ADARSH SHIKSHA MAHAVIDYALAYA AND OTHERS
v.
SUBHASH RAHANGDALE AND OTHERS
(CIVIL APPEAL NO. 104 OF 2012)

JANUARY 06, 2012

[G.S. SINGHVI AND ASOK KUMAR GANGULY, JJ.]

NATIONAL COUNCIL FOR TEACHER EDUCATION ACT, 1993:

Object of its enactment – Discussed.

Teachers – Role of, in Education system – Necessity of adequate teacher training – Discussed.

Public Interest Litigation – Writ petition praying for issue of direction to the NCTE for ensuring proper maintenance of norms and standards in the teacher education system – Whether High Court committed an error in entertaining writ petition filed in the name of public interest litigation without making enquiry into the background of petitioner and his special interest in the field of teacher education and ordering an inquiry into the allegations of irregularities committed in the matter of recognition and affiliation of self-financed private institutions and admission of the students by such institutions – Held: Writ petitioner was seeking to highlight grave irregularities committed by the Western Regional Committee of NCTE in granting recognition to private institutions who did not fulfill the mandatory conditions relating to financial resources, accommodation, library, laboratory and other physical infrastructure and qualified staff and admitted students who had either not passed the entrance test or had not appeared for the centralised counselling conducted under the directions issued by the State Government – Therefore, it cannot be said that High Court committed error in

entertaining the writ petition and in ordering the enquiry – Directions passed – National Council for Teacher Education (Recognition Norms and Procedure) Regulations, 2005 and 2007 – Regulations 7(2) and (3).

ss.14(3), 15(3) – Conditions prescribed u/ss.14(3), 15(3) – Grant of recognition – Held: Regional Committees established u/s.20 of the Act are duty bound to ensure that no private institution offering or intending to offer a course or training in teacher education is granted recognition unless it satisfies the conditions specified in s.14(3)(a) and Regulations 7 and 8 of the Regulations. Likewise, no recognised institution intending to start any new course or training in teacher education shall be granted permission unless it satisfies the conditions specified in s.15(3)(a) of the 1993 Act and the relevant Regulations – National Council for Teacher Education (Recognition Norms and Procedure) Regulations, 2005 and 2007 – Regulations 7, 8.

ss.14(3), 15(3) – Recognition – Date of effect – Held: Recognition granted by the Regional Committees u/s.14(3)(a) read with Regulations 7 and 8 of the Regulations and permission granted u/s.15(3)(a) read with the relevant Regulations shall operate prospectively, i.e., from the date of communication of the order of recognition or permission, as the case may be – Neither the NCTE nor the University can make it retrospective in nature – National Council for Teacher Education (Recognition Norms and Procedure) Regulations, 2005 and 2007 – Regulations 7, 8.

ss.14(3), 15(3) – Discontinuance of course or training when recognition is refused/withdrawn – Held: If the recognition is refused u/s.14(3)(b) after affording reasonable opportunity to the applicant to make a written representation, the concerned institution is required to discontinue the course or training from the end of the academic session next following the date of receipt of the order – Similarly, withdrawal of recognition becomes effective from the end of the academic

session next following the date of communication of the order of withdrawal .

s.18 – Right of appeal – Held: Any institution aggrieved by the decision of the Western Regional Committee to reject the application for recognition or for permission to start a new course or training or withdrawal of recognition u/s.17 shall be free to avail remedy of appeal u/s.18 of the Act.

EDUCATION/EDUCATIONAL INSTITUTIONS:

Recognised/Unrecognised institutions – Entitlement of students to appear in the examination – Held: The students admitted by unrecognised institution and institutions which are not affiliated to any examining body are not entitled to appear in the examination conducted by the examining body or any other authorised agency – The students admitted by the recognised institutions otherwise than through the entrance/ eligibility test conducted in accordance with the admission procedure contained in para 3.3 of Appendix-1 of the Regulations are also not entitled to appear in the examination conducted by the examining body or any other authorised agency – National Council for Teacher Education (Recognition Norms and Procedure) Regulations, 2005 and 2007 – Regulations 7, 8.

NATURAL JUSTICE: Writ petition praying for issue of direction to NCTE for ensuring proper maintenance of norms and standards in the teachers education system – High Court directed that recognition can be granted to an institution intending to undertake teacher training course only if the mandatory conditions are fulfilled and that the examining body cannot grant affiliation to any institution unless it is recognized by the NCTE – Plea of the appellants that directions given by High Court were vitiated due to violation of rules of natural justice since none of them were impleaded as party to the writ petition and they did not get opportunity to show that they were duly recognized by competent authority

– Held: The conclusions recorded by High Court and the directions contained in the impugned order were of general application and did not target any particular college or institution – Therefore, the appellants cannot be heard to make a grievance that the impugned order was violative of the rules of natural justice.

NATIONAL COUNCIL FOR TEACHER EDUCATION (RECOGNITION NORMS AND PROCEDURE) REGULATIONS, 2005 AND 2007: Regulations 7(2) and (3) – Role of State Government in the matter of grant of recognition to the private institutions who want to conduct teacher training course – Held: Regulations 7(2) and (3) lay down that a copy of the application form submitted by the institution(s) shall be sent by the office of the Regional Committee to the State Government/Union Territory Administration concerned and the latter shall furnish its recommendations within 60 days from receipt of the copy of the application – If the State Government/Union Territory Administration does not make favourable recommendations, then it is required to provide detailed reasons/grounds with necessary statistics – While deciding the application made for recognition, the Regional Committee is duty bound to consider the recommendations of the State Government/UT Administration.

Admission procedure – Held: Private institutions cannot admit students de hors the entrance examination conducted by the State Government.

One 'S' filed a writ petition by way of Public Interest Litigation and prayed for issue of direction to the NCTE, State of M.P., Barkatullah University and others for ensuring proper maintenance of norms and standards in the teacher education system in various colleges run by different educational societies/entities or the institutions financed by Central/State Government or Union Territory Administration or the universities including the deemed

universities and self-financed educational institutions established and operated by non-profit making societies and trusts registered within the State. Several other institutions filed similar writ petitions.

By interlocutory order dated 17.12.2008 and final order dated 13.03.2009, the High Court highlighted the need for well-equipped and trained teachers because in the last three decades private institutions engaged in conducting teacher training courses/programmes had indulged in brazen and bizarre exploitation of the aspirants for admission to teacher training courses and ranked commercialisation. The instant appeals were filed challenging the interim order and the final order of the High Court.

The questions which arose for consideration in the instant appeals were whether the High Court committed an error by entertaining the writ petition filed by 'S' as public interest litigation; whether the impugned order was contrary to the rules of natural justice, i.e., audi alteram partem; whether the State Government has any role in the matter of grant of recognition to the private institutions who want to conduct teacher training course; whether the private institutions could have made admissions de hors the entrance examination conducted by the State Government; whether the students who had taken admission in unrecognized institutions or the institutions which had not been granted affiliation by the examining body have the right to appear in the examination and whether the Court can issue a mandamus for declaration of the result of such students simply because they were allowed to provisionally appear in the examination in compliance of the interim orders passed by the High Court and/or this Court.

