlawful assembly was put to use by them. It is common ground that no injuries were caused by use of those weapons on the person of the deceased or any one of them was carrying a knife. The prosecution case, therefore, boils down to the appellant and his four companions arriving at the spot, one of them giving a knife blow to the deceased in his thigh which cut his femoral artery and caused death. The sudden action of one of the members of the unlawful assembly did not constitute an act in prosecution of the common object of the unlawful assembly namely preventing of erection of the fence in question and the members of the unlawful assembly did not know that such an offence was likely to be committed by any member of the assembly. The appellant could not in the facts and circumstances of the case be convicted under Section 302 read with Section 149 of the IPC. There was no evidence to show that the appellant knew that in prosecution of the common object of preventing the putting up of the fence around the chapel the members of the assembly or any one of them was likely to commit the murder of the deceased. There is indeed no evidence to even show that the appellant knew that accused no.2 was carrying a knife with him, which he could use. The evidence on the contrary was that after stabbing the deceased, accused no.2 had put

the knife back in the cover from where he had drawn it. The conduct of the members of the assembly especially the appellant also did not suggest that they intended to go beyond preventing the laying of the fence, leave alone committing a heinous offence of murder of a person who had fallen on the ground with a simple blow and who was being escorted away from the spot by his companions. Therefore, the Courts below fell in error in convicting the appellant for murder with the aid of Section 149, IPC. However, the conviction of the appellant for offences punishable under Sections 143, 148, 323 and 325 read with Section 149, IPC is perfectly justified. The evidence on record clearly made out a case against the appellant under those provisions and the Courts below rightly found him guilty on those counts. [Para 14, 16, 17, 23, 24] [492-B-C; 493-E-H; 494-A-C; 497-G-H; 498-A-D]

Lalji and Ors. v. State of U.P. **1989 (1) SCC 437: 1989 (1) SCR 130;** *Dharam Pal and Ors. v. State of U.P.* **1975 (2) SCC 596: 1976(1)SCR 587;** *Chikkarange Gowda & Ors. v. State of Mysore* **AIR 1956 SC 731;** *Gajanand & Ors. v. State of Uttar Pradesh* **AIR 1954 SC 695;** *Ram Charan Rai v. Emperor* AIR 1946 Pat 242; *Mizaji and Anr. Vs. State of U.P.* **AIR 1959 SC 572: 1959 Suppl. SCR 940;** *Shambhu Nath Singh and Ors. v. State of Bihar* **AIR 1960 SC 725;** *Gangadhar Behera and Others v. State of Orissa* **2002 (8) SCC 381: 2002 (3) Suppl. SCR 183;** *Bishna Alias Bhiswadeb Mahato and Others v. State of West Bengal* **2005 (12) SCC 657: 2005 (4) Suppl. SCR 892 – relied on.**

3. Section 357 of the Code of Criminal Procedure embodies the concept of compensating the victim of a crime and empowers the courts to award a suitable amount. This power shall be exercised by the Courts having regard to the nature of the injury or loss suffered by the victim as also the paying capacity of the accused. That the provision is wide enough to cover a case like

the instant one where the appellant has been found guilty of offences punishable under Sections 323 and 325, IPC. The provision for payment of compensation has been in existence for a considerable period of time on the statute book in this country. Even so, criminal courts have not taken significant note of the said provision or exercised the power vested in them thereunder. The incident in question had taken place as early as in the year 1997. The appellant has faced a prolonged trial and suffered the trauma of uncertainty arising out of his conviction by the trial court and the High Court in appeal. Besides the appellant had no criminal antecedents or involvement in any case, before or after the incident in question. He has already undergone nearly three months of imprisonment out of the sentence awarded to him. He offered to compensate the victims of the incident in question suitably. The appellant is running a hotel in Goa and is earning an amount of Rs.10-12 lakhs per year. The appellant is directed to deposit a sum of Rs.3,00,000/- towards compensation to be paid to the widow of the deceased, failing her to his surviving legal heirs. A sum of Rs.1,00,000/- is to be similarly deposited towards compensation payable to PW-6 besides a sum of Rs.50,000/- to be paid to another victim. The deposit shall be made within two months from today failing which the sentence of one year awarded to the appellant shall stand revived and the appellant taken in custody to serve the remainder of the period. [Paras 24, 25, 27, 30, 31] [580-C-D; 501-D; 502-F-H; 503-A, C-E]

Hansa v. State of Punjab **1977 (3) SCC 575;** *Hari Singh v. SukhbirSingh & Others* **1988 (4) SCC 551: 1988 (2) Suppl. SCR 571;** *ManishJalan* v. *State of Karnataka* **(2008) 8 SCC 225;** *Rachpal Singh andAnr. v. State of Punjab* **AIR 2002 SC 2710: 2002 (6) SCC 462 – relied on.**

Book "Criminology" by Prof. Andrew Ashworth of Oxford University **– referred to.**

Case Law Reference:

1974 (3) SCR 863	**referred to**	**Para 8**
1976 (1) SCR 587	**referred to**	**Para 9**
1989 (1) SCR 130	**referred to**	**Para 14**
AIR 1956 SC 731	**referred to**	**Para 18**
AIR 1954 SC 695	**referred to**	**Para 19**
AIR 1946 Pat 242	**referred to**	**Para 19**
1959 Suppl. SCR 940	**referred to**	**Para 21**
AIR 1960 SC 725	**referred to**	**Para 22**
2002 (3) Suppl. SCR 183	**referred to**	**Para 22**
2005 (4) Suppl. SCR 892	**referred to**	**Para 22**
1977 (3) SCC 575	**referred to**	**Para 24**
1988 (2) Suppl. SCR 571	**referred to**	**Para 24**
(2008) 8 SCC 225	**referred to**	**Para 28**
2002 (6) SCC 462	**referred to**	**Para 29**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1108 of 2002.

From the Judgment & Order dated 22.07.2002 of the High Court of Judicature of Bomaby at Goa in Criminal Appeal No. 69 of 2000.

Sidharth Luthra, Jaiveer Shergil, Rook Ray, Shazia Parveen, Arundhati Katju, Arshdeep SIngh, Sanjeeb Panigrahi, Naresh Kumar for the Appellant.

A. Subhashini for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal by special leave arises out of an order dated 22nd July 2002 passed by the High Court of Bombay at Goa whereby the appeal filed by the appellant has been dismissed and the conviction and sentence awarded to him by the trial Court for offences punishable under Sections 143, 148, 323, 325 and 302 read with Section 149 IPC upheld.

2. Felix Felicio Monteiro aged about 60 years at the time of the incident was the President of a Chapel at Bastora in Goa. The Chapel it appears is situated next to the house of one Rosalina Monteiro. The chapel and the house owned by Rosalina are accessible from the main road by a path about 20-25 meters in length. A dispute regarding the said path and resultant litigation was it appears at the bottom of the incident that culminated in the sad and untimely demise of Felix Felicio Monteiro.

3. On 11th May, 1997 the deceased Shri Monteiro, his wife PW1 Sebastiana Monteiro, PW4 Julie Monteiro, her husband PW6 Salish Monteiro besides a few others went to the Chapel equipped with the necessary tools and implements in order to put up a fence around the property. The prosecution story is that while pits for fixing cement poles required for the fencing were being dug in front of the house of Rosalina Monteiro, her daughter named Antonetta raised an objection and used harsh words against those engaged in digging the pits work. A few minutes later a Maruti Van arrived on the spot carrying “5 persons including the appellant herein”, who went to Salish PW6, and gave him a fist blow on the face and he started bleeding. He then gave a blow on the face of the deceased Felix Felicio Monteiro and threw him on the ground. While the deceased was being helped by his companions to stand up and move towards the road, Anthony D’Souza one of the accused persons took out a knife and gave a stab on the left thigh of the deceased which unfortunately cut one of his arteries that led to profuse bleeding. The result was that the injured breathed his last even before he could be helped by John, his neighbour to

rush him to the hospital. At the hospital, he was declared brought dead. The hospital all the same informed the Mapusa Police Station. P.I. Subhash Goltekar-PW22 from the police station recorded the statement of PW1-Sebastiana Monteiro in which she named the appellant. The police completed the investigation which included recovery of the weapon of offence pursuant to the disclosure made by accused No.2, Anthony D'Souza and lodged a chargesheet against the accused persons for offences punishable under Sections 143, 147, 148, 201, 302 and 323 read with Section 149 IPC. The Additional Sessions Judge to whom the case was eventually committed charged the accused persons including the appellant herein with the commission of offences punishable under Sections 143, 148, 302 read with Section 149 IPC and Sections 323 and 326 read with Section 149 IPC and Section 201 read with Section 149 IPC. At the trial the prosecution examined as many as 22 witnesses to prove its case against the accused persons. The accused persons did not lead any evidence in defence.

4. The Trial Court eventually found all the five accused guilty of offences punishable under Sections 143, 148, 323, 325 and 302 read with Section 149 IPC and sentenced each one of them to undergo one month's RI under Section 323 and two months' RI for the offence punishable under Section 143, three months' RI under Section 148 and one year RI and a fine of Rs.1000/- each under Section 325 besides imprisonment for life and a fine of Rs.2,000/- for offence punishable under Section 302 of the IPC.

5. Aggrieved by the judgment and order of the Trial Court the accused persons preferred Criminal Appeal Nos. 69/2000 and 77/2000 before the High Court of Bombay at Goa. By the impugned judgment in this appeal the High Court upheld the conviction and sentence awarded to the appellant, Roy Fernandes and Anthony D'Souza while setting aside the conviction and sentence awarded to the remaining three accused persons giving them the benefit of doubt. It is

noteworthy that against the judgment of the High Court Anthony D'Souza who had actually stabbed the deceased, preferred a special leave petition which was dismissed by this Court by order dated 15th April, 2011. To that extent the matter stands concluded. The present appeal is, in that view, limited to the question whether the conviction and sentence awarded to the appellant Roy Fernandes for the offences with which he stood charged, is in the facts and circumstances of the case, legally sustainable.

6. We have heard learned counsel of the parties at considerable length. It is common ground that the incident in question had taken place on account of a sudden dispute arising out of the proposed fencing of the Chapel property which act was apparently seen by Rosalina Monteiro as an obstruction to the use of the passage/pathway by her for the beneficial use of the property. There is evidence on record to suggest that the pending litigation between the villagers on the one hand and Rosalina on the other hand embittered the relationship between the parties including that with the deceased. Putting up of fence around the Chapel property thus provided a flash point leading to the unfortunate incident in which a valuable life was lost for no worthwhile reason. From the deposition of PW1 Sebastiana Monteiro, it is further clear that after the exchange of hot words between the deceased and his companions on the one hand and Antonetta, daughter of Rosalina on the other, the latter had made a call to the appellant who had no connection with the property in question or the dispute except that he was engaged to get married to Antonetta. As to what transpired over the telephone between the appellant and Rosalina is not known. Ms. Subhashini, learned counsel for the State of Goa fairly conceded that PW1 Sebastiana Monteiro was not a witness to the telephonic conversation between the two. Looking to the sequence of events that unfolded on the fateful day what appears to have happened is that on receiving a telephonic call from Rosalina, the appellant rushed to the spot alongwith four others to intervene and possibly prevent the putting up of the

fence by the deceased and his companions, on account of the pending dispute between the two groups. It is, therefore, reasonable to hold that when the appellant received a telephonic call from Rosalina possibly asking for help to prevent the putting up of the fence, the appellant and his companions rushed to the spot to do so. In the absence of any evidence leave alone credible evidence it is not possible for us to hold that the accused persons had come to the place of occurrence with the common object of killing the deceased Felix Felicio Monteiro.

7. That, however, is not the end of the matter. The next and perhaps an equally important question would be whether the appellant and his companions at all constituted an unlawful assembly and if they did whether murder of the deceased Felix Felicio Monteiro by Anthony D'Souza who was one of the members of the unlawful assembly would in the facts and circumstances of the case attract the provisions of Section 149 so as to make the appellant herein also responsible for the act.

8. Mr. Luthra made a feeble attempt to argue that the acquittal of the other three accused persons should be sufficient to negative the theory of there being an unlawful assembly of which the appellant was a member. He did not, however, pursue that argument for long and, in our opinion, rightly so because the legal position is fairly well-settled by the decision of this Court in *Khem Karan & Ors. Vs. The State of U.P. & Anr.* [1974 (4) SCC 603] where this Court observed:

> "6. xxxxxxxxx the fact that a large number of accused have been acquitted and the remaining who have been convicted are less than five cannot vitiate the conviction under Section 149 read with the substantive offence if – as in this case the court has taken care to find - there are other persons who might not have been identified or convicted but were party to the crime and together constituted the statutory number."

9. To the same effect is the decision of this Court in *Dharam Pal and Ors. Vs. State of U.P.* [1975 (2) SCC 596] where this Court observed:

> "10. xxxxxxxxx If, for example, only five known persons are alleged to have participated in an attack but the Courts find that two of them were falsely implicated, it would be quite natural and logical to infer or presume that the participants were less than five in number. On the other hand, if the Court holds that the assailants were actually five in number, but there could be a doubt as to the identity of two of the alleged assailants, and, therefore, acquits two of them, the others will not get the benefit of doubt about the identity of the two accused so long as there is a firm finding based on good evidence and sound reasoning that the participants were five or more in number."

10. Acquittal of three of the five accused persons comprising the unlawful assembly does not in the light of the settled legal position make any material difference. So long as there were four other persons with the appellant who had the common object of committing an offence the assembly would be unlawful in nature acquittal of some of those who were members of the unlawful assembly by reason of the benefit of doubt given to them notwithstanding.

11. That leaves us with the question whether the commission of murder by a member of an unlawful assembly that does not have murder as its common object would attract the provisions of Section 149 IPC. Section 149 IPC reads:

> "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."

12. A plain reading of the above would show that the provision is in two parts. The first part deals with cases in which an offence is committed by any member of the assembly "in prosecution of the common object" of that assembly. The second part deals with cases where the commission of a given offence is not by itself the common object of the unlawful assembly but members of such assembly 'knew that the same is likely to be committed in prosecution of the common object of the assembly'. As noticed above, the commission of the offence of murder of Felix Felicio Monteiro was itself not the common object of the unlawful assembly in the case at hand. And yet the assembly was unlawful because from the evidence adduced at the trial it is proved that the common object of the persons comprising the assembly certainly was to either commit a mischief or criminal trespass or any other offence within the contemplation of clause (3) of Section 141 of the IPC, which may to the extent the same is relevant for the present be extracted at this stage:

"Section 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.— xxxxxxxxxxxxxxxxxxxxxxx

Second.- xxxxxxxxxxxxxxxxxxxxxxx

"Third-To commit any mischief or criminal trespass, or other offence;"

13. From the evidence on record, we are inclined to hold that even when commission of murder was not the common object of the accused persons, they certainly had come to the spot with a view to overawe and prevent the deceased by use of criminal force from putting up the fence in question. That they

actually slapped and boxed the witnesses, one of whom lost his two teeth and another sustained a fracture only proves that point.

14. What then remains to be considered is whether the appellant as a member of the unlawful assembly knew that the murder of the deceased was also a likely event in prosecution of the object of preventing him from putting up the fence. The answer to that question will depend upon the circumstances in which the incident had taken place and the conduct of the members of the unlawful assembly including the weapons they carried or used on the spot. It was so stated by this Court in *Lalji and Ors. Vs. State of U.P.* [1989 (1) SCC 437] in the following words:

"8.xxxxxxxxxxxxxxxxxxxxx

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."

15. The Court elaborated the above proposition in *Dharam Pal and Ors. Vs. State of U.P.* [1975 (2) SCC 596] as :

"11. Even if the number of assailants could have been less than five in the instant case (which, we think, on the facts stated above, was really not possible), we think that the fact that the attacking party was clearly shown to have waited for the buggi to reach near the field of Daryao in the early hours of June 7, 1967, shows pre-planning. Some of the assailants had sharp-edged weapons. They were obviously lying in wait for the buggi to arrive. They surrounded and attacked the occupants shouting that the occupants will be killed. We do not think that more convincing evidence of a pre-concert was necessary. Therefore, if we had thought it necessary, we would not

have hesitated to apply Section 34 IPC also to this case. The principle of vicarious liability does not depend upon the necessity to convict a required number of persons. It depends upon proof of facts, beyond reasonable doubt, which makes such a principle applicable. (See: Yeshwant v. State of Maharashtra; and Sukh Ram v. State of U.P.). The most general and basic rule, on a question such as the one we are considering, is that there is no uniform, inflexible, or invariable rule applicable for arriving at what is really an inference from the totality of facts and circumstances which varies from case to case. We have to examine the effect of findings given in each case on this totality. It is rarely exactly identical with that in another case. Other rules are really subsidiary to this basic verity and depend for their correct application on the peculiar facts and circumstances in the context of which they are enunciated."