Dismissing the appeals, the Court

HELD: 1.1. THE SCHEME OF THE NATIONAL COUNCIL FOR TEACHER EDUCATION ACT, 1993 AND THE REGULATIONS. With a view to achieve the object of planned and coordinated development for the teacher education system throughout the country and for regulation and proper maintenance of norms and standards in the teacher education system and for matters connected therewith, Parliament enacted the National council for Teacher Education Act, 1993. The 1993 Act provides for the establishment of a Council to be called the National Council for Teacher Education (NCTE) with multifarious functions, powers and duties. Section 2(c) of the Act defines the term "council" to mean a council established under sub-section (1) of Section 3. Section 2(i) defines the term "recognised institution" to mean an institution recognised under Section 14. Section 2(j) defines the term "Regional Committee" to mean a committee established under Section 20. Section 3 provides for establishment of the Council which comprises of a Chairperson, a Vice-Chairperson, a Member-Secretary, various functionaries of the Government, thirteen persons possessing experience and knowledge in the field of education or teaching, nine members representing the States and the Union Territories administration, three members of Parliament, three members to be appointed from amongst teachers of primary and secondary education and teachers of recognised institutions. Section 12 of the Act enumerates functions of the Council. Section 14 provides for recognition of institutions offering course or training in teacher education. Section 15 lays down the procedure for obtaining permission by an existing institution for starting a new course or training. Section 16 contains a non obstante clause and lays down that an examining body shall not grant affiliation to any institution or hold examination for a course or training conducted by a recognised institution unless it has obtained recognition

from the Regional Committee concerned under Section 14 or permission for starting a new course or training under Section 15. The mechanism for dealing with the cases involving violation of the provisions of the Act or the Rules, Regulations, Orders made or issued thereunder or the conditions of recognition by a recognised institution finds place in Section 17. By an amendment made in July 2006, Section 17-A was added to the Act. It lays down that no institution shall admit any student to a course or training in teacher education unless it has obtained recognition under Section 14 or permission under Section 15. Section 31(1) empowers the Central Government to make rules for carrying out the provisions of the Act. Section 31(2) specifies the matters in respect of which the Central Government can make rules. Under Section 32(1) the Council can make regulations for implementation of the provisions of the Act subject to the rider that the regulations shall not be inconsistent with the provisions of the Act and the Rules made thereunder. In exercise of the power vested in it under Section 32, the NCTE has, from time to time, framed the regulations. [Paras 5.1, 6] [23-B-H; 24-A-D; 34-D]

Ahmedabad St. Xavier's College Society v. State of Gujarat **(1974) 1 SCC 717 : 1975 (1) SCR 173;** *Andhra Kesari Education Society v. Director of School Education* **(1989) 1 SCC 392 : 1988 (3) Suppl. SCR 893;** *State of Maharashtra v. Vikas Sahebrao Roundale* **(1992) 4 SCC 435 : 1992 (3) SCR 792;** *St. Johns' Teachers Training Institute (for Women), Madurai v. State of Tamil Nadu* **(1993) 3 SCC 595 : 1993 (3) SCR 985 – relied on.**

N.M. Nageshwaramma v. State of Andhra Pradesh **1986 (Supp.) SCC 166;** *Food Corporation of India v. Bhanu Lodh* **(2005) 3 SCC 618 : 2005 (2) SCR 350 – referred to.**

2. By filing the writ petition, the respondent had sought to highlight grave irregularities committed by the

Western Regional Committee of NCTE in granting recognition to private institutions who did not fulfill the mandatory conditions relating to financial resources, accommodation, library, laboratory and other physical infrastructure and qualified staff and admitted students who had either not passed the entrance test or had not appeared for the centralised counselling conducted under the directions issued by the State Government. The respondent derived support from the orders passed by the High Court in various cases. The statement made by the Member Secretary, NCTE, who appeared before this Court on 21.7.2010, that effective steps have been taken after discovery of irregularities in the grant of recognition to various private colleges in the State of Madhya Pradesh and other States falling within the Western Region also gives credence to the respondents' assertion that all was not well with the Western Regional Committee. In the pleadings filed before this Court, the appellants have not suggested that the respondents had filed the writ petition to settle score with any institution or with some ulterior motive. Therefore, it cannot be said that the High Court committed error by entertaining the writ petition and ordering an inquiry into the allegations of irregularities committed in the matter of recognition and affiliation of self-financed private institutions and admission of the students by such institutions. If the High Court had not ordered re-scrutiny of the recognition/ affiliation granted to the private institutions, the irregularities committed by Western Regional Committee may never have seen the light of the day and we do not see any reason to nullify the exercise undertaken by the High Court to ensure that the provisions of the 1993 Act and the Regulations thereunder are strictly followed by the authorities entrusted with the task of granting recognition and affiliation to the institutions and colleges engaged in conducting teacher training courses. [Para 18] [82-D-G; 83-A-C]

State of Uttaranchal v. Balwant Singh Chaufal **(2010) 3 SCC 402 : 2010 (1) SCR 678;** *Vineet Narain v. Union of India* **(1998) 1 SCC 226 : 1997 (6) Suppl. SCR 595;** *Centre for Public Interest Litigation v. Union of India* **(2003) 7 SCC 532 : 2003 (3) Suppl. SCR 746;** *Rajiv Ranjan Singh "Lalan" (VIII) v. Union of India* **(2006) 6 SCC 613 : 2006 (4) Suppl. SCR 742;** *M.C. Mehta v. Union of India* **(2007) 1 SCC 110 : 2006 (9) Suppl. SCR 683;** *M.C. Mehta v. Union of India* **(2008) 1 SCC 407 : 2007 (10) SCR 1060;** *Shivajirao Nilangekar Patil v. Dr. Mahesh Madhav Gosavi* **(1987) 1 SCC 227 : 1987 (1) SCR 458 – relied on.**

3. In the impugned order, the High Court has not discussed eligibility or entitlement of any particular institution to get recognition or affiliation. What High Court has done is to interpret the relevant statutory provisions in the light of the judgments of this Court and orders passed by it in other writ petitions. After examining the provisions of the 1993 Act and the Regulations, the High Court held that sub-section (3) of Section 14 and clauses of Regulations 7 and 8 of the Regulations are mandatory and that recognition can be granted to an institution intending to undertake teacher training course only if the mandatory conditions are fulfilled. The High Court also held that the examining body cannot grant affiliation to any institution unless it is recognized by the NCTE. The High Court highlighted the distinction between refusal to grant recognition under Section 14(3)(b) and withdrawal of the recognition under Section 17 and held that any person aggrieved by the decision of the competent authority refusing to grant recognition or to withdraw the recognition already granted is entitled to avail remedy of appeal. The conclusions recorded by the High Court and the directions contained in the impugned order were of general application and did not target any particular college or institution. Therefore, the appellants cannot be

heard to make a grievance that the impugned order is violative of the rules of natural justice. [Para 19] [83-D-H; 84-A-B]

4. Regulation 7(2) and (3) of the 2005 and 2007 Regulations lay down that a copy of the application form submitted by the institution(s) shall be sent by the office of the Regional Committee to the State Government/ Union Territory Administration concerned and the latter shall furnish its recommendations within 60 days from receipt of the copy of the application. If the State Government/Union Territory Administration does not make favourable recommendations, then it is required to provide detailed reasons/grounds with necessary statistics. While deciding the application made for recognition, the Regional Committee is duty bound to consider the recommendations of the State Government / UT Administration. The last portion of Regulation 7(3) contains a deeming provision and lays down that if no communication is received from the State Government/ Union Territory Administration within 60 days, then it shall be presumed that the concerned State Government/ Union Territory Administration has no recommendation to make. [Para 20] [84-C-F]

5. No recognition/permission can be granted to any institution desirous of conducting teacher training course unless the mandatory conditions enshrined in Sections 14(3) or 15(3) read with the relevant clauses of Regulations 7 and 8 are fulfilled and that in view of the negative mandate contained in Section 17A read with Regulation 8(10), no institution can admit any student unless it has obtained unconditional recognition from the Regional Committee and affiliation from the examining body. [para 26] [94-B-C]

State of Maharashtra v. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya **(2006) 9 SCC 1 : 2006 (3)**

SCR 638; *Government of Andhra Pradesh v. J.B. Educational Society* **(2005) 3 SCC 212 : 2005 (2) SCR 302;** *National Council for Teacher Education v. Shri Shyam Shiksha Prashikshan Sansthan* **(2011) 3 SCC 238 : 2011 (2) SCR 291;** *A.P. Christians Medical Educational Society v. Government of Andhra Pradesh* **(1986) 2 SCC 667 : 1986 (2) SCR 749;** *St. Johns Teachers Training Institute v. Regional Director, NCTE* **(2003) 3 SCC 321 : 2003 (1) SCR 975 – relied on**

6. The High Court answered the question whether the private institutions could have made admissions de hors the entrance examination conducted by the State Government in the negative by relying upon the admission procedure contained in para 3.3 of Appendix-I, which contains the Norms and Standards for Secondary Teachers Education Programme. The appellants have not questioned the vires of the admission procedure. Therefore, they cannot contend that they were entitled to admit students de hors the list prepared on the basis of entrance examination conducted under the directions of the State Government. [para 27] [94-D-F]

7. The impugned orders do not suffer from any legal infirmity warranting interference by this Court.

(i) The Regional Committees established under Section 20 of the 1993 Act are duty bound to ensure that no private institution offering or intending to offer a course or training in teacher education is granted recognition unless it satisfies the conditions specified in Section 14(3)(a) of the 1993 Act and Regulations 7 and 8 of the Regulations. Likewise, no recognised institution intending to start any new course or training in teacher education shall be granted permission unless it satisfies the conditions specified in Section 15(3)(a) of the 1993 Act and the relevant Regulations.

(ii) The State Government / UT Administration, to whom a copy of the application made by an institution for grant of recognition is sent in terms of Regulation 7(2) of the Regulations, is under an obligation to make its recommendations within the time specified in Regulation 7(3) of the Regulations.

(iii) While granting recognition, the Regional Committees are required to give due weightage to the recommendations made by the State Government/UT Administration and keep in view the observations made by this Court in St. Johns Teachers Training Institute v. Regional Director, NCTE (2003) 3 SCC 321 and National Council for Teacher Education v. Shri Shyam Shiksha Prashikshan Sansthan, which have been extracted in the earlier part of this judgment

(iv) The recognition granted by the Regional Committees under Section 14(3)(a) of the 1993 Act read with Regulations 7 and 8 of the Regulations and permission granted under Section 15(3)(a) read with the relevant Regulations shall operate prospectively, i.e., from the date of communication of the order of recognition or permission, as the case may be.

(v) The recognition can be refused by the Regional Committee under Section 14(3)(b), in the first instance, when an application for recognition is made by an institution. Likewise, permission can be refused under Section 15(3)(b).

(vi) If the recognition is refused under Section 14(3)(b) after affording reasonable opportunity to the applicant to make a written representation, the concerned institution is required to discontinue the course or training from the end of the academic session next following the date of receipt of the order.

(vii) Once the recognition is granted, the same can be withdrawn only under Section 17(1) if there is a contravention of the provisions of the Act or the Rules, or the Regulations, or orders made therein, or any condition subject to which recognition was granted under Section 14(3)(a) or permission was granted under Section 15(3)(a).

(viii) The withdrawal of recognition becomes effective from the end of the academic session next following the date of communication of the order of withdrawal.

(ix) Once the recognition is withdrawn under Section 17(1), the concerned institution is required to discontinue the course or training in teacher education and the examining body is obliged to cancel the affiliation. The effect of withdrawal of the recognition is that the qualification in teacher education obtained pursuant to the course or training undertaken at such institution is not to be treated as valid qualification for the purpose of employment under the Central Government, any State Government or University or in any educational body aided by the Central or the State Government.

(x) In view of the mandate of Section 16, no examining body, as defined in Section 2(d) of the 1993 Act, shall grant affiliation unless the applicant has obtained recognition from the Regional Committee under Section 14 or permission for starting a new course or training under Section 15.

(xi) While granting affiliation, the examining body shall be free to demand rigorous compliance of the conditions contained in the statute like the University Act or the State Education Board Act under which it was established or the guidelines / norms which may

have been laid down by the concerned examining body.

(xii) No institution shall admit any student to a teacher training course or programme unless it has obtained recognition under Section 14 or permission under Section 15, as the case may be.

(xiii) While making admissions, every recognised institution is duty bound to strictly adhere to para 3.1 to 3.3 of the Norms and Standards for Secondary/ Pre-School Teacher Education Programme contained in Appendix-1 to the Regulations.

(xiv) If any institution admits any student in violation of the Norms and Standards laid down by the NCTE, then the Regional Committee shall initiate action for withdrawal of the recognition of such institution and pass appropriate order after complying with the rules of natural justice.

(xv) The students admitted by unrecognised institution and institutions which are not affiliated to any examining body are not entitled to appear in the examination conducted by the examining body or any other authorised agency.

(xvi) The students admitted by the recognised institutions otherwise than through the entrance/ eligibility test conducted in accordance with the admission procedure contained in para 3.3 of Appendix-1 of the Regulations are also not entitled to appear in the examination conducted by the examining body or any other authorised agency.

(xvii) The NCTE shall issue direction for mandatory inspection of recognised institutions on periodical basis and all the Regional Committees are duty

bound to take action in accordance with those directions.

(xviii) In future, the High Courts shall not entertain prayer for interim relief by unrecognised institutions and the institutions which have not been granted affiliation by the examining body and/or the students admitted by such institutions for permission to appear in the examination or for declaration of the result of examination. This would also apply to the recognised institutions if they admit students otherwise than in accordance with the procedure contained in Appendix-1 of the Regulations. [Para 33] [98-C-H; 99-A-H; 100-A-H; 101-A-H; 102-A-B]

In the instant appeals the following directions are passed:

(i) Within one month from today, the concerned examining body shall declare the result of the students who were admitted for the session 2007-2008 keeping in view the directions contained in the impugned orders. This would mean that result of the students admitted for the session 2007-2008 by the institutions whose cases were scrutinised by the NCTE pursuant to the directions given by the High Court and who were found to have been validly recognised after compliance with the mandatory conditions specified in Section 14(3)(a) of 1993 Act and Regulations 7 and 8 of the Regulations shall be declared.

(ii) The result of the students admitted by an unrecognized institution or by an institution which had not been granted affiliation by the examining body shall not be declared. The result of the students who were admitted without qualifying the entrance examination shall also not be declared. In other words, the students admitted by the private

institutions on their own shall not be entitled to declaration of their result. If any private institution had not complied with the requirements of completing the prescribed training, then the result of students of such institution shall also not be declared.

(iii) The directions contained in the preceding clause shall not be used for dealing with the admissions made for the sessions 2005-2006, 2006-2007 or 2008-2009. The admissions made for those years shall be dealt with by the Western Regional Committee and the concerned examining body in accordance with the relevant statutory provisions.

(iv) Any institution aggrieved by the decision of the Western Regional Committee to reject the application for recognition or for permission to start a new course or training or withdrawal of recognition under Section 17 shall be free to avail remedy of appeal under Section 18 of the 1993 Act. If any such appeal is filed by the aggrieved party within 30 days from today, then the Appellate Authority shall entertain and decide the same on merits.

(v) If the Western Regional Committee has taken any action in furtherance of the directions given by the High Court, then the aggrieved person shall be entitled to challenge the same by availing remedy of appeal under Section 18 of the 1993 Act. [Para 34] [102-B-H; 103-A-E]

Case Law Reference:

1975 (1) SCR 173	**relied on**	**Para 2.1**
1988 (3) Suppl. SCR 893	**relied on**	**Para2.2**
1992 (3) SCR 792	**relied on**	**Para 2.3**
1993 (3) SCR 985	**relied on**	**Para 2.4**

1986 (Supp.) SCC 166	**referred to**	**Para 2.5**
2005 (2) SCR 350	**referred to**	**Para 9.3**
2006 (3) SCR 638	**relied on**	**Para 9.3**
2010 (1) SCR 678	**relied on**	**Para 16**
1997 (6) Suppl. SCR 595	**relied on**	**Para 16**
2003 (3) Suppl. SCR 746	**relied on**	**Para 16**
2006 (4) Suppl. SCR 742	**relied on**	**Para 16**
2006 (9) Suppl. SCR 683	**relied on**	**Para 16**
2007 (10) SCR 1060	**relied on**	**Para 16**
1987 (1) SCR 458	**relied on**	**Para 17**
2003 (1) SCR 975	**relied on**	**Para 21**
2005 (2) SCR 302	**relied on**	**Para 22**
2011 (2) SCR 291	**relied on**	**Para 24**
1986 (2) SCR 749	**relied on**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 104 of 2012.