16. Coming then to the facts of the present case, the first and foremost of the notable circumstances is that the appellant was totally unarmed for even according to the prosecution witnesses he had pushed, slapped and boxed those on the spot using his bare hands. The second and equally notable circumstance is that neither the cycle chain nor the belt allegedly carried by two other members of the unlawful assembly was put to use by them. Mr. Luthra argued that the prosecution had failed to prove that the assembly was armed with a chain and a belt for the seizure witnesses had not supported the recovery of the said articles from the accused. Even if we were to accept the prosecution case that the two of the members of the unlawful assembly were armed as alleged, the non-use of the same is a relevant circumstance. It is common ground that no injuries were caused by use of those weapons on the person of the deceased or any one of them was carrying a knife. The prosecution case, therefore, boils down to the appellant and his four companions arriving at the spot, one of them giving a knife blow to the deceased in his thigh which cut his femoral artery

and caused death. The question is whether the sudden action of one of the members of the unlawful assembly constitutes an act in prosecution of the common object of the unlawful assembly namely preventing of erection of the fence in question and whether the members of the unlawful assembly knew that such an offence was likely to be committed by any member of the assembly. Our answer is in the negative.

17. This Court has in a long line of decisions examined the scope of Section 149 of the Indian Penal Code. We remain content by referring to some only of those decisions to support our conclusion that the appellant could not in the facts and circumstances of the case at hand be convicted under Section 302 read with Section 149 of the IPC.

18. In *Chikkarange Gowda & Ors. Vs. State of Mysore* [AIR 1956 SC 731] this Court was dealing with a case where the common object of the unlawful assembly simply was to chastise the deceased. The deceased was, however, killed by a fatal injury caused by certain member of the unlawful assembly. The court below convicted the other member of the unlawful assembly under Section 302 read with Section 149 IPC. Reversing the conviction, this Court held:

"9. It is quite clear to us that on the finding of the High Court with regard to the common object of the unlawful assembly, the conviction of the appellants for an offence under Section 302 read with Section 149 Indian Penal Code cannot be sustained. The first essential element of Section 149 is the commission of an offence by any member of an unlawful assembly; the second essential part is that the offence must be committed in prosecution of the common object of the unlawful assembly, or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object.

In the case before us, the learned Judges of the High Court held that the common object of the unlawful assembly was

merely to administer a chastisement to Putte Gowda. The learned Judges of the High Court did not hold that though the common object was to chastise Putte Gowda, the members of the unlawful assembly knew that Putte Gowda was likely to be killed in prosecution of that common object. That being the position, the conviction under Section 302 read with Section 149 Indian Penal Code was not justified in law."

19. In *Gajanand & Ors. Vs. State of Uttar Pradesh* [AIR 1954 SC 695], this Court approved the following passage from the decision of the Patna High Court in *Ram Charan Rai Vs. Emperor* [AIR 1946 Pat 242]:

"Under Section 149 the liability of the other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behavior, at or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise".

20. This Court then reiterated the legal position as under:

"The question is whether such knowledge can be attributed to the appellants who were themselves not armed with sharp edged weapons. The evidence on this point is completely lacking. The appellants had only lathis which may possibly account for Injuries 2 and 3 on Sukkhu's left arm and left hand but they cannot be held liable for murder by invoking the aid of Section 149 IPC. According to the evidence only two persons were armed with deadly weapons. Both of them were acquitted and Sosa, who is alleged to have had a spear, is absconding. We are not

prepared therefore to ascribe any knowledge of the existence of deadly weapons to the appellants, much less that they would be used in order to cause death."

21. In *Mizaji and Anr. Vs. State of U.P.* [AIR 1959 SC 572] this Court was dealing with a case where five persons armed with lethal weapons had gone with the common object of getting forcible possession of the land which was in the cultivating possession of the deceased. Facing resistance from the person in possession, one of the members of the assembly at the exhortation of the other fired and killed the deceased. This Court held that the conduct of the members of the unlawful assembly was such as showed that they were determined to take forcible possession at any cost. Section 149 of IPC was, therefore, attracted and the conviction of the members of the assembly for murder legally justified. This Court analysed Section 149 in the following words:

"6. This section has been the subject matter of interpretation in the various High Court of India, but every case has to be decided on its own facts. The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For

instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all."

22. In *Shambhu Nath Singh and Ors. Vs. State of Bihar* [AIR 1960 SC 725], this Court held that members of an unlawful assembly may have a community of object upto a certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command but also according to the extent to which he shares the community of object. As a consequence, the effect of Section 149 of the Indian Penal Code may be different on different members of the same unlawful assembly. Decisions of this Court *Gangadhar Behera and Others Vs. State of Orissa* [2002 (8) SCC 381] and *Bishna Alias Bhiswadeb Mahato and Others Vs. State of West Bengal* [2005 (12) SCC 657] similarly explain and reiterate the legal position on the subject.

23. In the case at hand, there is, in our opinion, no evidence to show that the appellant knew that in prosecution of the common object of preventing the putting up of the fence around the chapel the members of the assembly or any one of them was likely to commit the murder of the deceased. There is indeed no evidence to even show that the appellant knew that Anthony D'Souza was carrying a knife with him, which he could use. The evidence on the contrary is that after stabbing the

deceased Anthony D'Souza had put the knife back in the cover from where he had drawn it. The conduct of the members of the assembly especially the appellant also does not suggest that they intended to go beyond preventing the laying of the fence, leave alone committing a heinous offence of murder of a person who had fallen to the ground with a simple blow and who was being escorted away from the spot by his companions. We have, therefore, no hesitation in holding that the Courts below fell in error in convicting the appellant for murder with the aid of Section 149 of the IPC.

24. Having said that, we have no manner of doubt that the conviction of the appellant for offences punishable under Sections 143, 148, 323 and 325 read with Section 149 of the IPC is perfectly justified. The evidence on record clearly makes out a case against the appellant under those provisions and the Courts below have rightly found him guilty on those counts. In fairness to Mr. Luthra, we must mention that even he did not assail the conviction of the appellant under those provisions. What was argued by the learned counsel is that this Court could reduce the sentence to the period already undergone by the appellant having regard to the fact that the incident in question had taken place nearly 15 years back and the appellant had not only suffered the trauma of a prolonged trial and uncertainty but his life had also suffered a setback, in as much Antonetta had divorced him. Mr. Luthra submitted that the appellant was a first offender and being a middle aged man, could be spared the ignominy and hardship of a jail term at this stage of his life when he was ready to abide by any directions of this Court regarding compensation to the victims of the incident. Support for his submissions was drawn by Mr. Luthra from the decisions of this Court in *Hansa Vs. State of Punjab* [1977 (3) SCC 575] and *Hari Singh Vs. Sukhbir Singh & Others* [1988 (4) SCC 551]. In *Hansa's* case (supra), the accused had been convicted for an offence under Section 325 and sentenced to undergo one year rigorous imprisonment. The High Court had, however, given the accused the benefit of probation of offenders Act, and

let him off on his giving a bond for good conduct for a year. This Court held that the power vested in the Court had been correctly exercised. Even in *Hari Singh's* case (supra), the court granted a similar benefit to a convict under Section 325 who had been sentenced to undergo two years rigorous imprisonment. The Court in addition invoked its power under Section 357 of the Cr.P.C. to award compensation to the victim, and determined the amount payable having regard to the nature of the injury inflicted and the paying capacity of the appellant. This Court said:

> "10. Sub-section (1) of Section 357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. In this case, we are not concerned with sub-section (1). We are concerned only with sub-section (3). It is an important provision but courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way.
>
> 11. The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account

> the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by instalments, may also be given. The court may enforce the order by imposing sentence in default."

25. Section 357 of the Code of Criminal Procedure embodies the concept of compensating the victim of a crime and empowers the courts to award a suitable amount. This power, it goes without saying, shall be exercised by the Courts having regard to the nature of the injury or loss suffered by the victim as also the paying capacity of the accused. That the provision is wide enough to cover a case like the present where the appellant has been found guilty of offences punishable under Sections 323 & 325 of the IPC has not been disputed before us. Indeed Mr. Luthra relied upon the provision and beseeched this Court to invoke the power to do complete justice short of sending the appellant back to the prison. Mrs. Subhashini also in principle did not have any quarrel with the proposition that the power was available and can be exercised, though according to her, the present being a gross case of unprovoked violence against law abiding citizens the exercise of the power to compensate the victims ought not to save accused from suffering a deterrent punishment warranted under law.

26. Prof. Andrew Ashworth of Oxford University Centre for Criminological Research has in the handbook of Criminology authored by him referred to what are called "Restorative and Reparative Theories" of punishment. The following passage from the book is, in this regard, apposite:

> *"Restorative and Reparative Theories*
>
> These are not theories of punishment, rather, their argument is that sentences should move away from

punishment of the offender towards restitution and reparation, aimed at restoring the harm done and calculated accordingly. Restorative theories are therefore victim-centred, although in some versions they encompass the notion of reparation to the community for the effective crime. They envisage less resort to custody, with onerous community based sanctions requiring offenders to work in order to compensation victims and also contemplating support and counselling for offenders to regenerate them into the community. Such theories therefore tend to act on a behavioural premises similar to rehabilitation, but their political premises is that compensation for victims should be recognised as more important than notions of just punishment on behalf of the State"

27. The provision for payment of compensation has been in existence for a considerable period of time on the statute book in this country. Even so, criminal courts have not, it appears, taken significant note of the said provision or exercised the power vested in them thereunder. The Law Commission in its 42nd Report at para 3.17 refers to this regrettable omission in the following words:

"We have a fairly comprehensive provision for payment of compensation to the injured party under Section 545 of the Criminal Procedure Code. It is regrettable that our courts do not exercise their statutory powers under this Section as freely and liberally as could be desired. The Section has, no doubt, its limitations. Its application depends, in the first instance, on whether the Court considers a substantial fine proper punishment for the offence. In the most serious cases, the Court may think that a heavy fine in addition to imprisonment for a long terms is not justifiable, especially when the public prosecutor ignores the plight of the victim of the offence and does not press for compensation on his behalf."

28. In *Manish Jalan Vs. State of Karnataka* (2008) 8 SCC 225, even this Court felt that the provision regarding award of compensation to the victims of crimes had not been made use by the Courts as often as it ought to be. This Court observed:

"Though a comprehensive provision enabling the Court to direct payment of compensation has been in existence all through but the experience has shown that the provision has really attracted the attention of the Courts. Time and again the Courts have been reminded that the provision is aimed at serving the social purpose and should be exercised liberally yet the results are not heartening."

29. In the above case the appellant had been convicted under Sections 279 and 304A of the IPC. The substantive sentence of imprisonment was in that case reduced by this Court to the period already undergone with payment of fine and a compensation of an amount of rupees one lakh to the mother of the victim. Reference may also be made to the decision of this Court in *Rachpal Singh and Anr. Vs. State of Punjab* AIR 2002 SC 2710, where this Court emphasised the need to assess and award compensation by the accused to the gravity of the offence, needs of the victim's family as also the paying capacity of the accused.

30. Coming to the case at hand we need to keep in mind that the incident in question had taken place as early as in the year 1997. The appellant has faced a prolonged trial and suffered the trauma of uncertainty arising out of his conviction by the Trial Court and the High Court in appeal. Besides the appellant have had no criminal antecedents or involvement in any case, before or after the incident in question. He has already undergone nearly three months of imprisonment out of the sentence awarded to him. He has, in the above backdrop, offered to compensate the victims of the incident in question suitably. Mr. Luthra submitted on instructions that the appellant is running a hotel in Goa and is earning an amount of Rs.10-

12 lakhs per year from the same implying thereby that he is in a position to deposit the amount of compensation ordered by this Court. In the totality of the above circumstances, we are inclined to interfere in so far as the quantum of sentence awarded under Section 325 of the IPC is concerned.

31. In the result, we allow this appeal in part, set aside the conviction and sentence awarded to the appellant under Section 302 read with Section 149 of the IPC and acquit the appellant of that charge. The conviction of the appellant for offences punishable under Sections 323 and 325 of the IPC is affirmed and the appellant is sentenced to the period of imprisonment already undergone by him. We further direct that the appellant shall deposit a sum of Rs.3,00,000/- towards compensation to be paid to the widow of the deceased Shri Felix Felicio Monteiro, failing her to his surviving legal heirs. A sum of Rs.1,00,000/- shall be similarly deposited towards compensation payable to Shri Salish Monteiro, besides a sum of Rs.50,000/- to be paid to Ms. Conceicao Monteiro failing to their legal representatives. The deposit shall be made within two months from today failing which the sentence of one year awarded to the appellant shall stand revived and the appellant taken in custody to serve the remainder of the period. The appeal is disposed of with the above modification and directions.

D.G. Appeal partly allowed.

NAND KUMAR VERMA
v.
STATE OF JHARKHAND & ORS.
(Civil Appeal No. 1458 of 2012)

FEBRUARY 01, 2012

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

SERVICE LAW:

Successive departmental proceedings on the same set of charges - Held: On general principles, there can be only one enquiry in respect of a charge for a particular misconduct and that is also what the rules usually provide - When a completed enquiry proceedings is set aside by a competent forum on a technical ground or on the ground of procedural infirmity, fresh proceedings on the same charges is permissible - In the instant case, the High Court, having accepted the explanations, could not have proceeded to pass the order of initiating subsequent departmental proceedings - There is no justification for conducting a second enquiry on the very charges, which had been dropped earlier - Even though the principles of double jeopardy is not applicable, the law permits only disciplinary proceedings and not harassment - Allowing such practice is not in the interest of public service - In the circumstances, the impugned order reverting the officer to the lower post cannot be sustained.

COMPULSORY RETIREMENT:

Order of compulsory retirement - Judicial review of - Held: When an order of compulsory retirement is challenged, the court has the right to examine whether some ground or material germane to the issue exists or not - However, the court is not to examine the sufficiency of the material upon which the order of compulsory retirement rests - Further, formation

of opinion for compulsory retirement is the subjective satisfaction of the authority concerned, but such satisfaction must be based on a valid material - It is permissible for courts to ascertain whether a valid material exists or otherwise, on which the subjective satisfaction of the administrative authority is based - In the instant matter, the material on which the decision of compulsory retirement was based and material furnished by the Judicial Officer would reflect that totality of relevant materials was not considered or completely ignored by the High Court - Consequently,the subjective satisfaction of the High Court was not based on sufficient or relevant material - In this view of the matter, it cannot be said that the service record of the Officer was unsatisfactory so as to warrant premature retirement from service - Therefore, there was no justification to retire the Officer compulsorily from service.

Judicial service - Annual confidential remarks - Held: Greater importance is to be given to the opinion or remarks made by the immediate superior officer as to the functioning of the judicial officer concerned for the purpose of his compulsory retirement - The immediate superior is better placed to observe, analyse, scrutinize from close quarters and then, to comment upon his working, overall efficiency, and reputation - In the instant case, the District and Sessions Judges had the opportunity to watch the functioning of the Judicial Officer from close quarters, who have reported favourably regarding his overall performance except about his disposal, in recent ACR for two years - High Court was not justified in sustaining the orders passed by the Full Court of the said High Court.

The Inspecting Judge of the High Court during his inspection noticed certain omissions and commissions in granting bail in certain cases by the appellant, who was working as Chief Judicial Magistrate. Further, the appellant granted bail to an accused charged with an offence punishable u/s 302 IPC (Case No.90/93). The

appellant furnished his explanations on 7.5.1994 for strictures passed by the Inspecting Judge and, secondly, on 21.12.1994 for adverse remarks made by the High Court in connection with the granting of bail in Case No.90/93. Both the explanations were duly accepted by the High Court.

Subsequently, the Standing Committee of the High Court in its meeting dated 11.8.1995 directed initiation of departmental proceedings against the appellant. The appellant was served 'Articles of Charge' dated 13.12.1995 containing two charges relating to granting of bail indiscriminately in Case No.90/93. The appellant in his reply asserted that his explanation on the said charges had already been accepted by the High Court. However, departmental proceedings were initiated and concluded against him. The Enquiry Officer submitted the report stating that the charges leveled against the appellant had been proved. The Government of Bihar acting on the recommendation of the High Court issued a formal notification dated 20.4.1998 reverting the appellant from the post of Civil Judge, Senior Division to the lower post of Munsif (Civil Judge, Junior Division). On bifurcation of State of Bihar, the appellant was allotted to the State of Jharkhand and was posted as Judicial Magistrate in the said State. On the recommendation of the Full Court of the Jharkhand High Court, the State Government issued notification dated 17.7.2001 compulsorily retiring the appellant from service. The writ petitions challenging both the orders were dismissed by the High Court.