From the Judgment & Order dated 13.03.2009 of the High Court of Madhya Pradesh Principal Seat at Jabalpur in Writ Petition No. 6146 of 2008.

WITH

C.A. Nos. 105, 106, 107, 108, 109, 110, 111, 114, 115, 116, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 131, 132, 133, 134, 135, 136, 137, 139, 140, 141, 142, 143, 144, 145, 146 & 147 of 2012.

P.S. Patwalia, S.K. Dubey, P.N. Mishra, Jasbir Singh Malik, Gouri Karuna Das, Bhakti Pasrija, Shanti Kumar Jaisani,

Ajay Singh, Sanjeev Kumar Sharma (for R.C. Kaushik), S.K. Sabharwal, B.K. Satija, P.P. Singh, Vipin Kumar, K.K. Shrivastava, Deepak Goel, Dr. Kailash Chand, R.C. Kohli, G. Prakash, Neeraj Shekhar, Ashutosh Thakur, Nikhil Jain, Kunal Verma, Umed Singh Gulia, Vikram Singh Gulia, Santosh Paul, Sriharsh N. Bundela, Abhay Kumar, Arti Singh, Anilendra Pandey, Priya Kashyap, Brijesh Pandey, Amitesh Kumar, Ravi Kant (for Gopal Singh), B.S. Banthia, Vikas Upadhyay, Varun Thakur, Shankar Dinate, Purvish Jitendra Malkan, Shree Prakash Sinha, Vijay Kumar, Shekhar Kumar, Niraj Sharma, Rajul Shrivastav, S.K. Verma, Rukhsana Choudhary, Dharmendra Kumar Sinha, Vibudhendra Mishra, M.k. Michael, Ekta Kadiyan, Anu Gupta, Tapan Trivedi, Gopal Singh, Amitesh Kumar, Ravi Kant for the appearing parties.

The Judgment of the Court was delivered by

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

2. The importance of teachers and their training has been highlighted time and again by eminent educationists and leaders of society. The Courts have also laid considerable emphasis on the dire need of having qualified teachers in schools and colleges.

2.1 In *Ahmedabad St. Xavier's College Society v. State of Gujarat* (1974) 1 SCC 717, A.N. Ray, C.J., observed:

> "Educational institutions are temples of learning. The virtues of human intelligence are mastered and harmonised by education. Where there is complete harmony between the teacher and the taught, where the teacher imparts and the student receives, where there is complete dedication of the teacher and the taught in learning, where there is discipline between the teacher and the taught, where both are worshippers of learning, no discord or challenge will arise. An educational institution runs smoothly when the teacher and the taught are engaged in the common ideal of pursuit of knowledge. It

is, therefore, manifest that the appointment of teachers is an important part in educational institutions. The qualifications and the character of the teachers are really important. The minority institutions have the right to administer institutions. This right implies the obligation and duty of the minority institutions to render the very best to the students. In the right of administration, checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. The right to administer is to be tempered with regulatory measures to facilitate smooth administration. The best administration will reveal no trace or colour of minority. A minority institution should shine in exemplary eclectism in the administration of the institution. The best compliment that can be paid to a minority institution is that it does not rest on or proclaim its minority character.

Regulations which will serve the interests of the students, regulations which will serve the interests of the teachers are of paramount importance in good administration. Regulations in the interest of efficiency of teachers, discipline and fairness in administration are necessary for preserving harmony among affiliated institutions.

Education should be a great cohesive force in developing integrity of the nation. Education develops the ethos of the nation. Regulations are, therefore, necessary to see that there are no divisive or disintegrating forces in administration."

2.2 In *Andhra Kesari Education Society v. Director of School Education* (1989) 1 SCC 392, this Court observed:

"Though teaching is the last choice in the job market, the role of teachers is central to all processes of formal education. The teacher alone could bring out the skills and intellectual capabilities of students. He is the 'engine' of the

educational system. He is a principal instrument in awakening the child to cultural values. He needs to be endowed and energised with needed potential to deliver enlightened service expected of him. His quality should be such as would inspire and motivate into action the benefiter. He must keep himself abreast of ever-changing conditions. He is not to perform in a wooden and unimaginative way. He must eliminate fissiparous tendencies and attitudes and infuse nobler and national ideas in younger minds. His involvement in national integration is more important, indeed indispensable. It is, therefore, needless to state that teachers should be subjected to rigorous training with rigid scrutiny of efficiency. It has greater relevance to the needs of the day. The ill-trained or sub-standard teachers would be detrimental to our educational system; if not a punishment on our children. The government and the University must, therefore, take care to see that inadequacy in the training of teachers is not compounded by any extraneous consideration."

2.3 In *State of Maharashtra v. Vikas Sahebrao Roundale* (1992) 4 SCC 435, the Court said:

"The teacher plays pivotal role in moulding the career, character and moral fibres and aptitude for educational excellence in impressive young children. Formal education needs proper equipping of the teachers to meet the challenges of the day to impart lessons with latest techniques to the students on secular, scientific and rational outlook. A well-equipped teacher could bring the needed skills and intellectual capabilities to the students in their pursuits. The teacher is adorned as Gurudevobhava, next after parents, as he is a principal instrument to awakening the child to the cultural ethos, intellectual excellence and discipline. The teachers, therefore, must keep abreast of ever-changing techniques, the needs of the society and to

cope up with the psychological approach to the aptitudes of the children to perform that pivotal role. In short teachers need to be endowed and energised with needed potential to serve the needs of the society. The qualitative training in the training colleges or schools would inspire and motivate them into action to the benefit of the students. For equipping such trainee students in a school or a college, all facilities and equipments are absolutely necessary and institutions bereft thereof have no place to exist nor entitled to recognition. In that behalf compliance of the statutory requirements is insisted upon. Slackening the standard and judicial fiat to control the mode of education and examining system are detrimental to the efficient management of the education."

2.4 In St. Johns' Teachers Training Institute (for Women), Madurai v. State of Tamil Nadu (1993) 3 SCC 595, the Court observed:

"The teacher-education programme has to be redesigned to bring in a system of education which can prepare the student-teacher to shoulder the responsibility of imparting education with a living dynamism. Education being closely interrelated to life the well trained teacher can instil an aesthetic excellence in the life of his pupil. The traditional, stereotyped, lifeless and dull pattern of "chalk, talk and teach" method has to be replaced by a more vibrant system with improved methods of teaching, to achieve qualitative excellence in teacher-education."

2.5 In *N.M. Nageshwaramma v. State of Andhra Pradesh* 1986 (Supp.) SCC 166, the Court observed:

"The Teachers Training Institutes are meant to teach children of impressionable age and we cannot let loose on the innocent and unwary children, teachers who have not received proper and adequate training. True they will be required to pass the examination but that may not be

enough. Training for a certain minimum period in a properly organised and equipped Training Institute is probably essential before a teacher may be duly launched."

3. We have prefaced disposal of these appeals, which are directed against interlocutory order dated 17.12.2008 and final order dated 13.03.2009 passed by the Division Bench of the Madhya Pradesh High Court in Writ Petition No. 6146 of 2008 and connected matters by highlighting the need for well-equipped and trained teachers because in the last three decades private institutions engaged in conducting teacher training courses / programmes have indulged in brazen and bizarre exploitation of the aspirants for admission to teacher training courses and ranked commercialisation and the regulatory bodies constituted under the laws enacted by Parliament and State Legislatures have failed to stem the rot. The cases filed by these institutions, many of whom have not been granted recognition due to non-fulfilment of the conditions specified in the National Council for Teacher Education Act, 1993 (for short, 'the 1993 Act') and the Regulations framed thereunder and by the students who have taken admission in such institutions with the hope that at the end of the day they will be able to get favourable order by invoking sympathy of the Court, have choked the dockets of various High Courts and even this Court. The enormity of litigation in this field gives an impression that implementation of the provisions contained in the 1993 Act and the Regulations framed thereunder has been acutely deficient and the objects sought to be achieved by enacting the special legislation, namely, planned and coordinated development of the teacher education system throughout the country, the regulation and proper maintenance of norms and standards in the teacher education system have not been fulfilled so far.

4. Before adverting to the appellants' grievance against the orders passed by the Madhya Pradesh High Court in Writ Petition No. 6146 of 2008 Subhash Rahangdale and connected

cases, we consider it necessary to notice the scheme of the 1993 Act and the Regulations framed thereunder.

THE SCHEME OF THE 1993 ACT AND THE REGULATIONS

5.1 With a view to achieve the object of planned and coordinated development for the teacher education system throughout the country and for regulation and proper maintenance of norms and standards in the teacher education system and for matters connected therewith, Parliament enacted the 1993 Act. The 1993 Act provides for the establishment of a Council to be called the National Council for Teacher Education (for short "the NCTE") with multifarious functions, powers and duties. Section 2(c) of the Act defines the term "council" to mean a council established under sub-section (1) of Section 3. Section 2(i) defines the term "recognised institution" to mean an institution recognised under Section 14. Section 2(j) defines the term "Regional Committee" to mean a committee established under Section 20. Section 3 provides for establishment of the Council which comprises of a Chairperson, a Vice-Chairperson, a Member-Secretary, various functionaries of the Government, thirteen persons possessing experience and knowledge in the field of education or teaching, nine members representing the States and the Union Territories administration, three members of Parliament, three members to be appointed from amongst teachers of primary and secondary education and teachers of recognised institutions. Section 12 of the Act enumerates functions of the Council. Section 14 provides for recognition of institutions offering course or training in teacher education. Section 15 lays down the procedure for obtaining permission by an existing institution for starting a new course or training. Section 16 contains a non obstante clause and lays down that an examining body shall not grant affiliation to any institution or hold examination for a course or training conducted by a recognised institution unless it has obtained recognition from the Regional

Committee concerned under Section 14 or permission for starting a new course or training under Section 15. The mechanism for dealing with the cases involving violation of the provisions of the Act or the Rules, Regulations, Orders made or issued thereunder or the conditions of recognition by a recognised institution finds place in Section 17. By an amendment made in July 2006, Section 17-A was added to the Act. It lays down that no institution shall admit any student to a course or training in teacher education unless it has obtained recognition under Section 14 or permission under Section 15. Section 31(1) empowers the Central Government to make rules for carrying out the provisions of the Act. Section 31(2) specifies the matters in respect of which the Central Government can make rules. Under Section 32(1) the Council can make regulations for implementation of the provisions of the Act subject to the rider that the regulations shall not be inconsistent with the provisions of the Act and the Rules made thereunder. Section 32(2) specifies the matters on which the Council can frame regulations. In terms of Section 33, the Rules framed under Section 31 and the Regulations framed under Section 32 are required to be laid before Parliament. By virtue of Section 34(1), the Central Government has been clothed with the power to issue an order to remove any difficulty arising in the implementation of the provisions of the Act.

5.2 The relevant portions of Sections 12, 14 to 16, 17, 17-A, 18, 20, 29 and 32 of the Act which have bearing on the decision of these appeals are reproduced below:

> **"12. Functions of the Council.**-It shall be the duty of the Council to take all such steps as it may think fit for ensuring planned and coordinated development of teacher education and for the determination and maintenance of standards for teacher education and for the purposes of performing its functions under this Act, the Council may-
>
> (a) undertake surveys and studies relating to various aspects of teacher education and publish the result thereof;

(b) make recommendations to the Central and State Governments, Universities, University Grants Commission and recognised institutions in the matter of preparation of suitable plans and programmes in the field of teacher education;

(c) coordinate and monitor teacher education and its development in the country;

(d) lay down guidelines in respect of minimum qualifications for a person to be employed as a teacher in schools or in recognised institutions;

(e) lay down norms for any specified category of courses or trainings in teacher education, including the minimum eligibility criteria for admission thereof, and the method of selection of candidates, duration of the course, course contents and mode of curriculum;

(f) lay down guidelines for compliance by recognised institutions, for starting new courses or training, and for providing physical and instructional facilities, staffing pattern and staff qualifications;

(g)-(i) * * *

(j) examine and review periodically the implementation of the norms, guidelines and standards laid down by the Council, and to suitably advise the recognised institutions;

(k)-(m) * * *

(n) perform such other functions as may be entrusted to it by the Central Government.

14. Recognition of institutions offering course or training in teacher education.-(1) Every institution offering or intending to offer a course or training in teacher education on or after the appointed day, may, for grant of

recognition under this Act, make an application to the Regional Committee concerned in such form and in such manner as may be determined by regulations:

Provided that an institution offering a course or training in teacher education immediately before the appointed day, shall be entitled to continue such course or training for a period of six months, if it has made an application for recognition within the said period and until the disposal of the application by the Regional Committee.

(2) The fee to be paid along with the application under sub-section (1) shall be such as may be prescribed.

(3) On receipt of an application by the Regional Committee from any institution under sub-section (1), and after obtaining from the institution concerned such other particulars as it may consider necessary, it shall-

(a) if it is satisfied that such institution has adequate financial resources, accommodation, library, qualified staff, laboratory and that it fulfils such other conditions required for proper functioning of the institution for a course or training in teacher education, as may be determined by regulations, pass an order granting recognition to such institution, subject to such conditions as may be determined by regulations; or

(b) if it is of the opinion that such institution does not fulfil the requirements laid down in sub-clause (a), pass an order refusing recognition to such institution for reasons to be recorded in writing:

Provided that before passing an order under sub-clause (b), the Regional Committee shall provide a reasonable opportunity to the concerned institution for making a written representation.

(4) * * *

(5) Every institution, in respect of which recognition has been refused shall discontinue the course or training in teacher education from the end of the academic session next following the date of receipt of the order refusing recognition passed under clause (b) of sub-section (3).

(6) Every examining body shall, on receipt of the order under sub-section (4)-

(a) grant affiliation to the institution, where recognition has been granted; or

(b) cancel the affiliation of the institution, where recognition has been refused.

15. Permission for a new course or training by recognised institution. - (1) Where any recognised institution intends to start any new course or training in teacher education, it may make an application to seek permission therefor to the Regional Committee concerned in such form and in such manner as may be determined by regulations.

(2) The fees to be paid along with the application under sub-section (1) shall be such as may be prescribed.

(3) On receipt of an application from an institution under sub-section (1), and after obtaining from the recognised institution such other particulars as may be considered necessary, the Regional Committee shall-

(a) if it is satisfied that such recognised institution has adequate financial resources, accommodation, library, qualified staff, laboratory, and that it fulfils such other conditions required for proper conduct of the new course or training in teacher education, as may be determined by regulations, pass an order granting permission, subject to such conditions as may be determined by regulation; or

(b) if it is of the opinion that such institution does not fulfil the requirements laid down in sub-clause (a), pass an order refusing permission to such institution, for reasons to be recorded in writing:

Provided that before passing an order refusing permission under sub-clause (b), the Regional Committee shall provide a reasonable opportunity to the institution concerned for making a written representation.

(4) * * *

16. Affiliating body to grant affiliation after recognition or permission by the Council.-Notwithstanding anything contained in any other law for the time being in force, no examining body shall, on or after the appointed day-

(a) grant affiliation, whether provisional or otherwise, to any institution; or

(b) hold examination, whether provisional or otherwise, for a course or training conducted by a recognised institution, unless the institution concerned has obtained recognition from the Regional Committee concerned, under Section 14 or permission for a course or training under Section 15.