In the instant appeal, it was contended for the appellant that the High Court having accepted his explanation to the show cause notices, could not have initiated departmental proceedings against him.

Allowing the appeal, the Court

HELD: 1.1 Having accepted the explanations and having communicated the same to the appellant, the High Court could not have proceeded to pass the order of initiating departmental proceedings and reverting the appellant from the post of Chief Judicial Magistrate to the post of Munsif. On general principles, there can be only one enquiry in respect of a charge for a particular misconduct and that is also what the rules usually provide. However, when a completed enquiry proceeding is set aside by a competent forum on a technical ground or on the ground of procedural infirmity, fresh proceedings on the same charges are permissible. [Para 27] [518-E-H]

1.2 In the instant case, a charge memo was issued and served on the appellant. A reading of the charge memo shows that it does not contain any reference to the proceedings of the Standing Committee at all. It is also not found as to whether the earlier proceedings were revived in accordance with the procedure prescribed. In fact, after receipt of the charge memo, the appellant, in his reply statement, brought to the notice of the enquiry officer that on the same set of charges, a notice had been issued earlier and Standing Committee, after accepting his explanation dated 21.12.1994, had dropped the entire proceedings and the same had been communicated to him by the Registrar General of the High Court by his letter dated 02.02.1995. In spite of this, the enquiry officer proceeded with the enquiry proceedings and after completion of the same, submitted his report which was accepted by the disciplinary authority. Therefore, in these circumstances, there is no justification for conducting a second enquiry on the very charges, which had been dropped earlier. Even though the principle of double jeopardy is not applicable, the law permits only disciplinary proceedings and not harassment. Allowing such practice is not in the interest of public service. In

the circumstances, the impugned order reverting the appellant to the lower post cannot be sustained. [Para 27] [518-H; 519-A-E]

2.1 It is now well settled that the object of compulsory retirement from service is to weed out the dead wood in order to maintain a high standard of efficiency and honesty and to keep the judicial service unpolluted. [Para 28] [519-F-G]

Baikuntha Nath Das v. Chief District Medical Officer **1992 (1) SCR 836 = (1992) 2 SCC 299;** *Madan Mohan Choudhary v. State of Bihar* **1999 (1) SCR 596 = (1999) 3 SCC 396 and** *Registrar, High Court of Madras v. R. Rajiah* **1988 (1) Suppl. SCR 332 (1988) 3 SCC 211 - referred to.**

2.2 The Court is conscious of the fact that there is very limited scope of judicial review of an order of premature retirement from service. As observed by this Court in Rajiah's case, when the High Court takes the view that an order of compulsory retirement should be made against a member of the Judicial Service, the adequacy or sufficiency of such materials cannot be questioned, unless the materials are absolutely irrelevant to the purpose of compulsory retirement. Further, when an order of compulsory retirement is challenged in a court of law, the court has the right to examine whether some ground or material germane to the issue exists or not. However, the court is not to examine the sufficiency of the material upon which the order of compulsory retirement rests. [Para 30] [522-D-F]

High Court of Punjab & Haryana v. Ishwar Chand Jain **1999 (2) SCR 834 = (1999) 4 SCC 579 - referred to.**

2.3 It is also well settled that the formation of opinion for compulsory retirement is based on the subjective satisfaction of the authority concerned but such

satisfaction must be based on a valid material. It is permissible for the courts to ascertain whether a valid material exists or otherwise, on which the subjective satisfaction of the administrative authority is based. In the instant matter, the High Court has taken the decision on the basis of selective record which includes the summarised ACRs. There appears to be some discrepancy. The appellant has produced the copies of the ACR's which were obtained by him from the High Court under the Right to Information Act, 2005 and a comparison of these two would positively indicate that the High Court has not faithfully extracted the contents of the ACRs. The material on which the decision of compulsory retirement was based, as extracted by the High Court in the impugned judgment, and material furnished by the appellant would reflect that totality of relevant materials was not considered or was completely ignored by the High Court. This leads to only one conclusion that the subjective satisfaction of the High Court was not based on the sufficient or relevant material. In this view of the matter, it cannot be said that the service record of the appellant was unsatisfactory which would warrant premature retirement from service. Therefore, there was no justification to retire the appellant compulsorily from service. [Para 32] [523-G-H; 524-A-C; 527-A-D]

Swami Saran Saksena v. State of U.P., **(1980) 1 SCC 12 - referred to**

2.4 Moreover, the District and Sessions Judges had the opportunity to watch the functioning of the appellant from close quarters. They had reported favourably regarding the appellant's overall performance except about his disposal, in the ACRs for the years 1997-98 and 1998-99. In view of this, greater importance is to be given to the opinion or remarks made by the immediate

superior officer as to the functioning of the judicial officer concerned for the purpose of his compulsory retirement. The immediate superior is better placed to observe, analyse, scrutinize from close quarters and then, to comment upon his working, overall efficiency, and reputation. [Para 33] [526-B-D]

Nawal Singh v. State of U.P., **(2003) 8 SCC 117 - referred to.**

3. The High Court was not justified in sustaining the orders passed by the Full Court of the same High Court. Accordingly, the orders passed by the High Court are set aside. Since the appellant has retired from service on attaining the age of superannuation, he is entitled to all the monetary benefits from the date of his notional posting as C.J.M. till his notional retirement from service on attaining the age of superannuation, as expeditiously as possible. [Para 34] [526-F-G]

Case Law Reference

1992 (1) SCR 836	**referred to**	**Para 28**
1999 (1) SCR 596	**referred to**	**Para 29**
1988 (1) Suppl. SCR 332	**referred to**	**Para 29**
1999 (2) SCR 834	**referred to**	**Para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1458 of 2012.

From the Judgment & Order dated 11.7.2006 of the High Court of Jharkhand in Writ Petition(s) No. 2856 of 2002 and 1620 of 2003.

Manish Mohan, Aditya P. Singh (for Bijan Kumar Ghosh), N.N. Singh, Krishnanand Pandeya, Amrendra Kr. Chaubey, Akshay Shukla, Ratan Kumar Choudhuri, Brahmajeet Mishra for the appearing parties.

The following Order of the Court was delivered

O R D E R

1. Leave granted.

2. This appeal is directed against the judgment and order passed by the High Court of Jharkhand at Ranchi in Writ Petition No.2856 of 2002 and Writ Petition No.1620 of 2003 dated 11.07.2006. By the impugned judgment and order, the High Court has sustained the order of reversion and the order of compulsory retirement passed against the appellant.

3. At the outset, we intend to observe that the Judicial Officers are part and parcel of this institution. They should be respected and their career should be carefully protected. But in the present case, it appears to us, after going through the records that the appellant, who was serving as a Judicial Officer, has been treated with scant respect by the High Court. Be that as it may.

4. The appellant was initially appointed as Munsif (now known as Civil Judge, Junior Division) in the Bihar Subordinate Judicial Service in the year 1975 and his services were confirmed as Munsif in the year 1980. Subsequently, in the year 1986, he was promoted to the rank of Sub-Judge (Civil Judge, Senior Division) and confirmed on the same rank w.e.f. 19.01.1988. In the year 1987, the appellant was made Sub-Judge-cum-Addl. Chief Judicial Magistrate. Thereafter, in November 1989, he was posted as Chief Judicial Magistrate by the Patna High Court vide Notification dated 5.11.1989. While he was working as a Chief Judicial Magistrate at Gopalganj, an inspection was made by the portfolio Judge and on noticing certain omissions and commissions in granting bail in certain cases by the appellant, certain adverse remarks were made against him in the note made on 09.03.1994. Further, the appellant had also passed an Order dated 10.2.1994 granting bail to one person accused of offences punishable

under Section 302 of the I.P.C. in Mohammadpur Police Station case no. 90/93. This was taken as an exception by the learned District Judge and also by the High Court while deciding the Criminal Miscellaneous Petition No.11327/1994. The High Court of Patna vide Order dated 12.09.1994 in Cr. Misc. No. 11327 of 1994, whilst commenting adversely against the appellant, had observed that the appellant had granted bail in the said matter on extraneous consideration and further directed the matter to be placed before the Hon'ble Chief Justice of the High Court for taking necessary action.

5. In view of the abovementioned adverse comments passed against the appellant, he was directed to offer his explanation if any, by the High Court. In this regard, the appellant had offered his explanation, firstly, on 7.5.1994 for strictures passed by the Inspecting Judge and; secondly on 21.12.1994 for adverse remarks made by the High Court dated 12.09.1994 in Cr. Misc. No. 11327 of 1994.

6. The explanation so offered on 7.5.1994 was placed before the Standing Committee of the High Court on 17.11.1994. In regard to this explanation, the Standing Committee further sought explanation from the appellant for using objectionable language against the Inspecting Judge and directed him to appear before it in its next meeting.

7. Accordingly, the appellant appeared on 1.12.1994 and 2.12.1994 and had promptly stated that he was apologetic for the impertinent language used in the explanation. The Standing Committee, after accepting the unconditional apology offered by the appellant, had condoned his lapses and had transferred him from Gopalganj to Samastipur.

8. The case of the appellant was also considered for promotion from Sub-Judge to the Additional District Judge among 16 Sub-Judges by the Standing Committee in its meeting dated 3.2.1995 and the same came to be deferred

because of the pendency of the inquiry proceedings against him.

9. In the second explanation offered by the appellant dated 21.12.1994 he had, specifically, adverted to the allegations made for granting bail indiscriminately even in cases of heinous crimes. The said explanation was placed before the Standing Committee of the High Court for its consideration in its meeting dated 5.1.1995 as an Additional Agenda which was duly accepted by the High Court. Thereafter, the same was communicated to the appellant by the Registrar General of the High Court vide his order dated 1.2.1995.

10. After accepting the explanations offered, the High Court was still under the impression that the Judicial Officer should not be left in peace. Therefore, it appears to us, that the Standing Committee of the High Court in its meeting dated 11.08.1995 directed the initiation of the departmental proceedings against the appellant by framing the Articles of Charges. Accordingly, the appellant was served Articles of Charges dated 13.12.1995 containing two charges and was also asked to show cause within one month. Both the charges relate to the granting of bail indiscriminately in Mohammadpur Police Station Case No. 90/93, by the appellant while he was discharging his functions as Chief Judicial Magistrate. Pursuant to the Show Cause, the appellant had replied in detail on 16.01.1996 that his explanation on the said charges has already been accepted by the High Court. However, the High Court through the District Judge, Samastipur had served a notice dated 03.04.1996 to the appellant for initiating departmental proceedings against him on the basis of Articles of Charges. The appellant had submitted his reply statement dated 11.06.1996 and 22.06.1996 wherein he had specifically contended that on the same set of charges, he had already offered his explanation on 21.12.1994 and the same was placed before the Standing Committee consisting of Hon'ble the Chief Justice and also other learned Judges of the High

Court in its meeting dated 5.1.1995 and wherein they have accepted his explanation. But the explanation so offered was not accepted by the Enquiry Officer, therefore, he proceeded with the Enquiry proceedings.

11. After recording the evidence of the witnesses and the documents produced by them, the Enquiry Officer had submitted a report to the disciplinary authority, namely, the High Court on 19.07.1996.In the Enquiry Report, the Enquiry Officer was of the view that both the charges alleged against the appellant are proved beyond all reasonable doubt.

12. Based on the report of the Enquiry Officer, the disciplinary authority, viz. the High Court, took a decision to compulsorily retire appellant from service in its administrative jurisdiction and acting on the recommendation made by the High Court, a formal notification dated 20.04.1998 came to be issued by the personnel department, Government of Bihar, reverting the appellant from the rank of Sub-Judge (Civil Judge, Senior Division) to the lower post of Munsif (Civil Judge, Junior Division).

13. Aggrieved by the said order, the appellant had approached this Court in Writ Petition (S) No.547 of 1999 under Article 32 of the Constitution of India.

14. This Court, while admitting the petition, had issued notices to the respondents therein.

15. At this stage, one more factor which requires to be noticed by us is that during pendency of the said Writ Petition, in the month of May, 2001, due to bifurcation of the State of Bihar, the appellant was allotted to the State of Jharkhand and was posted as Judicial Magistrate (First Class) at Koderma vide Order dated 21.04.2001. Accordingly, the appellant had joined his services under new regime on 5.5.2001. While working as Judicial Magistrate, on the recommendation made by the Full Court of Jharkhand High Court, the State

Government has issued notification dated 17.07.2001 compulsorily retiring appellant from service. The said order was served on the appellant on 26.7.2001. This decision was taken by the High Court on the basis of appellant's Annual Character Roll/Annual Confidential Report (hereinafter referred to as "the A.C.R.") pertaining to past service which includes the A.C.R.'s of the selective period of the service.

16. Aggrieved by the aforesaid order of compulsory retirement from service, the appellant had approached this Court in Writ Petition No.5 of 2002. This Court, however, dismissed the W.P. No. 5 of 2002 vide Order dated 18.01.2002 with liberty to avail alternative remedy under Article 226 of the Constitution of India. Accordingly, the appellant filed a Writ Petition no. 2856 of 2002 under Article 226 before the Jharkhand High Court.

17. The respondents herein had brought to the notice of this Court in Writ Petition (C) No.547 of 1999 that the appellant had retired from service and therefore, this Court transferred the pending proceedings in W.P.(C) NO.547/1999 to the Jharkhand High Court for its consideration and decision. On transfer, the same was registered as W.P. No. (S) 1620 of 2003 before the High Court.

18. By the impugned judgment, the High Court has rejected both the writ petitions filed by the appellant. That is how the appellant is before us in this Civil Appeal.

19. Learned counsel for the appellant submitted that the order of reversion, whereby the appellant was reverted from the post of Chief Judicial Magistrate to that of Munsif (Civil Judge, Junior Division) is smacked with arbitrariness and contrary to the norms of service law jurisprudence and therefore, is bad in law. While elaborating his submission, the learned counsel would contend that the High Court, having accepted his explanation to the Show Cause Notice issued to explain the notings made by the Inspecting Judge in Criminal

Miscellaneous Petition No.10327 of 1994, could not have initiated departmental proceedings against the appellant. This, the learned counsel would contend, would amount to double jeopardy.

20. *Per contra,* learned counsel for the respondents would submit that the explanation was accepted by the Standing Committee only with regard to the impertinent language used by the appellant and not with regard to the allegations of granting of bail/provisional bail to the accused persons even in heinous crimes. Therefore, he submits that the High Court was justified in initiating departmental inquiry proceedings against the appellant for the charges alleged in the charge memo.

21. Learned counsel for the appellant, insofar as his compulsory retirement from service is concerned, submits that the adverse remarks that were taken into consideration by the High Court while terminating the services of the appellant, were never communicated to him and secondly, he would submit that the High Court was selective in taking into consideration the ACR's of the appellant from the date of his entry into service till the date of his retirement. He further submits that the High Court, while recording the entries made in the ACR's in the impugned judgment, has not made the correct reflection of the actual contents of the ACR's which are in the records. In support of that contention, the learned counsel has invited our attention to the additional affidavit filed before the High Court as well in these proceedings.

22. In reply to the submissions made by the learned counsel for the appellant, the learned counsel for the High Court submits that in the Writ Petition, filed by the appellant, he had not specifically contended that the adverse remarks which were entered in the ACR's were not communicated to him. Even otherwise, learned counsel would contend that the entire service profile of the appellant while in service was not above board and therefore, the High Court was justified in

recommending the case of the appellant to the State Government for compulsory retirement from service.

23. The issues that would fall for our consideration and decision in this appeal are: Whether the High Court was justified in passing the order dated 21.4.1998 in reverting the appellant from the post of Chief Judicial Magistrate to the rank of Munsif (Civil Judge, Junior Division); and Whether the High Court was justified in passing the order of compulsorily retiring the appellant from service in public interest.

24. To answer the first issue, we may have to notice the observations made by the learned Inspecting Judge in Criminal Miscellaneous Petition No.11327 of 1994. The same is extracted :-

> "In the present case, as stated above, the grant of bail by the Chief Judicial Magistrate itself was against the statutory provision contained in section 437 of the Code as the materials on the record clearly show that there was reasonable ground for believing that the petitioner has been guilty of an offence punishable with death or imprisonment for life. The grant of bail itself was not permissible in law and virtually the Chief Judicial Magistrate has surrendered his judicial discretion to some other consideration.

25. In pursuance to certain directions issued in the aforesaid Criminal Miscellaneous Petition, the High Court had called for the explanation from the appellant. Pursuant to the direction so issued, the appellant had offered his explanation. The Standing Committee of the High Court had directed the appellant to appear before it. Before the Standing Committee, the appellant had expressed his unconditional apology and the same was accepted by the Standing Committee and the Standing Committee had observed in its noting that the case has been closed against the appellant and the same was informed to the appellant also.

26. By yet another explanation, the appellant had justified his action in granting bail. This explanation offered by him was also accepted by the High Court and the same was communicated to the appellant by the Registrar General of the High Court in which specific reference is made to the explanation offered by the appellant in his reply dated 21.12.1994.

27. After accepting his explanation, the High Court was still of the view that disciplinary proceedings requires to be initiated against the appellant for his alleged omission and commission of granting bail indiscriminately even in heinous crimes. The Charge Memo was replied by the appellant and in that he had, specifically, contended that the Standing Committee of the High Court, after accepting the explanation, had informed him that his explanation is accepted and all the allegations made against him are closed. This aspect of the matter, though noticed by the Inquiry Officer, he does not give any finding. He, however, has observed that the charges alleged against the appellant are proved. Based on this, the High Court has passed the order of reversion whereby the appellant was reverted from the post of Chief Judicial Magistrate to that of Munsif and the same was notified by the State Government also. In our opinion, having accepted the explanations and having communicated the same to the appellant, the High Court could not have proceeded to pass the order of initiating departmental proceedings and reverting the appellant from the post of Chief Judicial Magistrate to the post of Munsif. On General Principles, there can be only one enquiry in respect of a charge for a particular misconduct and that is also what the rules usually provide. If, for some technical or other good ground, procedural or otherwise, the first enquiry or punishment or exoneration is found bad in law, there is no principle that a second enquiry cannot be initiated. Therefore, when a completed enquiry proceedings is set aside by a competent forum on a technical or on the ground of procedural infirmity, fresh proceedings on the same charges is permissible. In the present case, a charge memo was

issued and served on the appellant. A reading of the charge memo does not contain any reference to the proceedings of the Standing Committee at all. It is also not found as to whether the earlier proceedings has been revived in accordance with the procedure prescribed. In fact, after receipt of the charge memo, the appellant, in his reply statement, had brought to the notice of the enquiry officer that on the same set of charges, a notice had been issued earlier and after receipt of his explanation dated 21.12.1994, the Standing Committee, after accepting his explanation had dropped the entire proceedings and the same had been communicated to him by the Registrar General of the High Court by his letter dated 02.02.1995. In spite of his explanation in the reply statement filed, the enquiry officer has proceeded with the enquiry proceedings and after completion of the same, has submitted his report which has been accepted by the disciplinary authority. Therefore, in these circumstances, there is no justification for conducting a second enquiry on the very charges, which have been dropped earlier. Even through the principles of double jeopardy is not applicable, the law permits only disciplinary proceedings and not harassment. Allowing such practice is not in the interest of public service. In the circumstance, we cannot sustain the impugned order reverting the appellant to the lower post.

28. We now proceed to consider the second order passed by the High Court for recommending the case of the appellant to the State Government to accept and issue appropriate notification to compulsorily retire the appellant from Judicial Service. It is now well settled that the object of compulsory retirement from service is to weed out the dead wood in order to maintain a high standard of efficiency and honesty and to keep the judicial service unpolluted. Keeping this object in view, the contention of the appellant has to be appreciated on the basis of the settled law on the subject of Compulsory retirement. In *Baikuntha Nath Das v. Chief District Medical Officer*, (1992) 2 SCC 299, three Judge Bench of this Court has laid down the

principles regarding the Order of Compulsory retirement in public interest :

34. The following principles emerge from the above discussion:

(*i*) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(*ii*) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(*iii*) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. *While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary — in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.*

(*iv*) *The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter — of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse.* If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(*v*) An order of compulsory retirement is not liable to

be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned in (*iii*) above. This aspect has been discussed in paras 30 to 32 above.

29. In *Madan Mohan Choudhary* v. *State of Bihar,* (1999) 3 SCC 396, this Court was considering the order of compulsory retirement of the appellant, who was a Member of the Superior Judicial Service in the State of Bihar. On a writ petition filed by the appellant in the High Court, challenging his order of compulsory retirement by the Full Court of the High Court, the High Court on the judicial side refused to interfere and dismissed the petition. The appellant came in appeal before this Court. This Court found that while on various earlier occasions remarks were given by the High Court but there were no entries in the character roll of the appellant for the years 1991-92, 1992-93 and 1993-94. The entries for these years were recorded at one time simultaneously and the appellant was categorized as 'C' Grade officer. The date on which these entries were made was not indicated either in the original record or in the counter-affidavit filed by the respondent. These were communicated to the appellant on 29-11-1996 and were considered by the Full Court on 30-11-1996. It was clear that these entries were recorded at a stage when the Standing Committee had already made up its mind to compulsorily retire the appellant from service as it had directed the office on 6-11-1996 to put up a note for compulsory retirement of the appellant. This Court held that it was a case where there was no material on the basis of which an opinion could have been reasonably formed that it would be in the public interest to retire the appellant from service prematurely. This Court was of the opinion that the entries recorded "at one go" for three years, namely, 1991-92, 1992-93 and 1993-94 could hardly have been taken into consideration. The Court then referred to its

earlier decision in *Registrar, High Court of Madras* v. *R. Rajiah,* (1988) 3 SCC 211, where this Court said that the High Court in its administrative jurisdiction has the power to recommend compulsory retirement of the Member of the judicial service in accordance with the rules framed in that regard but it cannot act arbitrarily and there has to be material to come to a decision to compulsorily retire the officer. In that case it was also pointed out that the High Court while exercising its power of control over the subordinate judiciary is under a constitutional obligation to guide and protect judicial officers from being harassed or annoyed by trifling complaints relating to judicial orders so that the officers may discharge their duties honestly and independently; unconcerned by the ill-conceived or motivated complaints made by unscrupulous lawyers and litigants.

30. We are conscious of the fact that there is very limited scope of judicial review of an order of premature retirement from service. As observed by this Court in *Rajiah's* case (supra) that when the High Court takes the view that an order of compulsory retirement should be made against a member of the Judicial Service, the adequacy or sufficiency of such materials cannot be questioned, unless the materials are absolutely irrelevant to the purpose of compulsory retirement. We also add that when an order of compulsory retirement is challenged in a court of law, the Court has the right to examine whether some ground or material germane to the issue exists or not. Although, the Court is not interested in the sufficiency of the material upon which the order of compulsory retirement rests.

31. This Court in *High Court of Punjab & Haryana v. Ishwar Chand Jain*, (1999) 4 SCC 579, has discussed the purpose, importance and effect of the remarks made during inspection which ultimately become the part of the ACR of the concerned Judicial officer. This Court has observed thus:

32. Since late this Court is watching the spectre of either judicial officers or the High Courts coming to this Court

when there is an order prematurely retiring a judicial officer. Under Article 235 of the Constitution the High Court exercises complete control over subordinate courts which include District Courts. Inspection of the subordinate courts is one of the most important functions which the High Court performs for control over the subordinate courts. The object of such inspection is for the purpose of assessment of the work performed by the Subordinate Judge, his capability, integrity and competency. Since Judges are human beings and also prone to all the human failings inspection provides an opportunity for pointing out mistakes so that they are avoided in future and deficiencies, if any, in the working of the subordinate court, remedied. Inspection should act as a catalyst in inspiring Subordinate Judges to give the best results. They should feel a sense of achievement. They need encouragement. They work under great stress and man the courts while working under great discomfort and hardship. A satisfactory judicial system depends largely on the satisfactory functioning of courts at the grass-roots level. Remarks recorded by the Inspecting Judge are normally endorsed by the Full Court and become part of the annual confidential reports and are foundations on which the career of a judicial officer is made or marred. Inspection of a subordinate court is thus of vital importance. It has to be both effective and productive. It can be so only if it is well regulated and is workman-like. Inspection of subordinate courts is not a one-day or an hour or a few minutes' affair. It has to go on all the year round by monitoring the work of the court by the Inspecting Judge. A casual inspection can hardly be beneficial to a judicial system. It does more harm than good.

32. It is also well settled that the formation of opinion for compulsory retirement is based on the subjective satisfaction of the concerned authority but such satisfaction must be based on a valid material. It is permissible for the Courts to ascertain whether a valid material exists or otherwise, on which the

subjective satisfaction of the administrative authority is based. In the present matter, what we see is that the High Court, while holding that the track record and service record of the appellant was unsatisfactory, has selectively taken into consideration the service record for certain years only while making extracts of those contents of the ACR's. There appears to be some discrepancy. We say so for the reason that the appellant has produced the copies of the ACR's which were obtained by him from the High Court under the Right to Information Act, 2005 and a comparison of these two would positively indicate that the High Court has not faithfully extracted the contents of the ACRs. The High Court has taken the decision on the basis of selective service record which includes the summarized ACR's, as quoted in the impugned judgment, for the selected years. The ACR for the initial years: 1975-76 and 1976-77 remarks him as capable of improvement against quality of work, the ACR's for the years: 1982-83, 1983-84 points that his work is unsatisfactory, the ACR's for the year: 1984-85, 1987-88 remark his work performance as unsatisfactory with bad reputation and quarrelsome attitude, and the ACR for the later years: 1993-94 & 1994-95 refers to some private complaints and remark that his powers were divested by the High Court and the ACR's for the recent years: 1997-98 & 1998-99 points that no defect in judicial work but disposal of cases is poor. Whereas, the appellant furnished certain Service records which includes: the ACR recorded by inspecting Judge in the year 1985 which evaluate the appellant as 'B'-Satisfactory against the entry "Net result", further the ACR prepared by the District and Sessions Judge, Samastipur for the year 1997-98 assessed him as an officer of average merit, maintaining good relationship with bar, staffs and colleagues but poor disposal, and the ACR prepared by the District and Sessions Judge, Muzaffarpur for the year 1998-99 assessed him as a good officer but poor disposal. However, his poor disposal during this period is justified up to certain extent in the background of his involvement in the continuous and unnecessary disciplinary proceedings which was based on the charges of granting of

bail indiscriminately, even after, the fact that he had been exonerated of these charges long back in the year 1995 by the High Court at Patna. The material on which the decision of the Compulsory retirement was based, as extracted by the High Court in the impugned judgment, and material furnished by the appellant would reflect that totality of relevant materials were not considered or completely ignored by the High Court. This leads to only one conclusion that the subjective satisfaction of the High Court was not based on the sufficient or relevant material. In this view of the matter, we cannot say that the service record of the appellant was unsatisfactory which would warrant premature retirement from service. Therefore, there was no justification to retire the appellant compulsorily from service. In *Swami Saran Saksena v. State of U.P.*, (1980) 1 SCC 12, this Court has quashed the order of Compulsory retirement of the appellant, therein, in the public interest, which was found to be in sharp contradiction with his recent service performance and record. This Court observed:

> 3. Ordinarily, the Court does not interfere with the judgment of the relevant authority on the point whether it is in the public interest to compulsorily retire a government servant. And we have been even more reluctant to reach the conclusion we have, when the impugned order of compulsory retirement was made on the recommendation of the High Court itself. But on the material before us we are unable to reconcile the apparent contradiction that although for the purpose of crossing the second efficiency bar the appellant was considered to have worked with distinct ability and with integrity beyond question, yet within a few months thereafter he was found so unfit as to deserve compulsory retirement. The entries in between in the records pertaining to the appellant need to be examined and appraised in that context. There is no evidence to show that suddenly there was such deterioration in the quality of the appellant's work or integrity that he deserved to be compulsorily retired. For

all these reasons, we are of opinion that the order of compulsory retirement should be quashed. The appellant will be deemed to have continued in service on the date of the impugned order.

33. Moreover, the District and Sessions Judge have the opportunity to watch the functioning of the appellant from close quarters, who have reported favourably regarding the appellant's overall performance except about his disposal, in the appellant's recent ACR for the year 1997-98 and 1998-99. In view of this, the greater importance is to be given to the opinion or remarks made by the immediate superior officer as to the functioning of the concerned judicial officer for the purpose of his compulsory retirement. The immediate superior is better placed to observe, analyse, scrutinize from close quarters and then, to comment upon his working, overall efficiency, and reputation. In *Nawal Singh v. State of U.P.*, (2003) 8 SCC 117, this Court has observed thus:

> 12. … In the present-day system, reliance is required to be placed on the opinion of the higher officer who had the opportunity to watch the performance of the officer concerned from close quarters and formation of his opinion with regard to the overall reputation enjoyed by the officer concerned would be the basis.

34. In view of the above discussion, we are of the opinion that the High Court was not justified in sustaining the orders passed by the Full Court of the same High Court. Accordingly, we allow this appeal, set aside the orders passed by the High Court. Since the appellant has retired from service on attaining the age of superannuation, he is entitled to all the monetary benefits from the date of his notional posting as C.J.M. till his notional retirement from service on attaining the age of superannuation, as expeditiously as possible, at any rate, within four months from the date of receipt of a copy of this order.

Ordered accordingly.

R.P. Appeal allowed.

MANGANI LAL MANDAL
v.
BISHNU DEO BHANDARI
(Civil Appeal No. 10728 of 2011)

FEBRUARY 1, 2012

[R.M. LODHA AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

REPRESENTATION OF THE PEOPLE ACT, 1951:

s.100(1)(d)(iv) - Election petition challenging the election of returned candidate - On the ground of non-compliance of provisions of the Constitution or the Act - Held: A mere non-compliance or breach of the Constitution or the statutory provisions by itself, does not result in invalidating the election of a returned candidate u/s 100(1)(d)(iv) - For the election petitioner to succeed on such ground, he has not only to plead and prove the ground but also that the result of the election insofar as it concerned the returned candidate has been materially affected - In the entire election petition there is no pleading at all that suppression of the information by the returned candidate in the affidavit filed along with the nomination papers with regard to his first wife and dependent children from her and non-disclosure of their assets and liabilities has materially affected the result of the election insofar as it concerned the returned candidate - There is no issue framed in this regard nor is there any evidence let in by the election petitioner - High Court has also not formed any opinion on this aspect - Judgment of High Court is gravely flawed and legally unsustainable and, as such, is set aside - Election petition dismissed - Costs.

The respondent, a voter, filed an election petition challenging the election of the returned candidate to the Lok Sabha on the ground that he suppressed the facts

in the affidavit filed along with his nomination papers, that he had two wives and the dependant children from marriage with his first wife and also did not disclose the assets and liabilities of his first wife and the dependent children born out of that wedlock. The High Court allowed the election petition and set aside the election of the returned candidate holding it as void u/s 100(1)(d)(iv) of the Representation of the People Act, 1951. Aggrieved, the returned candidate filed the appeal.

Allowing the appeal, the Court

HELD: 1.1 A reading of s.100(1)(d)(iv) with s.83 of the Representation of the People Act, 1951 leaves no manner of doubt that where a returned candidate is alleged to be guilty of non-compliance of the provisions of the Constitution or the 1951 Act or any rules or orders made thereunder and his election is sought to be declared void on such ground, it is essential for the election petitioner to aver by pleading material facts and prove that the result of the election insofar as it concerned the returned candidate has been materially affected by such breach or non-observance. A mere non-compliance or breach of the Constitution or the statutory provisions by itself, does not result in invalidating the election of a returned candidate u/s 100(1)(d)(iv). [para 9] [532-E-G; 533-A-B]

Jabar Singh Vs. Genda Lal **(1964) 6 SCR 54;** *L.R. Shivaramagowda and Others Vs. T.M. Chandrashekhar (dead) by LRs. and Others.* **1998 (3) Suppl. SCR 241 = 1999 (1) SCC 666 and** *Uma Ballav Rath (Smt.) Vs. Maheshwar Mohanty (Smt) and others* **1999 (1) SCR 895 = 1999 (3) SCC 357 - relied on.**

1.2 The impugned judgment does not reflect any consideration on the most vital aspect as to whether the non-disclosure of the information concerning the appellant's first wife and the dependent children born out

of that wedlock and their assets and liabilities has materially affected the result of the election insofar as it concerned the returned candidate. As a matter of fact, in the entire election petition there is no pleading at all in this regard nor is there any issue framed nor any evidence let in by the election petitioner. The High Court has also not formed any opinion on this aspect. The impugned judgment of the High Court is gravely flawed and legally unsustainable and, as such, is set aside. As a matter of law, the election petition deserved dismissal at threshold yet it went into the whole trial consuming Court's precious time and putting the returned candidate to unnecessary trouble and inconvenience. The election petition is, therefore, dismissed with costs of Rs. 1,00,000/-. [para 10-11] [533-F-H; 534-A-D]

Union of India Vs. Association for Democratic Reforms & Anr. **2002 (3) SCR 696 = 2002 (5) SCC 294 and** *People's Union for Civil Liberties (PUCL) & Anr. Vs. Union of India & Anr.* **2003 (2) SCR 1136 = 2003 (4) SCC 399 - cited.**

Case Law Reference:

2002 (3) SCR 696	**cited**	**para 5**
2003 (2) SCR 1136	**cited**	**para 5**
(1964) 6 SCR 54	**relied on**	**para 9**
1998 (3) Suppl. SCR 241	**relied on**	**para 9**
1999 (1) SCR 895	**relied on**	**para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10728 of 2011.