* * *

17 - Contravention of provisions of the Act and consequences thereof

(1) Where the Regional Committee is, on its own motion or on any representation received from any person, satisfied that a recognised institution has contravened any of the provisions of this Act, or the rules, regulations, orders made or issued thereunder, or any condition subject to which recognition under sub-section (3) of section 14 or permission under sub-section (3) of section 15 was granted, it may withdraw recognition of such recognised

institution, for reasons to be recorded in writing;

Provided that no such order against the recognised institution shall be passed unless a reasonable opportunity of making representation against the proposed order has been given to such recognised institution:

Provided further that the order withdrawing or refusing recognition passed by the Regional Committee shall come into force only with effect from the end of the academic session next following the date of communication of such order.

(2) A copy of every order passed by the Regional Committee under sub-section (1),-

(a) shall be communicated to the recognised institution concerned and a copy thereof shall also be forwarded simultaneously to the University or the examining body to which such institution was affiliated for cancelling affiliation; and

(b) shall be published in the Official Gazette for general information.

(3) Once the recognition of a recognised institution is withdrawn under sub-section (1), such institution shall discontinue the course or training in teacher education, and the concerned University or the examining body shall cancel affiliation of the institution in accordance with the order passed under sub-section (1), with effect from the end of the academic session next following the date of communication of the said order.

(4) If an institution offers any course or training in teacher education after the coming into force of the order withdrawing recognition under sub-section (1), or where an institution offering a course or training in teacher education immediately before the appointed day fails or neglects to

obtain recognition or permission under this Act, the qualification in teacher education obtained pursuant to such course or training or after undertaking a course or training in such institution, shall not be treated as a valid qualification for purposes of employment under the Central Government, any State Government or University, or in any school, college or other educational body aided by the Central Government or any State Government.

17-A. No admission without recognition.-No institution shall admit any student to a course or training in teacher education, unless the institution concerned has obtained recognition under Section 14 or permission under Section 15, as the case may be.

18 - Appeals

(1) Any person aggrieved by an order made under section 14 or section 15 or section 17 of the Act may prefer an appeal to the Council within such period as may be prescribed.

(2) No appeal shall be admitted if it is preferred after the expiry of the period prescribed therefore:

Provided that an appeal may be admitted after the expiry of the period prescribed therefor, if the appellant satisfied the Council that he had sufficient cause for not preferring the appeal within the prescribed period.

(3) Every appeal made under this section shall be made in such form and shall be accompanied by a copy of the order appealed against and by such fees as may be prescribed.

(4) The procedure for disposing of an appeal shall be such as may be prescribed:

Provided that before disallowing an appeal, the appellant

shall be given a reasonable opportunity to represent its case.

(5) The Council may confirm or reverse the order appealed against.

20 - Regional Committees

(1) The Council shall, by notification in the Official Gazette, establish the following Regional Committees, namely:--

(i) the Eastern Regional Committee;

(ii) the Western Regional Committee;

(iii) the Northern Regional Committee; and

(iv) the Southern Regional Committee.

(2) The Council may, if it considers necessary, establish with the approval of the Central Government, such other Regional Committees as it may deem fit.

(3) ***

(4) ***

(5) ***

(6) The Regional Committee shall in addition to its functions under Sections 14, 15 and 17, perform such other functions, as may be assigned to it by the Council or as may be determined by regulations.

(7) The functions of, the procedure to be followed by, the territorial jurisdiction of and the manner of filling casual vacancies among members of, a Regional Committee shall be such as may be determined by regulations.

29 - Directions by the Central Government

(1) The Council shall, in the discharge of its functions and duties under this Act be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time.

(2) The decision of the Central Government as to whether a question is one of policy or not shall be final.

32 - Power to make regulations

(1) The Council may, by notification in the Official Gazette, make regulations not inconsistent with the provisions of this Act and the rules made thereunder, generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-

(a) the time and the place of the meetings of the Council and the procedure for conducting business thereat under sub-section (1) of section 7;

(b) the manner in which and the purposes for which persons may be co-opted by the Council under sub-section (1) of section 9;

(c) the appointment and terms and conditions of service of officers and other employees of the Council under sub-sections (1) and (2) respectively of section 19;

(d) the norms, guidelines and standards in respect of-

(i) the minimum qualifications for a person to be employed as a teacher under clause (d) of section 12;

(ii) the specified category of courses or training in teacher education under clause(e) of section 12;

(iii) starting of new courses or training in recognised

institutions under clause (f) of section 12;

(iv) standards in respect of examinations leading to teacher education qualifications referred to in clause (g) of section 12;

(v) the tuition fees and other fees chargeable by institutions under clause (h) of section 12;

(vi) the schemes for various levels of teachers education, and identification of institutions for offering teacher development programmes under clause (l) of section 12;

(e) the form and the manner in which an application for recognition is to be submitted under sub-section (1) of section 14;

(f) conditions required for the proper functioning of the institution and conditions for granting recognition under clause (a) of sub-section (3) of section 14;

(g) the form and the manner in which an application for permission is to be made under sub-section (1) of section 15;

(h) conditions required for the proper conduct of a new course or training and conditions for granting permission under clause (a) of sub-section (3) of section 15;

(i) the functions which may be assigned by the Council to the Executive Committee under sub-section (1) of section 19;

(j) the procedure and the quorum necessary for transaction of business at the meetings of the Executive Committee under sub-section (5) of section 19;

(k) the manner in which and the purposes for which the Executive Committee may co-opt persons under sub-section (6) of section 19;

(l) the number of persons under clause (c) of sub-section (3) of section 20;

(m) the term of office and allowances payable to members under sub-section (5) of section 20;

(n) additional functions to be performed by the Regional Committee under sub-section (6) of section 20;

(o) the functions of the procedure to be followed by the territorial jurisdiction of, and the manner, of filling casual vacancies among members of a Regional Committee under sub-section (7) of section 20;

(p) any other matter in respect of which provision is to be, or may be, made by regulations."

6. In exercise of the power vested in it under Section 32, the National Council for Teacher Education (for short, 'the NCTE') has, from time to time, framed the regulations. Initially, the NCTE framed "the National Council for Teacher Education (Application for Recognition, the Manner for Submission, Determination of Conditions for Recognition of Institutions and Permissions to Start New Course or Training) Regulations, 1995". In 2002, the NCTE framed "the National Council for Teacher Education (Form of Application for Recognition, the Time-Limit of Submission of Application, Determination of Norms and Standards for Recognition of Teacher Education Programmes and Permission to Start New Course or Training) Regulations, 2002". Between 2003 and 2005, 6 amendments were made in the 2002 Regulations, which were finally repealed with the enactment of "the National Council for Teacher Education (Recognition Norms and Procedure) Regulations, 2005 (for short, 'the 2005 Regulations'). The relevant provisions of the 2005 Regulations are reproduced below:

"3. Applicability: These regulations shall be applicable to all matters relating to teacher education programmes

covering norms and standards and procedures for recognition of institutions, commencement of new programmes and addition to sanctioned intake in existing programmes and other matters incidental thereto.

5. Manner of making application

(1) An institution eligible under Regulation 4, desirous of running a teacher education programme may apply to the concerned Regional Committee of NCTE in the prescribed form in triplicate along with processing fee and requisite documents, for recognition.

(2) The form can be downloaded from the Council's website www.ncte-in.org, free of cost. The said form can also be obtained from the office of the Regional Committee concerned by payment of Rs. 1,000 by way of a demand draft of a Nationalised Bank drawn in favour of the Member Secretary, NCTE payable at the city where the office of the Regional Committee is located.

(3) An application can be submitted conventionally or electronically on-line. In the latter case, the requisite documents in triplicate along with the processing fee shall be submitted separately to the office of the Regional Committee concerned. Those who apply on-line shall have the benefit of not to pay for the form.

7. Processing of applications

(1) Applications which are complete in all respects shall be processed by the office of the Regional Committee concerned within 30 days of receipt of the such applications.

(2) The applications shall be processed as under: -

(i) The particulars of the institutions shall be hosted on the official website of the Regional Committee concerned of

the National Council for Teacher Education.

(ii) This will serve as an electronic communication to the applicant and also the State Government/UT Administration concerned for necessary follow up action on their part.

(iii) A written communication in addition shall also follow to the applicant.