From the Judgment & Order dated 25.11.2011 of the High Court of Judicature at Patna in Election Petition No. 4 of 2009.

A. Sharan, Ashutosh Jha, Somesh Chandra Jha, Amit Anand Tiwari for the Appellant.

S.B.K. Mangalam, Nakul Pathania, Abhay Kumar for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The returned candidate – Mangani Lal Mandal – is in appeal under Section 116A of the Representation of the People Act, 1951 (for short, '1951 Act') aggrieved by the judgment dated November 25, 2011 of the Patna High Court whereby his election to the 15th Lok Sabha has been set aside.

2. The appellant – the returned candidate – contested the general Parliament election to the 15th Lok Sabha from 7, Jhanjharpur Parliamentary Constituency held on April 23, 2009. Altogether 12 candidates filed their nomination papers, including the appellant, as per the schedule fixed for conducting the said election. On May 16, 2009, the result of the above election was announced and the appellant was declared elected.

3. The respondent - Bishnu Deo Bhandari, a voter (hereinafter referred to as the 'election petitioner') - challenged the election of the returned candidate by filing the election petition before the Patna High Court. The election petitioner alleged that the returned candidate suppressed the facts in the affidavit that he filed alongwith his nomination papers that he had two wives and the dependent children by marriage with his first wife. He did not disclose the assets and liabilities of his first wife and the dependent children born out of that wedlock. The challenge to the election of the returned candidate was brought under Section 100(1)(d)(iv) of the 1951 Act and it was prayed that the election of the returned candidate be declared to be void.

4. The returned candidate traversed the averments made by the election petitioner and also raised diverse objections, *inter alia*, that the election petition did not disclose any cause of action nor it contained the concise statement of material

facts.

5. The High Court, on the basis of the pleadings of the parties, framed as many as seven issues and, after recording the evidence, held that the returned candidate failed to furnish information about his first wife and the dependents in the affidavit filed along with his nomination papers. The High Court heavily relied upon the two decisions of this Court in *Union of India Vs. Association for Democratic Reforms & Anr*[1]*. and People's Union for Civil Liberties (PUCL) & Anr. Vs. Union of India & Anr.*[2] and held that the suppression of facts by the returned candidate with regard to the assets and liabilities of his first wife and the dependent children born out of that wedlock was breach of the Constitution viz. Article 19(1)(a) and for such breach and non-compliance, the candidate who has not complied with and breached the right to information of electors and has won the election has to suffer the consequence of such non-compliance and the breach. The High Court, in view of the above, set aside the election of the returned candidate from Jhanjharpur Parliamentary Constituency being void under Section 100(1)(d)(iv) of the 1951 Act.

6. We have heard Mr. A. Sharan, learned senior counsel for the appellant, and Mr. S.B.K. Manglam, learned counsel for the respondent.

7. The Appeal deserves to be allowed on the short ground which we indicate immediately hereinafter.

8. Section 100 of the 1951 Act provides for grounds for declaring election to be void. As we are concerned with Section 100(1)(d)(iv), the same is reproduced which reads as under :-

> "100. Grounds for declaring election to be void.-(1) Subject to the provisions of sub-section (2) if the High Court is of opinion-

1. (2002) 5 SCC 294.
2. (2003) 4 SCC 399.

> (a) x x x x
>
> (b) x x x x
>
> (c) x x x x
>
> (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-
>
> (i) x x x
>
> (ii) x x x
>
> (iii) x x x
>
> (iv) by any non-compliance with the provisions of the Constitution or of this Act or any rules or orders made under this Act,
>
> the High Court shall declare the election of the returned candidate to be void.
>
> (2) x x x x"

9. A reading of the above provision with Section 83 of the 1951 Act leaves no manner of doubt that where a returned candidate is alleged to be guilty of non-compliance of the provisions of the Constitution or the 1951 Act or any rules or orders made thereunder and his election is sought to be declared void on such ground, it is essential for the election petitioner to aver by pleading material facts that the result of the election insofar as it concerned the returned candidate has been materially affected by such breach or non-observance. If the election petition goes to trial then the election petitioner has also to prove the charge of breach or non-compliance as well as establish that the result of the election has been materially affected. It is only on the basis of such pleading and proof that the Court may be in a position to form opinion and record a finding that breach or non-compliance of the provisions of the Constitution or the 1951 Act or any rules or orders made

thereunder has materially affected the result of the election before the election of the returned candidate could be declared void. A mere non-compliance or breach of the Constitution or the statutory provisions noticed above, by itself, does not result in invalidating the election of a returned candidate under Section 100(1)(d)(iv). The *sine qua non* for declaring election of a returned candidate to be void on the ground under clause (iv) of Section 100(1)(d) is further proof of the fact that such breach or non-observance has resulted in materially affecting the result of the returned candidate. In other words, the violation or breach or non-observation or non-compliance of the provisions of the Constitution or the 1951 Act or the rules or the orders made thereunder, by itself, does not render the election of a returned candidate void Section 100(1)(d)(iv). For the election petitioner to succeed on such ground viz., Section 100(1)(d)(iv), he has not only to plead and prove the ground but also that the result of the election insofar as it concerned the returned candidate has been materially affected. The view that we have taken finds support from the three decisions of this Court in (1) *Jabar Singh Vs. Genda Lal*[3]; (2) *L.R. Shivaramagowda and Others Vs. T.M. Chandrashekhar (dead) by LRs. and Others.*[4] and (3) *Uma Ballav Rath (Smt.) Vs. Maheshwar Mohanty (Smt) and others*[5].

10. Although the impugned judgment runs into 30 pages, but unfortunately it does not reflect any consideration on the most vital aspect as to whether the non-disclosure of the information concerning the appellant's first wife and the dependent children born out of that wedlock and their assets and liabilities has materially affected the result of the election insofar as it concerned the returned candidate. As a matter of fact, in the entire election petition there is no pleading at all that suppression of the information by the returned candidate in the affidavit filed along with the nomination papers with regard to

3. (1964) 6 SCR 54.

4. (1999) 1 SCC 666..

5. (1999) 3 SCC 357.

his first wife and dependent children from her and non-disclosure of their assets and liabilities has materially affected the result of the election. There is no issue framed in this regard nor there is any evidence let in by the election petitioner. The High Court has also not formed any opinion on this aspect. We are surprised that in the absence of any consideration on the above aspect, the High Court has declared the election of the returned candidate to the 15th Lok Sabha from the Jhanjharpur Parliamentary Constituency to the void. The impugned judgment of the High Court is gravely flawed and legally unsustainable. As a matter of law, the election petition filed by the election petitioner deserved dismissal at threshold yet it went into the whole trial consuming Court's precious time and putting the returned candidate to unnecessary trouble and inconvenience.

11. Civil Appeal is, accordingly, allowed. The impugned judgment dated November 25, 2011 is set aside. The election petition filed by the respondent is dismissed with costs which we quantify at ' 1,00,000/- (Rupees One Lakh).

R.P. Appeal allowed.

STATE OF MADHYA PRADESH & ANR.

v.

BHERU SINGH & ORS.

(Civil Appeal No. 1211 of 2012)

FEBRUARY 1, 2012

[ASOK KUMAR GANGULY AND GYAN SUDHA MISRA, JJ.]

LAND ACQUISITION:

Acquisition of land for construction of Man Dam in State of MP-Rehabilitation and Resettlement Policy (R & R Policy) framed by State Government - Claim for 2 hectares of land for each major son of the landholder whose land had been acquired - Held: Since the claim of entitlement of land is based exclusively on a policy decision of the State Government which has been incorporated in R & R Policy, the entitlement would be determined strictly based on the Policy - R & R Policy makes it clear that only such displaced family whose more than 25% of land holding had been acquired, would be entitled to compensation of 2 hectares of land and this displacement of land would not merely be notional - If each major son of the displaced family had not been separately deprived of 25% of the land, then even as per the R & R Policy, they were not entitled 2 hectares of land.

ADMINISTRATION OF JUSTICE:

The oustees/displaced persons are weak and vulnerable tribal population whose plea may get ignored or are not properly addressed - In order to impart full justice to the causes in terms of R & R Policy, it is desirable that the State Government may constitute an appellate forum where the aggrieved party may challenge the decision of GRA in case there is any justifiable reason to do so - Public Interest Litigation.

REFERENCE TO LARGER BENCH:

Conflicting views in two judgements of Supreme Court - Held: Though there appears to be conflict in two judgments of the Supreme Court in regard to claim of share by each major son of the family whose land has been acquired for construction of the dam, the issue arises out of a policy decision of the State Government and hence the same at the most would be confined to R & R Policy as the issue is not really a legal issue emerging from any statutory provisions having a bearing in future on other similar controversy, so as to refer it to a Constitution Bench; the Court refrains from referring the question to a larger Bench.

In the process of construction of Man Dam on the tributary of Narmada river in the State of Madhya Pradesh, lands of 448 families were acquired, out of which 62 families opted for and were allotted land as per Rehabilitation and Resettlement Policy (R & R policy). The remaining 386 families accepted full cash compensation in terms of R & R policy. Subsequently, the State Government took a decision as a welfare measure to grant Special Rehabilitation Grant (SRG) to the families/ oustees who had lost their land, in order to enable them to purchase land of their own choice to the extent they had lost in the submergence on the condition that they would not claim any land from the Government. Out of the 386 families who had accepted full cash compensation, 337 families accepted the SRG. Disputes, which arose while implementing the R & R Policy and disbursement of SRG, were referred to the Grievance Redressal Authority. Aggrieved by some of the orders passed by the GRA a writ petition in public interest was filed before the High Court, which though held that there was substantial compliance of R & R policy, but directed the State Government to allot land to every son of the land holder, who had become a major on or before the

notification u/s 4 of Land Acquisition Act and was part of the larger family from whom land had been acquired.

Disposing of the appeals, the Court

HELD: 1.1. The two decisions of this Court reported in 2005 (4) SCC 32 (Narmada Bachao II) and (2011) 7 SCC 639 (Narmada Bachao III) undoubtedly appear to be in conflict with each other in regard to the claim of share by each major son of the family of land holder whose land has been acquired. However, the question as to whether major sons would be included in the definition of the displaced family or not is not really a legal issue emerging from any statutory provision or ambiguity in the Land Acquisition Act or any statute or an Act having a bearing in future on other similar controversy so as to refer it to a Constitution Bench of this Court. Since the entire issue arises out of a policy decision of the Government of M.P. and at the most would be confined to interpretation of the R & R Policy formulated by the State of M.P., therefore, this Court refrains from referring the question of entitlement of major son to a separate holding, to a larger Bench. [para 41-42] [566-B-D; 567-A-B]

Narmada Bachao Andolan Vs. Union of India **2005 (2) SCR 840 = 2005 (4) SCC 32 and** *State of M.P. Vs. Narmada Bachao Andolan & Anr.* **(2011) 7 SCC 639 - referred to.**

1.2 When the claim or entitlement of land is based exclusively on a policy decision of the Government of M.P. which has been incorporated in the R & R Policy, the entitlement clearly would be based strictly on the Policy formulated by the State Government. This policy holds a displaced family entitled to 2 hectares of land but it further envisages actual displacement from the acquired land which is 25%, meaning thereby, that only such displaced family from whom more than 25% of its

land holding has been acquired would be entitled for compensation of 2 hectares of land and this displacement from land would not merely be notional. Thus, even if the displaced family had several major sons, allotment on account of acquisition to each major son does not arise in terms of the policy. It needs to be highlighted that when there has been no acquisition from each major son of the family, the question of allotment of land to all major sons of the family would be clearly contrary to the provision of the R & R Policy. [Para 43-44] [567-C-H; 568-A-B]

1.3 The entire right of the respondent/oustee in this litigation flows from the R & R Policy and it is crystal clear that the redeeming feature of the policy is acquisition of 25% land of the displaced family. Therefore, even if the displaced family constituted of several major sons, the acquisition of 25% of land from each major son is completely missing and, therefore, there is no reason as to why the parties should be allowed to be bogged down into further litigation for determination of the question as to whether all major sons of a displaced family are entitled to a separate unit of 2 hectares of land or only the land holder of the displaced family would be entitled. Therefore, the direction of the High Court in the impugned judgment for allotment of land to each major son of the displaced family needs to be overturned. [Para 44] [568-A-D]

1.4 The High Court was not justified in entertaining a writ petition by way of public interest litigation when it had already dealt with the question against which the appeal also travelled up to this Court and was seized of other writ petitions on the question. Besides, the High Court in the impugned judgment itself has laid down that there had been substantial compliance of the R & R Policy of the Government of M.P. and yet it directed the

State Government to consider the question of allotment of 2 hectares of land to each major son of a displaced family overlooking the fact that if each major son of the displaced family had not been separately deprived of 25% of the acquired land, then even as per the Policy, they were not entitled to 2 hectares of land. In that view of the matter also the direction of the High Court travels beyond the scope of R & R Policy. The High Court had no reason to expand the scope of R & R Policy by directing the State Government to allot land to each of the displaced family. [Para 45-46] [568-E-F; 569-C-E]

Joydeep Mukharjee vs. State of West Bengal & Ors. **2011 (2) SCR 493 = (2011) 2 SCC 706-relied on**

1.5. However, this Court is conscious of the fact that in the process of allotment, it is quite possible that some of the oustees might have been deprived of the land who were separately holding the acquired land. But in order to ensure effective implementation, there is already a Grievance Redressal Authority (GRA) and if the oustees have any grievance in regard to non-implementation of the R & R Policy in so far as their entitlement as per the policy is concerned, they would be free to move the GRA for redressal of their grievance. But a blanket direction as given out by the High Court to allot land to each major son of a displaced family without any averment to the effect that they were deprived of 25% of acquired land separately, appears to be contrary to the R & R Policy. Acquisition of 25% of land is a condition precedent to become eligible for allotment of 2 hectares of land. It, therefore, needs to be clarified that this Court has not entered into the area of determination of the question as to whether major son of a family is entitled to a separate unit or not as even if (2005) 4 SCC 32 is to be followed that each major son of a displaced family is entitled to a separate unit of compensatory land, deprivation of 25%

of land from them is totally missing and if that is so, the respondents cannot be allowed to reopen this question after four years of revision of R & R Policy. [Para 47] [569-F-H; 570-A-E]

2.1. When a social activist takes up the cause for the oustees, it is expected of him to take a balanced view of the cause raised on behalf of the affected party in the light of the policy which is formulated and made effective by the State authorities. The effort made by the social activist taking up the cause for the rehabilitation of the oustees is laudable but in the process this Court is under constraint as it cannot overlook the practical fall out/consequences by allowing him to take up the cause of the oustees oblivious of its consequence or the administrative fall out since a cause cannot be allowed to be raised incessantly by indulging in multiplicity of proceedings which at times do more harm to the cause than seek cure for the misery of the affected parties. [Para 47] [570-D-G]

2.2. The oustees/displaced persons come from the weak and vulnerable tribal population whose plea may get ignored or are not properly addressed. Therefore, for this purpose and in order to impart full justice to the cause in terms of the R & R Policy, it is desirable that the State Government may constitute an appellate forum where the aggrieved party may challenge the decision of the GRA in case there is any justifiable reason to do so. This appellate forum should include a sitting or retired District Judge and an administrative member under the Chairmanship of a retired Judge of the High Court which will oversee whether the R & R Policy has been effectively and accurately implemented and whether the SRG have been properly distributed in the light of the grievance raised by the displaced persons. This appellate forum in effect would confine itself to the questions relating to compliance of the R & R Policy and

distribution of SRG in terms of the provisions enumerated therein. [Para 49] [571-E-H; 572-A-C]

2.3 The respondents-oustees would be at liberty to approach the GRA or the Appellate Forum of GRA in case they have been deprived of adequate compensation or benefit in any manner which is not in consonance with the R & R Policy. Liberty is further granted to the respondents including the social activist-respondent No.3 to take up the matter before the State Government for rectification or further amendment of the Policy in case they are able to establish and make out a case that the revision of R & R Policy 2003 still further requires rectification or improvement as there can be no limitation of time for reviewing or reframing a Policy decision if it has to serve the cause of eradicating human suffering specially if it has emerged as a consequence of the state activity like the land acquisition where the affected parties lost their home and cultivable land. [Para 50] [572-D-G]

Case Law Reference:

2005 (2) SCR 840	**referred to**	**Para 3**
(2011) 7 SCC 639	**referred to**	**Para 3**
2011 (2) SCR 493	**relied on**	**Para 45**

CIVIL APPEAL JURISDICTION : Civil Appeal No. 1211 of 2012.

From the Judgment & Order dated 11.8.2009 of the High Court of Madhya Pradesh at Jabalpur in W.P. No. 48 of 2004.

WITH

C.A. No. 1212 of 2012.

P.S. Patwalia, C.D. Singh, Sunny Choudhary, Aman Rahi,

Ajay Chauhan, Prashant Bhushan, Pyoli Swatija for the appearing parties.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. Leave granted.

2. These two appeals arise out of the judgement and order dated 11.08.2009 passed by the High Court of Madhya Pradesh, Bench at Indore in a public interest petition bearing Writ Petition No. 48 of 2004 against which the State of Madhya Pradesh as also the respondents Bheru Singh alongswith two others which include a social activist have filed separate Special Leave Petitions bearing Nos. 30685/2009 and 10163/2010 respectively giving rise to these two appeals which are confined to some of the directions only, that were issued by the High Court in its impugned judgement, to be stated hereinafter.

3. The material factual details of these two appeals have a prolonged history giving rise to a labyrinth of litigation which emerged as a consequence of displacement of large number of persons from a massive area of agricultural and homestead land which were in occupation of the oustees/displaced persons, due to land acquisition which was done for the purpose of construction of Man Dam on the tributary of Narmada River in the State of Madhya Pradesh. This had given rise to the filing of several other writ petitions in the High Court of Madhya Pradesh in the past which gave rise to the appeals reaching even upto this Court and are reported in (2000) 10 SCC 664, (2005) 4 SCC 32 and (2011) 7 SCC 639 which are commonly referred to as Narmada Bachao Ist judgment, Narmada Bachao IInd judgment and Narmada Bachao IIIrd judgement.

4. But before we discuss the relevance and implications of these judgements on the instant appeals, it would be relevant to relate the historical background of the matter giving rise to a spate of litigations in the High Court of Madhya Pradesh. In

this context, it may be stated that a detailed Project Report (DPR) for the construction of 'Man Dam' on the tributary of Narmada River at Village Jirabad, Tehsil Gandhwani, District Dhar, having a total submergence area of 1168.67 hectares in 17 villages of Tehsil Dhar and Gandhwani, District Dhar, M.P. was submitted in July, 1982. A Rehabilitation and Re-settlement (R & R) was framed by the State of M.P. for the project affected families (PAF) and oustees of Narmada Project including 'Man Dam'. This R & R policy was later on amended several times in which the latest amendment was made in the year 2003. The Planning Commission of India accorded investment clearance for the 'Man Project' out of total submergence area of 1168.67 hectares and 584.646 hectares of private land was acquired by invoking the provision of Land Acquisition, 1894. In the construction of the 'Man Dam' which took place between the year 1991-1994, 1266 families were affected, out of which 448 families lost their land. Out of these 448 families, 62 families opted for land as per the policy and they were given land in the year 1994 itself. The remaining 386 families accepted full cash compensation in terms of Clause 5.1 of R & R policy.

5. However, since the displaced persons were still dissatisfied, the Government of Madhya Pradesh as a welfare measure took a decision in 2002 to grant 'Special Rehabilitation Grant' (SRG) to the families/oustees who had lost their land in submergence in the Narmada Project in order to enable them to purchase land of their own choice to the extent they lost in the submergence on condition that they will not claim any land from the Government. The benefit of SRG was also extended to the families/oustees who had lost their land in submergence in the 'Man Project'. Out of the 386 families who had accepted full cash compensation in terms of Clause 5.1 of R & R policy, 337 oustees/PAF came forward and accepted the SRG. The intention behind the approval of SRG was that every oustees' level of living should not be lower than what it was before displacement, even if they cannot be made better

off. The oustees who had been provided land for land by the Government were not eligible for Special Rehabiliation Grant.

6. However, while implementing the R & R Policy and distributing the SRG, disputes arose between the displaced persons and the executing authorities of the State of M.P. In order to resolve the same, the Government of Madhya Pradesh constituted a Committee known as Grievance Redressal Authority. Subsequently, the Government of Madhya Pradesh issued a notification dated 11.06.2002 extending the jurisdiction of the Grievances Redressal Authority (GRA) to hear the grievances of the displaced families of the Man Dam Project who started hearing the grievances of the displaced families from July, 2002 with regard to their rehabilitation and resettlement and continued to pass orders on the grievances of the displaced families of Man Dam Project till 2003.

7. Aggrieved by some of the orders passed by the GRA as well as the inadequate measures adopted by the Government of Madhya Pradesh for rehabilitation and resettlement of displaced families of the 'Man Dam Project', the respondents 1 and 2 who are tribals living in villages Khedi-Balwadi and Khanpura of District Dhar alongwith Respondent No. 3 who is stated to be a social activist working with the people of displaced families of Man Dam Project which have been submerged by the Man Dam Project, filed a writ petition in 2004 under Article 226 of the Constitution as a PIL claiming appropriate reliefs. Response of the State of Madhya Pradesh was duly filed on 21.6.2004 in the writ petition No. 48/2004 and in paragraph B it was specifically stated that 62 project affected families who demanded land for land has been given land and all the orders of GRA have been complied with and thus substantial compliance of R & R Policy was also made. On 17.2.2005, the State of Madhya Pradesh filed further reply to the rejoinder of the petitioner – Bheru Singh in W.P.No.48/2004 and in paragraph B it was specifically stated that 62 project affected families who demanded land for land has been

given land and with the help of SRG, the oustees have even purchased more land comparatively to the lost land in the submergence and have even saved the money.

8. Still further on 19.3.2009, the State of Madhya Pradesh filed its reply in the writ petition No.48/2004 submitting the status with regard to the rehabilitation of 448 families who had lost their land in submergence. In the affidavit, the State of Madhya Pradesh submitted that out of 448 families, 386 families accepted the full cash compensation as per R & R Policy and remaining 62 who demanded land, have been allotted land in the year 1994 itself. Out of these 386 families, 337 families accepted SRG and out of remaining of 49 families 26 families approached GRA for allotment of land but their claim was rejected as they have already accepted full cash compensation. Thereafter, on 1.5.2009, the State of Madhya Pradesh filed further affidavit in the writ petition No. 48/2004 wherein it was clarified that the cash compensation was given to the land holders in 1995 with the direction to the bank to initially disburse only 50 per cent of the amount , with the balance 50 per cent being payable only after obtaining an order in that behalf from the concerned Land Acquisition Officer.

9. The Hon'ble High Court vide its impugned order dated 11.8.2009 passed in W.P.No.48/2004 was pleased to hold that there was substantial compliance of R & R Policy but by relying on a previous judgment and order dated 21.2.2008 passed by the High Court of M.P. in W.P.No.4457/2007 (Narmada Bachao Andolan vs. State of Madhya Pradesh) directed the State to allot land to the adult son irrespective of the fact whether he had lost the land or not. It has been stated herein by the State of Madhya Pradesh that subsequently the three Judge Bench of the Supreme Court by its judgment and order dated 11.5.2011 passed in Civil Appeal No. 2082/2011 reported in (2011) 7 SCC 639 set aside the judgment and order dated 21.2.2008 passed in W.P.No.4457/2007 and held

that the adult sons are not entitled for allotment of land as per the R & R Policy. However, the High Court vide its impugned judgment had already disposed of the writ petition with the following directions:

"(i) We hold that there has been substantial compliance of paragraphs 3.2(a) and 3.2 (b) of the Rehabilitation Policy which provides for allotment of agricultural land, government or private, to the displaced families and there is no violation of fundamental right to livelihood guaranteed under Article 21 of the Constitution and, therefore, no direction need be given by this court in this regard;

(ii) We hold that SRG amount together with compensation paid to the displaced families computed on the basis of average sale price per acre prevalent in the year 1997-98 was sufficient to enable the displaced families to purchase as much land was acquired from them under the Land Acquisition Act, 1894 and no decision can be given by the Court to the Respondents/State to pay SRG amount on the basis of average sale price of the year 2001-02, this being a policy matter;

(iii) We direct that every son who had become a major on or before the date of notification under Section 4 of Land Acquisition Act, but who was part of larger family from whom land has been acquired will be treated as a separate displaced family and would be allotted agricultural land as per paragraphs 3 and 5 of the Rehabilitation Policy for the Man Project and in case he does not opt for land in accordance with paragraph 5 of Rehabilitation Policy, will be paid SRG in addition to compensation under Land Acquisition Act, in accordance with notification dated 7.3.2002 of Government of Madhya Pradesh, Narmada Valley Development Authority, by the Respondents within four months from today;

(iv) We hold that the definition of 'displaced family' in

paragraph 1(b) of the Rehabilitation Policy does not discriminate against women and is not violative of Articles 14 and 21 of the Constitution, but women who are included in the definition of "displaced persons" will be given those benefits under the Rehabilitation Policy by the Respondents which are to be given to "displaced persons;

(v) We hold that respondents were not entitled to deduct the amount of compensation payable for trees and wells located on the land of oustees as determined under the award passed under the Land Acquisition Act, 1894 from the SRG amount paid to the oustees and we direct the respondents to refund such compensation amount to the oustees with interest @ 9 per cent per annum calculated from the date on which the amount was deducted till the date on which the amount was deducted till the date on which refund in made to them."

10. The State of Madhya Pradesh which was respondent in the writ petition before the High Court feeling aggrieved by the decision of the High Court have filed this appeal arising out of the SLP No. 30685/2009 under Article 136 of the Constitution challenging directions Nos. (iii) and (v) issued by the High Court.

11. The respondents/displaced persons on the other hand are also aggrieved of the directions of the High Court given out at para Nos. (ii) and (iv) and have therefore separately filed Special Leave Petition bearing SLP (C) No.10163/2010, wherein they have essentially challenged the directions of the High Court by which it has declined to grant the relief to the petitioners seeking a direction for each displaced family. But specifically, the directions of the High Court in paragraph No. 37 (i) (ii) and (iv) of the impugned order and also partially the portion of direction No. 37 (iii) which directs payment of SRG in lieu of land entitlements in paragraphs (iii) and (v) of R and R Policy to adult sons of cultivators as well as failure of the High Court to pass directions with regard to relief at clause

9 of the writ petition is under challenge at the instance of the petitioner Bheru Singh and others against the aforesaid directions.

12. The State of Madhya Pradesh in this appeal has primarily raised substantial questions of law as to whether the Hon'ble High Court has erred in law in holding that every son who had become major on or before the date of notification under Section 4 of the Land Acquisition Act is entitled for separate allotment of land in spite of the fact that the issue regarding the allotment of land to adult/major son was pending consideration before the Supreme Court wherein the Supreme Court by its interim order directed that the applications pertaining to allotment of land to major son of oustees will not be disposed of or decided by GRA till issue is decided by the Hon'ble Supreme Court.

13. The question has further been raised as to whether the High Court has erred in holding whether the major son is a 'displaced family' or a 'displaced person' contrary to the R & R Policy if he had not been cultivating land for at least one year before the date of publication of notification under Section 4 of the Land Acquisition Act specially if he had not been cultivating the land in the capacity of the land owner in absence of which he would merely be a labourer.

14. Further question which has been raised at the instance of State of Madhya Pradesh is whether the High Court has erred in directing the petitioner to refund compensation payable for trees and wells located on the land of the outstees with interest at the rate of 9 per cent without appreciating the basic genesis of the provisions of SRG. Still further, the question which has been raised by the State of Madhya Pradesh is whether the High Court has erred in directing the appellant State of Madhya Pradesh to allot separate land to the major sons of the oustees of the Man Dam in spite of the fact that the appellant-State has substantially complied with the provisions of the rehabilitation policy and there is no violation

of right of livelihood under Article 21 of the Constitution of India and the objective of the Rehabilitation Policy has already been achieved.

15. Learned senior counsel Shri P.S. Patwalia, representing the State of Madhya Pradesh, while assailing the impugned directions of the High Court has first of all raised some preliminary issues. At the outset, it was stated that a three Judge Bench of this Court vide its judgment dated 11.5.2011 passed in Civil Appeal No.2082/2011 reported in (2011) 7 SCC 639 had set aside the judgment and order dated 21.2.2008 passed by the High Court of Madhya Pradesh in Writ Petition No.4457/2007 and it was pleased to hold that the adult sons are entitled for allotment of land as per the R & R Policy.

16. As already stated earlier, the State of Madhya Pradesh had constituted a Grievance Redressal Authority ('GRA' for short) by order dated 11.6.2002 to hear the grievances of the oustees of Man Project also and in the year 2003-2004, the construction of the Man Dam was complete. Thereafter, 337 families out of 386 families had accepted SRG and out of the remaining 49 families, 26 families approached GRA for the allotment of land but their claim was rejected as they had already accepted the full cash compensation. This prompted the oustees in the year 2007 to file a writ petition bearing No.4457/2007 in the High Court of Madhya Pradesh which gave rise to Civil Appeal No. 2082/2011 which was heard and decided by a three Judge Bench vide its judgment and order dated 11.5.2011 reported in (2011) 7 SCC 639. As a consequence thereof, the three Judge Bench of this Court set aside the judgment and order dated 21.2.2008 passed in Writ Petition No. 4457/2007 and was pleased to hold that the adult sons are not entitled for allotment of separate holding of land as per the R & R Policy.

17. It appears that the controversy did not set at rest even after this judgment as writ petition No. 48/2004 was filed by the respondent-Bheru Singh and others by way of a public

interest litigation and the said writ petition was disposed of by judgment and order dated 11.8.2009 which is under challenge herein issuing certain directions quoted hereinbefore. As already stated, the State of Madhya Pradesh is aggrieved by some of the directions recorded hereinbefore and the oustees-Bheru Singh and others also are aggrieved in view of some other directions quoted hereinbefore. As such they have also filed an appeal arising out of SLP(C) No. 10163 of 2010. But this contention of the Respondent-Bheru Singh and Ors. who are Petitioners/Appellants in their appeal are common which shall be recorded and dealt with later at the appropriate stage.

18. However, while dealing with the submissions and contentions of learned counsel for the Appellant-State of M.P., it is necessary to record the submissions of the counsel for the appellant, State of M.P. who, while assailing the impugned directions of the High Court, first of all submitted that vague pleadings have been incorporated in the writ petition including multiple cause of action. It was submitted that a reading of the case of the respondent-Bheru Singh who was petitioner in the High Court would show that the petitioner challenged 426 different orders passed by the GRA without any factual basis. No factual details have been laid down in the petition either by giving facts relating to each of those cases or the circumstance under which the orders were passed. Commenting upon the contents of the writ petition, it was pointed out that the petition is claimed to have been filed on behalf of several thousand persons but there is no proper affidavit supporting the petition of any individual on whose behalf it is purported to have been filed. The petition contains a vague allegation of non-compliance of R & R Policy which is actually a roving enquiry. It was submitted at this stage that this PIL was liable to be rejected by the High Court at the very threshold for want of proper pleadings and material to substantiate the averments/allegations contained therein.

19. However, the learned Judges of the High Court took

notice of the fact that the Court had to strike a balance between the interest of the parties in a PIL and had to take into consideration the pitiable conditions of oustees, their poverty, inarticulateness, illiteracy, extent of backwardness and unawareness also. However, the High Court should have taken note of the observation wherein it was observed that in future it was desirable that the Court must view presentation of any matter by the NBA with caution and care insisting on proper pleadings, disclosure of full facts truly and fairly and should insist for an affidavit of some responsible person in support of facts contained therein. It was submitted that in view of this observation, the petition was fit to be dismissed as the same lacked material particulars being completely vague which was not supported by a proper affidavit and was, therefore, liable to be rejected at the threshold.

20. Learned counsel then raised the question of delay and laches on the part of the petitioner-Bheru Singh who is respondent in the main appeal as it was stated that the writ petition was filed by the respondent-Bheru Singh at a time when the Man Dam had already been completely constructed. It was thus an effort to upset a settled state of affairs at such a belated stage which has an upsetting effect on settled society. Such a belated petition was, therefore, liable to be rejected on the ground of laches and delay specially when this issue has already been dealt with by the IIIrd Narmada judgment which is reported in (2011) 7 SCC 639.

21. In so far as the contentions of the counsel for the State of Madhya Pradesh in regard to the main directions are concerned, it is the case of the State of M.P. that the R & R Policy prescribes a comprehensive scheme as to who is entitled for land and simultaneously how the cost of land to be allotted is recoverable by the State. Clause 3.2(a) specifically envisages that it is only a displaced family from whom more than 25% of its land have been acquired who is entitled for land. This loss of land is the pre-requisite to create entitlement.