(iv) A written communication alongwith a copy of the application form submitted by the institution(s) of the concerned State/U.T. shall be sent to the State Government/U.T. Administration concerned.

(3) On receipt of the communication, the State Government/UT Administration concerned shall furnish its recommendations on the applications to the office of the Regional Committee concerned of the National Council for Teacher Education within 60 days from receipt. If the recommendation is negative, the State Government/UT Administration shall provide detailed reasons/grounds thereof, which could be taken into consideration by the Regional Committee concerned while deciding the application. If no communication is received from the State Government/UT Administration within the stipulated 60 days, it shall be presumed that the State Government/UT Administration concerned has no recommendation to make.

(4) Though normally the applicant institutions will ensure submission of applications complete in all respects, in order to cover the inadvertent omission of deficiencies in documents, the office of the Regional Committee shall point out the deficiencies within 30 days of receipt of the applications, which the applicants shall remove within 90 days. The date of receipt of the application after completion of deficiencies shall be treated as the date of

receipt of the application complete in all respects within the meaning of Regulation 7(1).

(5) Ordinarily, the inspection of infrastructure, equipment, instructional facilities, etc., of an institution shall be conducted within 30 days of completion of processing of its application by the office of the Regional Committee with a view to assessing the level of preparedness of the institution to commence the course. Such inspection shall be in the chronological order of the date of receipt of the completed application in the office of the Regional Committee concerned. Among the applications received on the same day, alphabetical order shall be followed.

(6) All the applicant institutions are expected to launch their own website simultaneously with the submission of their applications covering, inter alia, the details of the institutions, its location, name of the course applied for with intake, availability of physical infrastructure (land, building, office, classrooms, and other facilities/amenities), instructional facilities (laboratories, library, etc.) and the particulars of their proposed teaching and non-teaching staff, etc. with photographs for information of all concerned.

(7) At the time of visit of the team of experts to an institution, the institution concerned shall arrange for the inspection to be videographed in a manner that all important facilities are videographed along with interaction with the management and the staff (if available). The visiting teams shall finalize and courier their reports alongwith the video tapes on the same day.

(8) The application and the report alongwith the video tapes of the Visiting Team shall be placed before the Regional Committee concerned for consideration of grant of recognition or permission to an institution in its next meeting.

(9) The Regional Committee shall decide grant of recognition or permission to an institution only after satisfying itself that the institution fulfills all the conditions prescribed by the NCTE under the NCTE Act, Rules or Regulations, including, inter alia, the norms and standards laid down for the relevant teacher education programme/ course.

(10) In the matter of grant of recognition, the Regional Committees shall strictly act within the ambit of the National Council for Teacher Education, Act, 1993, the National Council for Teacher Education Rules, 1997 as amended from time to time and the regulations including the norms and standards for various teacher education programmes and shall not make any relaxation thereto. The Regional Directors shall be responsible for ensuring that the decisions of the Regional Committees are not in contravention of the NCTE Act, NCTE Rules and regulations including the norms and standards.

(11) The institution concerned shall be informed of the decision for grant of recognition or permission subject to appointment of qualified faculty members before the commencement of the academic session.

(12) The institution, concerned, after appointing the requisite faculty/staff, shall put the information on its official website and also formally inform the Regional Committee concerned. The Regional Committee concerned shall then issue a formal unconditional recognition order.

(13)-(14) * * *

8. Conditions for grant of recognition:

(1) An institution must fulfill all the prescribed conditions related to norms and standards as prescribed by the NCTE for conducting the course or training in teacher education. These norms, inter alia, cover conditions

relating to financial resources, accommodation, library, laboratory, other physical infrastructure, qualified staff including teaching and non-teaching personnel, etc.

(2) In the first instance, an institution shall be considered for grant of recognition for the basic unit as prescribed in the norms & standards for the particular teacher education programme.

(3) An institution shall be permitted to apply for enhancement of intake in a teacher education course already approved after completion of three academic sessions of running the course.

(4) An institution shall be permitted to apply for enhancement of intake in Secondary Teacher Education Programme - B.Ed. & B.P.Ed. Programme, if it has accredited itself with the National Assessment and Accreditation Council (NAAC) with a grade of B+ on a nine point scale developed by NAAC.

(5) No institution shall be granted recognition under these regulations unless it is in possession of required land on the date of application. The land free from all encumbrances could be either on ownership basis or on lease for a period of not less than 30 years. In cases where under relevant State/UT laws the maximum permissible lease period is less than 30 years, the State Government/UT Administration law shall prevail.

(6)-(9) * * *

(10) An institution shall make admission only after it obtains unconditional letter of recognition from the Regional Committee concerned, and affiliation from the examining body.

(11) Whenever there are changes in the norms and standards for the course or training in teacher education,

the institution shall comply with the requirements laid down in the revised norms and standards immediately but not later than the date of commencement of the next academic session, subject to conditions prescribed in the revised norms.

(12)-(14) * * *"

7. Appendix-1 of the Norms and Standards for Secondary Teacher Education Programme leading to Bachelor of Education (B.Ed.) Degree, which was notified with the 2002 Regulations and was retained in the 2005 Regulations wa amended vide notification dated 12.7.2006, paragraphs 1.0, 2. , 3.0, 3.1, 3.2 and 3.3 of which are extracted below: **"1 0 Preamble** Teacher preparation course for secondary edu ation, generally known as B.Ed., is a professional course that repares teachers for upper primary/middle level (classes VI VIII), secondary (classes IX-X) and senior secondary (classes XI-XII) levels.

2.0 Duration and working days

2.1 Duration

B.Ed. programme shall be of a duration of at least one academic year.

2.2 Working Days

There shall be at least 200 working days exclusive of period of examination and admission etc., out of which at least 40 days shall be for practice-teaching in about ten schools at upper primary / secondary / senior secondary level. A working day shall be of a minimum of 6 hours in a six-day week, during which physical presence in the institution of teachers and student-teachers is necessary to ensure their availability for individual advice, guidance, dialogues and consultation as and when needed.

3.0 Intake, Eligibility and Admission Procedure

3.1 Intake

There shall be a unit of 100 students divided into two sections of 50 each for general sessions and not more than 25 students per teacher for a school subject for methods courses and other practical activities of the programme to facilitate participatory teaching and learning.

3.2 Eligibility

3.2.1 Candidates with at least 50% marks either in the Bachelor's Degree and/or in the Master's degree or any other qualification equivalent thereto, are eligible for admission to the programme.

3.2.2 There shall be relaxation of marks/reservation of seats for candidates belonging to SC/ST/OBC communities and other categories as per the Rules of the Central/State Government/UT Administration concerned.

3.3 Admission Procedure

Admission shall be made on merit on the basis of marks obtained in the qualifying examination and/or in the entrance examination or any other selection process as per the policy of the State Government/U.T. Administration and the University."

8. The 2005 Regulations were repealed by the National Council for Teacher Education (Recognition Norms and Procedure) Regulations, 2007, the relevant provisions of which read as under:

"4. Eligibility.-The following categories of institutions are eligible for consideration of their applications under these Regulations:

(1) Institutions established by or under the authority of the

Central/State Government/UT administration;

(2) Institutions financed by the Central/State Government/ UT administration;

(3) All universities, including institutions deemed to be universities, so recognised under the UGC Act, 1956.

(4) Self-financed educational institutions established and operated by 'not for profit', Societies and Trusts registered under the appropriate law.

5. Manner of making application and time-limit.-(1) An institution eligible under Regulation 4, desirous of running a teacher education programme may apply to the concerned Regional Committee of NCTE for recognition in the prescribed form in triplicate along with processing fee and requisite documents.

(2) The form can be downloaded from the Council's website www.ncte-in.org, free of cost. The said form can also be obtained from the office of the Regional Committee concerned by payment of Rs. 1000 (Rupees one thousand only) by way of a demand draft of a nationalised bank drawn in favour of the Member-Secretary, NCTE payable at the city where the office of the Regional Committee is located.