The scheme then continues under Clause 5.1 which envisages that the cost of acquired land is to be made out of the compensation payable for the land which one has lost. Thus, if a person does not lose any land then he is not entitled to any compensation and would not be able to pay for the land for which he is not covered by the R & R Policy. However, this does not mean that an adult son who is treated as a separate family is not entitled to any benefit in the policy. He still gets a number of benefits for which a family is entitled under Clause 6.1, 7.1 and 8.1 of the R & R Policy.

22. Elaborating on the question involved, it was next submitted that under Section 4 of the Land Acquisition Act 1894 the adult son who has become major on or before the date of notification under Section 4 of the Land Acquisition Act is considered to be a separate family and clause 3 of the R & R also provides for allotment of land in lieu of land. Clause 3.2(a) provides for every displaced family including major son from whom more than 25% of its land holding is acquired in revenue villages or forest villages shall be entitled to and as far as possible the land to the extent of the land acquired from it. This loss of land is essential before one can become entitled to land for land from the State Government. Reiterating the submission, it was submitted that as per Clause 3.2(a) of the R & R Policy, adult son will be entitled for land as far as possible only if some land belonging to him as on date of the Section 4 notification under Land Acquisition Act, 1894 was actually acquired from him and clause 5 of the R & R Policy provides for recovery of the cost of allotted land.

23. Learned counsel appearing the appellant-State of Madhya Pradesh further invited the attention of this Court to certain important features of the R & R Policy in order to impress upon this Court that the oustees have been duly compensated for the acquired land with beneficial schemes incorporated therein. It was stated that clause 5.1 of the R & R Policy provides that 50 of the compensation for the acquired

land was permitted to be retained as initial instalment towards payment of the cost of the land to be allotted to the oustees. Clauses 5.2 and 5.3 further provided that the balance cost of the allotted land will be treated as interest free land to be recovered within 20 equal yearly instalments and clause 5.1 provided that if the displaced family did not wish to obtain land in lieu of land and claim full payment of the compensation, they could do so but with a rider that this option once exercised, the displaced families could not lay any claim for land afterwards. It was, therefore, submitted by the learned counsel that if impugned direction of he High Court in the judgment and order under challenge dated 11.8.2009 directing to allot land to each and every major son irrespective of the fact whether any land was acquired from them or not, would make the clauses 5.1, 5.2 and 5.3 of R & R Policy as inoperative. It was contended that if no land was acquired from the adult son as a separate land holder then how would the cost of the land be recovered from them.

24. Learned counsel for the State of Madhya Pradesh in order to reinforce his submission on the aforesaid aspects first of all placed reliance on the judgment and order reported in (2000)10 SCC 664 commonly referred to as first Narmada judgment wherein this Court (Supreme Court) has held that the rehabilitation and resettlement packages in the three states were different due to geographical and economic conditions and availability of the land. The States have liberalised their policies and decided to allot land to adult son and daughter over and above the NWDT Award. Heavy reliance has been placed by the counsel on the judgment of this Court reported in (2011) 7 SCC 639 referred to as IIIrd Narmada judgment wherein this Court has examined the R & R Policy of the State of Madhya Pradesh and inter alia has held that the issue has to be decided by strict adherence to the amended R & R Policy in view of which all adult sons of a displaced family is not entitled for allotment of separate unit of land as it would lead to absurd results and unjust enrichment at the expense of the State

exchequer. The relevant paragraph specifically states as follows:

> "96. The rehabilitation has to be done to the extent of the displacement. The rehabilitation is compensatory in nature with a view to ensure that the oustee and his family are at least restored to the status that was existing on the date of the commencement of the proceedings under the 1894 Act. There was no intention on behalf of the State to have awarded more land treating a major son to be a separate unit. This would otherwise bring about an anomaly, as is evident from the chart that has been gainfully reproduced hereinabove. The idea of rehabilitation was, therefore, not to distribute largesse of the State that may reflect distribution totally disproportionate to the extent of the land acquired. The State has, therefore, rightly resisted this demand of the writ petitioners and, in our opinion, for the High Court to presuppose or assume a separate unit for each major son far above the land acquired, was neither justified nor legally sustainable."

25. It was submitted that the Supreme Court while further examining and scrutinizing the clauses 3.2, 5.1 and other provisions of the R & R Policy of the State of M.P. as also that allotment of land to adult son from whom no land is acquired, will amount to unjust enrichment which is against the law.

26. In order to add further weight to the submission, it was submitted that in fact the IIIrd Narmada judgment (2011) 7 SCC 639 has examined the issues in detail after which it was concluded that if the interpretation is sought to be given by the Narmada Bachao Andolan and the same is accepted, it would lead to absurd results, for instance, if a family of three joint khatedars have 3-4 sons losing only 2 hectares of land and each major son would claim 2 hectares separately, then the family would end up getting 26 hectares of land. It was contended that this was never the intention of the R & R Policy and the conclusion drawn by three Judge Bench

cannot be overlooked. Thus the entire emphasis of the appellant-State of M.P. is on the three Judge Bench of (2011) 7 SC 639 as also other judgments reported in (2000) 10 SCC 664, (2005) 4 SCC 32 which has incorporated the NWDT Award. But it was also submitted that the 2005 judgment interpreting the NWDT Award which has no application to the R & R Policy of the State of M.P. in regard to the displaced persons of the Man Dam Project.

27. Learned counsel submitted that in the first place there is, in fact, no discordant note between the IInd Narmada judgment reported in (2005) 4 SCC 32 and IIIrd Narmada judgment reported in (2011) 7 SCC 639. In fact, it was contended that the IInd Narmada judgment interpreting NWDT Award relates to an inter state project rather than R & R Policy of the State of M.P. while the issue before the IIIrd Narmada judgment was interpretation of the State Policy i.e. R & R Policy which was not an issue for consideration by the Hon'ble Judges delivering the IInd and IIIrd Narmada judgment reported in (2000) 10 SCC 664 and (2005) 4 SCC 32. According to the learned counsel , the IInd Narmada judgment contained an inadvertent error as it refers only to a particular paragraph (para 176) of the Ist Narmada judgment reported in (2000) 10 SCC 664 without considering the importance of other paragraphs at paragraphs 152 and 156. In paragraph 152, it was categorically noted by the Ist Narmada judgment that all states except Madhya Pradesh in that case were ready to give land to major sons and on this account the Court observed whether this inadvertent error should be allowed to perpetuate if the policy states otherwise.

28. Placing reliance on the IIIrd Narmada judgment reported in (2011) 7 SCC 639 holding therein that under the R & R Policy there is no entitlement of land for land for major son, it was submitted that this finding recorded by three Hon'ble Judges Bench after noticing and interpreting the earlier judgments i.e. (2000) 10 SCC 664, (2005) 4 SCC 32

would be binding on the present Bench comprising of two Hon'ble Judges and hence the views expressed therein should hold the field in this appeal/matter also filed by the State of M.P. It was contended that a fresh interpretation of the R & R Policy to the extent of giving land to major son would result in a total arbitrary implementation of the policy has not been approved by the Bench of three Judges vide (2011) 7 SCC 639 and in case this Court found that there were divergence of views in the judgment referred to hereinbefore and relied upon by the State of M.P., the matter may be referred to a larger bench. If this Hon'ble Court comes to the conclusion that there are divergent views of co-strength bench on the issue of the allotment of land to adult son in (2000) 10 SCC 664 Ist Narmada Judgment and (2005) 4 SCC 32- IInd Narmada judgment and (2011) 7 SCC 639-IIIrd Narmada judgment.

29. In so far as the impugned direction of the High Court concluding that value of trees and wells could not have been deducted from the amount payable as SRG, it was submitted that compensation under the Land Acquisition Act is to be determined as per Section 23 of the said Act and apart from the market rate, value of the land, the damage sustained by taking standing crops or trees is part of compensation as also the damage sustained by person interested on account of loss of land. Thus loss of trees and wells is part of compensation plaid under the Land Acquisition Act and the formula for calculating SRG is given in two Government orders dated 31.2.2002 which is a general order and dated 7.3.2002 which is a specific order for the Man Dam Project. It was submitted that once compensation payable under the Land Acquisition Act is to be deducted then the same would include the complete compensation paid for the land, trees, wells, solatium, interest etc. and, therefore, it was submitted that the finding of the High Court on this issue is liable to be reversed. Reliance was also placed on the ratio of the decision reported in (1995) Supp. 2 SCC 637 *State of Haryana vs. Gurcharan Singh and Anr*. wherein this Court had held that it is well settled

law that the Collector or the Court who determined the compensation for the land as well as fruit bearing trees cannot determine them separately as the compensation is in regard to the value of the acquired land.

30. Shri Prashant Bhushan, learned counsel representing respondent –Bheuru Singh & Ors. - who was the petitioner in the High Court and are also appellant in the connected appeal, refuted the contentions of the counsel for the State of M.P. and first of all referred to the relevant provisions of R & R Policy relating to displaced family. He has, therefore, extracted the relevant provisions in this regard for ready reference which is as follows:-

> **"1.1 (b) Displaced Family—**(i) A family composed of displaced persons as defined above shall include husband, wife and minor children and other persons dependent on the head of the family, eg. Widowed mother, widowed sister, unmarried daughter or old father.
>
> (ii) Every son/un-married daughter who has become major on or before the date of Notification under section 4 of the Land Acquisition Act, will be treated as a separate family."
>
> 3.2 (a) Every displaced family from whom more than 25 percent of its land is acquired in revenue villages or forest villages shall be entitled to the extent of land acquired from it, and shall be allotted such land, subject to provision in 3.2 below.
>
> (b) A minimum area of 2 ha. of land would be allotted to all the families whose lands would be acquired irrespective of whether government land is offered or private land is purchased for allotment. Where more than 2 ha. of land is acquired from a family, it will be allotted equal and, subject to a ceiling of 8 ha.
>
> (c) The government will assist displaced families in

> providing irrigation by well/tube-well or any other method on the land allotted, provided such land is not already irrigated…"

31. Relying on the aforesaid provision it was contended that under the R & R Policy every joint land holder is treated as a displaced family and is entitled to a minimum of 2 hectares of land. So if there are three joint land holders in a joint land holding they will each be entitled to a minimum of 2 hectares of land. While explaining this, it was stated that if the name of the adult son had been recorded on the title as a joint land holder, he would have been entitled to 2 hectares of land as a land holder had the acquired land been partitioned prior to acquisition, the adult son whose family land held in the name of the head of the family is being acquired and who undisputedly has rights on the land had he been recorded as joint title holder, he would have been entitled to a minimum of 2 hectares of land each. It was, therefore, submitted that it would be discriminatory to deny the opportunity to obtain a viable livelihood after displacement to the adult sons who have rights on these lands simply because there was no partition due to customary practices. It was sought to be explained that this is the tribal area where culturally lands are not partitioned till the death of the head of the family. Thus many of the adults sons are themselves very old. It was submitted that in fact para 2.1 of the R & R Policy expressly required that all relevant land records would be brought up to date expeditiously for ensuring adequate compensation and allotment of land to displaced persons. However, the same was never done. It was contended that if the land records had been updated, the adult sons would have been included in the land records as joint holders and would have been entitled to a minimum of 2 hectares of land in their own right. The State Government in order to conclude the matter formulated the provision that every adult son will be treated as a separate family.

32. It was still further submitted that the vision of the R &

R Policy that every family dependent on land facing force displacement, which has to severe its link with family lands hitherto relied on, must be provided a viable land based livelihood on a minimum viable land holding 2 hectares of land which would be entirely in consonance with the socialist vision of the Constitution and the Fundamental Rights and Directive Principles of State Policy. The minimum entitlement of 2 hectares of land is also in consonance with the vision of the planning process indicating national development which requires both the victims and the beneficiaries of such product to become better off from the project and project resources. It was submitted that this Court has also emphatically taken the view that the oustees on development projects must be made better off after their displacement at project cost and as per the R & R Policy framed by the Government under Article 21 of the Constitution. It was also submitted that the R & R Policy of the Government of Madhya Pradesh requires the allotment of land even to encroachers. The State of M.P. also has programme for the allotment of land to landless SC and ST families. Thus the well considered provisions of the R & R Policy which require the allotment of a minimum of 2 hectares of land to the adult sons of cultivators whose family land is being acquired as separate families is a valuable part of the social-economic programme part designed to meet goals of the Constitution.

33. In reply to the submission of the learned counsel for the appellant-State of M.P., Mr. Bhushan submitted that the provisions for the treatment of adult sons as a separate family for the allotment of a minimum of 2 hectares of land is the same under the NWDT Award and the R & R Policy of the State. Learned counsel has placed reliance on the IInd Narmada judgment of High Court for the definition of 'adult son' as separate family and allotment of land reported in (2005) 4 SCC 32. It was submitted that as per the definition of oustee, an oustee means any person who at least one year prior to the publication of the notification under Section 4 of the Act has

been ordinarily residing or cultivating land or carrying on any trade, occupation or calling or working for gain in the area likely to be submerged permanently or temporarily and the definition of family includes husband, wife and minor children and other persons dependent on the head of the family, for example, widowed mother.

34. Learned counsel for the respondent/appellant in the connected appeal also submitted that in fact the R & R Policy was formulated by adopting the provisions of the NWDT Award which may be seen from the minutes of the meeting dated 9.6.1987 of the Committee of Secretaries which formulated the R & R Policy. The High Court in the impugned judgment has also held that the State Government adopted similar definition of displaced family in the R & R Policy as is present in the NWDT Award. It was, therefore, submitted that the provisions of the NWDT Award and the R & R Policy are in *pari materia* on the basis of which it has been contended that the view taken by the learned Judges in the IInd Narmada judgment reported in (2005) 4 SCC 32, adult sons of cultivators are entitled to a minimum of 2 hectares of land as separate families wherein the specific question was considered as to whether adult sons of cultivators are entitled to a minimum of 2 hectares of land as per the NWDT Award. Learned counsel specifically referred to the question which was considered in (2005) 4 SCC 32 judgment which is quoted as follows:-

> "Whether adult sons are entitled to a minimum of 2 hectares of land as per NWDT Award and judgment of this Court?"

35. Learned counsel placed reliance on certain portions of the judgment which was follows:-

> "59. The definition of family indisputably includes major sons. A plain reading of the said definition clearly shows that even where a major son of the land-holder did not possess land separately, he would be entitled to grant of

a separate holding.

64. One major son comes within the purview of expansive definition of family, it would be idle to contend that the scheme of giving 'land for land' would be applicable to only those major sons who were landholders in their own rights if a person was a landholder, he in his own right would be entitled to the benefit of rehabilitation scheme and, thus, for the said purpose, an expansive definition of family was not necessarily to be rendered. Furthermore, if such a meaning is attributed as has been suggested by Mr. Vaidyanathan, the definition of 'family' to an extent would become obscure. As a major son constitutes 'separate family' within the interpretation clause of 'family' no meaning thereto can be given."

36. Placing reliance on the aforesaid portion of the judgment of this Court, it was submitted that this Hon'ble Court has decisively interpreted the treatment of adult sons as separate family and relying on similar provisions for treatment of adult sons as separate family and for allotment of a minimum of 2 hectares of land in the NWDT Award and the R & R Policy, the High Court vide its impugned judgment has rightly held that the oustees of the Man Dam Project are also entitled to a minimum of 2 hectares of land as per the R & R Policy. It was submitted that the judgment and order dated 15.3.2005 of this Court was accepted and fully implemented by an order of the State Government dated 16.6.2005 by providing benefits to several thousands adults sons which may be seen from the order of the State Government dated 16.6.2005 which states that it is in compliance of judgment and order of this Hon'ble Court dated 15.3.2005 holding that in the case of cultivators losing more than 25% of the land, the adult sons will be entitled to 2 hectares of land and while computing the SRG for adult sons, the previous compensation will be taken to be zero.

37. It was next contended on behalf of the oustees/

Respondents that in this case, the State has relied on the reasonings of the judgment and order of a three Member Bench dated 11.5.2011 reported in (2011) 7 SCC 639 referred to as IIIrd Narmada judgment in order to challenge the finding of the judgment and order dated 11.8.2009 reported in (2005) 4 SCC 32 i.e. IInd Narmada judgment with regard to land allotment to adult sons which is not legally permissible and in case this court finds conflicting judgment the matter may be referred to a Larger Bench.

38. While considering the rival submissions of the counsel for the contesting parties in both the appeals, it is manifestly clear that the principal contentious issue between the State of Madhya Pradesh and the displaced persons/oustees is in regard to the claim of land for each major son of the land holders family as according to the oustees, the definition of displaced family in paragraph 1(b) of the R & R Policy discloses that every son who has become major on or before the date of notification under Section 4 of the Land Acquisition Act, will be treated as a separate family. As already noted, this has given rise to several rounds of litigation in the High Court of Madhya Pradesh due to which three judgments have been delivered by this Court and for facility of reference they have been termed as Narmada Bachao Andolan Ist, Narmada Bacaho Andolan IInd and Narmada Bachao Andolan IIIrd judgments. However, in Narmada Bachoa Andolan I, the question of entitlement of land in favour of each major son of the family was neither considered but Narmada Bachao Andolan II reported in (2005) 4 SCC 32, the question clearly came up for consideration regarding entitlement of land by major sons which according to the learned three Judge Bench indisputably includes major sons in view of the definition of family. A three Judge Bench of this Court in the said matter observed that even on a plain reading of the definition, it clearly shows that even where a major son of the land holder did not possess land separately, he would be entitled to grant of separate holding. It was held that the definition of 'family'

has to be read along with that of ' oustee' and it was noted that 'outsee family' and 'displaced family' have interchangeably been used in the award. It was, therefore, observed that they thus carry the same meaning. This Court also took notice of paragraph 152 of the main judgment i.e. Naramda Bachao Andolan I judgment wherein this Court noticed that every affected family must be allotted land, house, plot and other amenities and this was in terms of the tribunal's award wherein it was held that the sons who had become major on or prior to the issuance of notification of Land Acquisition Act were entitled to be allotted land and since the interpretation clause used an inclusive definition, it would be expansive in nature. It was, therefore, held that as follows:

> "Once major son comes within the purview of the expansive definition of family, it would be idle to contend that the scheme of giving "land for land" would be applicable to only those major sons who were landholders in their own rights. If a person was a landholder, he in his own right would be entitled to the benefit of rehabilitation scheme and, thus, for the said purpose, an expansive definition of family was not necessarily to be rendered. Furthermore, if such a meaning is attributed as has been suggested by Mr. Vaidyanathan, the definition of "family" would to an extent become obscure. As a major son constitutes "separate family" within the interpretation clause of "family", no meaning thereto can be given.....The court further observed that the award provided that every displaced family whose 25% or more agricultural land holding hs been acquired , shall be entitled to be allotted irrigable land to the extent of land acquired subject to prescribed ceiling of the State with a minimum of 2 hectares of land."

39. Thus in view of this judgment the respondent oustees could have approached the Grievance Redressal Authority (GRA) for allotment of land in terms of the judgment if they felt that the GRA was not examining the grievance in the light of

the law laid down by this Court in the IInd Narmada Judgment (2005) 4 SCC 32. However, the oustees respondents Bheru Singh and others instead of approaching the G.R.A. approached the High court by way of a writ petition No. 48/2004 in which judgment was delivered by the Division Bench on 11.8.2009 out of which these appeals arise and in this judgment the learned Judges followed the judgment and order of the IInd Narmada Bachao Andolan referred to hereinabove as the subsequent IIIrd judgment of 2011 (Supra) had not been delivered by that time. Hence the High Court was pleased to hold vide the impugned judgment that although there has been substantial compliance of R & R Policy which provides for allotment of agricultural land government or private to the displaced family and there is no violation of fundamental right to livelihood guaranteed under Article 21 of the Constitution, it was further pleased to direct that every son who had become major on or before the date of notification under Section 4 of the Land Acquisition Act but who was part of their family from whom land had been acquired will be treated as a separate displaced family and would be allotted agricultural land in accordance with paragraph 3 and 5 of the R & R Policy for the Man Dam Project and in case he does not opt land for land in accordance with paragraph 5 of the R & R Policy, he will be paid Special Rehabilitation Grant (SRG) in addition to the compensation under the Land Acquisition Act in accordance with the order dated 7.3.2002 of the Government of Madhya Pradesh Narmada Valley Development Authority by the respondents within four months from that date.

40. As already stated, the State of Madhya Pradesh and the oustee respondents Nos. 1 & 2 along with social activist respondent No.3 filed separate special leave petition in this Court on 9.11.2009 and 1.2.2010. But it appears that in the meantime, another appeal had been entertained by this Court bearing Civil Appeal Nos. 2115-2116/2011 arising out of an interim order passed by the High Court of Madhya Pradesh in writ petition No.4457/2007 entitled *Narmada Bachao Andolan*

vs. State of Madhya Pradesh wherein the High Court as an interim measure had issued direction *inter alia* for allotment of agricultural land to the displaced persons in lieu of the land acquired for the construction of the dam in terms of the Rehabilitation and Resettlement Policy as amended on 3.7.2003. The High Court direction applied even to those oustees who had already withdrawn the compensation if such oustees opted for such land and refund 50% of the compensation amount received by them. The balance cost of the allotted land was to be deposited by the allottee in 20 equal yearly instalments as per clause 5.3 of the R & R Policy and it further directed to treat a major son of the family whose land had been acquired as a separate family for the purpose of allotment of agricultural land. During the pendency of the appeals of the State of Madhya Pradesh and the respondents, the judgment and order was delivered by a Bench of three Judges of this Court wherein the question of entitlement of each major son of a displaced family was taken into consideration and it was observed therein that the rehabilitation has to be done to the extent of the displacement. It was further held that rehabilitation was compensatory in nature with a view to ensure that the oustee and his family are at least restored to the status that was existing on the date of commencement of the proceedings under the Land Acquisition Act, 1894. There was no intention on behalf of the State to have awarded more land treating a major son to be a separate unit. It was further observed that the idea of rehabilitation was not to distribute largesse of the State that may reflect distribution of total disproportionate to the extent of land acquired and therefore, the State had rightly registered this demand of the oustee- writ petitioners directing a separate unit for each major son for the above land acquired, was neither justified nor legally permissible. It was, therefore, held that in effect the major son would not be entitled to anything additional as his separate share in the original holding and it will not get enhanced by the fiction definition as stated in the impugned judgment. The major sons, however, would

be entitled to his share in the area which is to be allotted to the tenure holder on rehabilitation in case he is entitled to such share in the land applicable to the particular State.

41. On perusal of the ratio of the two decisions of this Court referred to hereinabove viz. 2005 (4) SCC 32 and (2011) 7 SCC 639, they undoubtedly appear to be in conflict with each other in regard to the claim of share by each major son of the family of land holder whose land has been acquired. This Court, therefore, is clearly confronted with two conflicting views on the claim of entitlement of a major son for a separate share in the land holders family and in view of this it would have been a fit case for reference of this matter before a Constitution Bench of 5 Judges for determination of the question as to whether all major sons of a displaced family would be entitled to 2 hectares of land in view of the R & R Policy of the State of M.P.

42. But on a careful consideration of the matter, it is manifestly clear that the dispute between the State of M.P. and the displaced family on the question of entitlement of a major son do not arise out of a statute like the Land Acquisition Act, 1894 or the Hindu Succession Act or Land Ceiling Act or any other similar Act in order to treat the issue as the purely a legal controversy giving rise to a conflicting situation regarding the entitlement of land to a major son of a family which would give rise for determination of the question as to whether all major sons of the land holders family who might be constituting joint family would be entitled to 2 hectares of land separately or only through the main land holder of a displaced family in order to be entitled to 2 hectares of land arising out of a Policy decision. This marathon exercise that have been done giving rise to repeated rounds of litigation for determination of the question as to whether major sons would be included in the definition of the displaced family or not in our view is not really a legal issue emerging from any statutory provision which needs to be addressed since the entire issue is merely a question which

arises out of a policy decision of the Government of M.P. and at the most would be confined to interpretation of the R & R Policy formulated by the State of M.P. We, therefore, refrain from referring this question of entitlement of major son to a separate holding to a larger Bench as it needs to be highlighted that this controversy arises out of Policy decision and has clearly not emerged from any ambiguity in the Land Acquisition Act or any statute or an Act having a bearing in future on other similar controversy so as to refer it to a Constitution Bench of this Court.

43. Thus, when the claim or entitlement of land is based exclusively on a Policy decision of the Government of M.P. which have been incorporated in the R & R Policy, the entitlement clearly would be based strictly on the Policy decision formulated by the Government of M.P. which clearly lays down as follows:

> *"24(IV(7) Allotment of agricultural lands.*—Every displaced family from whom more than 25% of its land holding is acquired shall be entitled to and be allotted irrigable land to the extent of land acquired from it subject to the prescribed ceiling in the State concerned and a minimum of 2 hectares (5 acres) per family……."

44. This policy holds a displaced family entitled to 2 hectares of land but it further envisages actual displacement from the acquired land which is 25% meaning thereby that only such displaced family from whom more than 25% of its land holding has been acquired would be entitled for compensation of 2 hectares of land from whom land has been acquired and this displacement from land would not merely be notional. The R & R policy unequivocally lays down its entire emphasis on acquisition of land from a displaced family and that displacement also has to be 25% of the land acquired from the family by the Government. Thus even if the displaced family had several major sons, allotment on account of acquisition to each major son do not arise in terms of the policy. Even at the

risk of repetition it needs to be highlighted that when there has been no acquisition from each major son of the family, the question of allotment of land to all major sons of the family would be clearly contrary to the provision of the R & R Policy. The entire right of the respondent/oustee in this litigation flows from the R & R Policy of the State of M.P. and it is crystal clear that the redeeming feature of the policy is acquisition of 25% land of the displaced family. Therefore, even if the displaced family constituted of several major sons, the acquisition of 25% of land from each major son is completely missing, and, therefore, we do not see any reason as to why we should allow the parties to be bogged down into further litigation for determination of the question as to whether all major sons of a displaced family are entitled to a separate unit of 2 hectares of land or only the land holder of the displaced family would be entitled. Hence, the direction of the High Court of Madhya Pradesh vide its impugned judgment for allotment of land to each major son of the displaced family needs to be overturned.

45. There is yet another reason for us for disapproving the direction of the High Court as the High Court, in our view, was not justified in entertaining a writ petition by way of public interest litigation when the High Court of Madhya Pradesh had already dealt with the question against which the appeal also travelled upto this Court and was seized of other writ petitions on the question. In regard to the above question, we take note of a decision of this Court in *Joydeep Mukharjee vs. State of West Bengal & Ors.,* reported in (2011) 2 SCC 706 wherein this Court had been pleased to hold that the jurisdiction even of the Supreme Court:

> "in a public interest litigation cannot be pressed into service where matters have already been completely and effectively adjudicated upon not only in individual petitions but even in writ petitions raising the larger question as was raised in the earlier writ petition."

The learned Judges have been pleased to hold that:

principles of finality and fairness demand that there should be an end to litigation and it is in public interest that issues settled by judgment of the court which have attained finality should not be permitted to be re-agitated all over again.

46. Taking note of the aforesaid observation fraught with wisdom, we are of the view that the High Court was not correct in entertaining a writ petition all over again by way of a Public Interest Litigation when the question of implementation of R & R Policy had been considered and decided by the High Court of Madhya Pradesh earlier giving rise to appeals up to this Court. Besides this, the High Court in the impugned judgment itself has laid down that there had been substantial compliance of the R & R Policy of the Government of M.P. and yet it was pleased to direct the respondent-State/appellant herein to consider the question of allotment of 2 hectares of land to each major son of a displaced family overlooking the fact that if each major son of the displaced family had not been separately deprived of 25% of the acquired land, then even as per the Policy, they were not entitled to 2 hectares of land. In that view of the matter also the direction of the High Court travels beyond the scope of R & R Policy. The High Court in any view had no reason to expand the scope of R & R Policy by directing the State of M.P. to allot land to each of the displaced family.

47. However, we are conscious of the fact that in the process of allotment, it is quite possible that some of the oustees might have been deprived of the land who were separately holding the acquired land. But in order to ensure effective implementation, there is already a Grievance Redressal Authority (GRA) and if the oustees have any grievance in regard to non-implementation of the R & R Policy in so far as their entitlement as per the policy is concerned, they would be free to move the GRA for redressal of their grievance. But a blanket direction as given out by the High Court to allot land to each major son of a displaced family

without any averment to the effect that they were deprived of 25% of acquired land separately, the plea that the State of M.P. should consider their grievance and allot them land appears to be contrary to the R & R Policy**.** Acquisition of 25% of land is a condition precedent to become eligible for allotment of 2 hectares of land. We, therefore, feel the need to clarify that we have not entered into the area of determination of the question as to whether major son of a family is entitled to a separate unit or not as in our view even if we were to follows (2005) 4 SCC 32 and were to hold that each major son of a displaced family is entitled to a separate unit of compensatory land, deprivation of 25% of land from them is totally missing and if that is so, we fail to understand as to how we can allow the respondents to reopen this question after four years of revision of R & R Policy. Learned counsel for the respondent Bheru Singh, no doubt, had submitted that this Court had to take into consideration the indigent status of the affected parties. But when a social activist takes up the cause for the oustees, it is expected of them to take a balanced view of the cause raised on behalf of the affected party in the light of the policy which is formulated and made effective by the State authorities. We undoubtedly also appreciate the laudable effort made by the social activist taking up the cause for the rehabilitation of the oustees but in the process we are under constraint as we cannot overlook the practical fall out/consequences by allowing them to take up the cause of the oustees oblivious of its consequence or the administrative fall out since a cause cannot be allowed to be raised incessantly by indulging in multiplicity of proceedings which at times do more harm to the cause than seek cure for the misery of the affected parties. In fact, in our view, if anyone concerned including an activist genuinely and bona fide feels that full justice has not been done to the cause they raised would do well to use their effort and good offices by persuading the administrative machinery with the assistance, the leadership for rectifying the policy decision and getting the matter clarified rather than travelling to the court by filing one writ petition after

the other unsettling the settled position by way of fresh round of litigation in the form of Public Interest Litigation.

48. However, in view of the meticulous analysis of the R & R Policy in the instant matter in the light of the statement of the counsel for the parties as also the decisions relied upon by them, we are of the view that the direction of the High Court in spite of its finding that R & R Policy has been substantially complied, has gone beyond the ambit of the R & R Policy and has generated a controversy as to whether all major sons of a displaced family are entitled to a separate unit of land or not under the R & R Policy which has clearly laid emphasis on the fact that only those displaced families would be entitled to 2 hectares of land from whom 25% of their separate holding of land had been acquired which inference in our view is the only inference which can reasonably be drawn from the relevant provision of the R & R Policy.

49. However, the counsel for the respondent/appellant Bheru Singh and others have given out large number of factual details stating that the GRA has committed grave errors while dealing with the representation and grievance of the oustees which is not possible for this Court to examine nor it lies within the ambit and scope of Article 136 of the Constitution. Nevertheless, we find substance in the argument advanced that the oustees/displaced persons come from the weak and vulnerable tribal population whose plea may get ignored or are not properly addressed. Hence for this purpose and in order to impart full justice to the cause in terms of the R & R Policy, it is desirable that the State Government may constitute an appellate forum where the aggrieved party may challenge the decision of the GRA in case there is any justifiable reason to do so. This appellate forum in our view should include a sitting or retired District Judge and an administrative member under the Chairmanship of a retired Judge of the High Court which will oversee whether the R & R Policy has been effectively and accurately implemented and whether the SRG have been

properly distributed in the light of the grievance raised by the displaced persons. This appellate forum in our view appears to be essential in order to supervise and oversee by way of an appellate forum and hear the grievance of the affected displaced persons arising out of implementation of the R & R Policy and SRG as also to ventilate the grievances of affected persons. However, this appellate forum shall not enter into any question relating to interpretation of the R & R Policy but by and large examine whether the benefit of the R & R Policy has been allowed to be availed by the oustees or not. In effect it would confine itself to the questions relating to compliance of the R & R Policy and distribution of Special Rehabilitation Grant (SRG) in terms of the provisions enumerated therein.

50. As a consequence of the above analysis, deliberation and consideration, the appeal arising out of special leave petition(c) No.30685/09 of the State of Madhya Pradesh stands allowed and the appeal arising out of special leave petition (c) 10163/2010 of the oustees is disposed of with liberty to the respondents-oustees to approach the GRA or the Appellate Forum of GRA in case they have been deprived of adequate compensation or benefit in any manner which is not in consonance with the R & R Policy. We further grant liberty to the respondents including the social activist-Respondent No.3 to take up the matter before the Government of M.P. for rectification or further amendment of the Policy in case they are able to establish and make out a case that the revision of R & R Policy 2003 still further requires rectification or improvement as there can be no limitation of time for reviewing or reframing a Policy decision if it has to serve the cause of eradicating human suffering specially if it has emerged as a consequence of the state activity like the land acquisition where the affected parties lost their home and cultivable land. However, under the circumstance, there shall be no order as to costs.

R.P. Appeals disposed of.