(3) An application can be submitted conventionally or electronically online. In the latter case, the requisite documents in triplicate along with the processing fee shall be submitted separately to the office of the Regional Committee concerned. Those who apply online shall have the benefit of not to pay for the form.

(4) The cut-off date for submission of application to the Regional Committee concerned shall be 31st October of the preceding year to the academic session for which recognition has been sought.

(5) All complete applications received on or before 31st October of the year shall be processed for the next academic session and final decision, either recognition granted or refused, shall be communicated by 15th May of the succeeding year.

* * *

7. Processing of applications.-(1) The applicant institutions shall ensure submission of applications complete in all respects. However, in order to cover the inadvertent omissions or deficiencies in documents, the office of the Regional Committee shall point out the deficiencies within 30 days of receipt of the applications, which the applicants shall remove within 90 days. No application shall be processed if the processing fees of Rs. 40,000 is not submitted and such applications would be returned to the applicant institutions.

(2) Simultaneously, on receipt of application, a written communication along with a copy of the application form submitted by the institution(s) shall be sent by the office of the Regional Committees to the State Government/UT administration concerned.

(3) On receipt of the communication, the State Government/UT administration concerned shall furnish its recommendations on the applications to the office of the Regional Committee concerned of the National Council for Teacher Education within 60 days from receipt. If the recommendation is negative, the State Government/UT administration shall provide detailed reasons/grounds thereof with necessary statistics, which shall be taken into consideration by the Regional Committee concerned while deciding the application. If no communication is received from the State Government/UT administration within the stipulated 60 days, it shall be presumed that the State Government/UT administration concerned has no

recommendation to make.

(4) After removal of all the deficiencies and to the satisfaction of the Regional Committee concerned, the inspection of infrastructure, equipments, instructional facilities, etc. of an institution shall be conducted by a team of experts called Visiting Team (VT) with a view to assessing the level of preparedness of the institution to commence the course. Inspection would be subject to the consent of the institution and submission of the self-attested copy of the completion certificate of the building. Such inspection, as far as administratively and logistically possible, shall be in the chronological order of the date of receipt of the consent of the institution. In case the consent from more than one institution is received on the same day, alphabetical order may be followed. The inspection shall be conducted within 30 days of receipt of the consent of the institution.

(5)-(8) * * *

(9) The institution concerned shall be informed, through a letter, of the decision for grant of recognition or permission subject to appointment of qualified faculty members before the commencement of the academic session. The letter issued under this clause shall not be notified in the Gazette. The faculty shall be appointed on the recommendations of the Selection Committee duly constituted as per the policy of the State Government/ Central Government/University/UGC or the affiliating body concerned, as the case may be. The applicant institution shall submit an affidavit in the prescribed form that the Selection Committee has been constituted as stated above. A separate staff list with the details would be submitted in the prescribed form. The Regional Committee would rely on the above affidavit and the staff list before processing the case for grant of formal recognition.

(10) All the applicant institutions shall launch their own website soon after the receipt of the letter from the Regional Committee under Regulation 7(9) covering, inter alia, the details of the institution, its location, name of the course applied for with intake, availability of physical infrastructure (land, building, office, classrooms, and other facilities/amenities), instructional facilities (laboratory, library, etc.) and the particulars of their proposed teaching and non-teaching staff, etc. with photographs, for information of all concerned.

(11) The institution concerned, after appointing the requisite faculty/staff as per Regulation 7(9) above and fulfilling the conditions under Regulation 7(10) above shall formally inform the Regional Committee concerned along with the requisite affidavit and staff list. The Regional Committee concerned shall then issue a formal recognition order that shall be notified as per provision of the NCTE Act.

(12)-(13) * * *

8. Conditions for grant of recognition.-(1) An institution must fulfil all the prescribed conditions related to norms and standards as prescribed by NCTE for conducting the course or training in teacher education. These norms, inter alia, cover conditions relating to financial resources, accommodation, library, laboratory, other physical infrastructure, qualified staff including teaching and non-teaching personnel, etc.

(2) In the first instance, an institution shall be considered for grant of recognition for only one course for the basic unit as prescribed in the norms and standards for the particular teacher education programme. An institution can apply for one basic unit of an additional course from the subsequent academic session. However, application for not more than one additional course can be made in a

year.

(3) An institution shall be permitted to apply for enhancement of course wise intake in teacher education courses already approved, after completion of three academic sessions of running the respective courses.

(4) An institution shall be permitted to apply for enhancement of intake in Secondary Teacher Education Programme - BEd & BPEd programme, if it has accredited itself with the National Assessment and Accreditation Council (NAAC) with a Letter Grade B developed by NAAC.

(5) An institution that has been granted additional intake in BEd and BPEd teacher training courses after promulgation of the 2005 Regulations i.e. 13-1-2006 shall have to be accredited itself with the National Assessment and Accreditation Council (NAAC) with a Letter Grade B under the new grading system developed by NAAC before 1-4-2010 failing which the additional intake granted shall stand withdrawn w.e.f. the academic session 2010-2011.

(6) * * *

(7) No institution shall be granted recognition under these regulations unless it is in possession of required land on the date of application. The land free from all encumbrances could be either on ownership basis or on lease from Government/government institutions for a period of not less than 30 years. In cases where under relevant State/UT laws the maximum permissible lease period is less than 30 years, the State Government/UT administration law shall prevail. However, no building could be taken on lease for running any teacher training course.

(8)-(9) * * *

(10) At the time of inspection, the building of the institution shall be complete in the form of a permanent structure on the land possessed by the institution in terms of Regulation 8(7), equipped with all necessary amenities and fulfilling all such requirements as prescribed in the norms and standards. The applicant institution shall produce the original completion certificate, approved building plan in proof of the completion of building and built-up area and other documents to the visiting team for verification. No temporary structure/asbestos roofing shall be allowed.

(11) * * *

(12) An institution shall make admission only after it obtains order of recognition from the Regional Committee concerned under Regulation 7(11), and affiliation from the examining body.

(13)-(16) * * *"

The details of the petitions filed in 2007 and 2008 and the orders passed by the High Court

9.1 One of the four Committees constituted by the Council under Section 20(1) of the 1993 Act is the Western Regional Committee, which is required to perform functions under Sections 14, 15 and 17 in relation to the States of Gujarat, Goa, Madhya Pradesh and Maharashtra. In the last about 15 years, the Western Regional Committee entertained thousands of applications made by private institutions for starting teacher training courses albeit without ensuring compliance of the mandatory provisions contained in the 1993 Act and the relevant regulations. Some of these institutions were started in commercial premises like marriage halls and shops, and in the existing school premises without the required infrastructure and staff. They admitted students from different parts of the country, majority of whom did not even know the place from where the institutions were operating. This must have become possible

because of the active or tacit connivance of those who were entrusted with the task of ensuring effective implementation of the provisions of the 1993 Act. When the Central Government was apprised of the irregularities committed by the Western Regional Committee in the matter of grant of recognition to the so-called teacher training institutions, it was decided to take necessary corrective measures. Therefore, the Central Government invoked the power vested in it under Section 29(1) of the 1993 Act and directed that henceforth no recognition be granted to any teacher training institution/courses/additional intake by the Western Regional Committee. The decision of the Central Government was communicated to the Chairperson of NCTE vide letter dated 20.8.2007, the relevant portions of which are extracted below:

"New Delhi

20th August, 2007

Government of India,

Ministry of Human Resources Development

Department of School Education & Literacy

The Chairperson,

National Council for Teacher Education,

I, Bahadur Shah Zafar Marg, New Delhi 110002

Subject: Directions under Section 29 of the NCTE Act, 1993 to withhold the grant of recognition in institutions Courses /Additional intake falling under Jurisdiction of Western Regional Committee of National Council for Teacher Education (NCTE).

Sir,

It has come to notice of the department of school education

& Literacy that there has been uneven and disproportionate growth in the number of recognitions granted to various courses and institutions in the states falling under the Western Regional Committee of NCTE and that while granting recognition, the actual demand of teachers in particular states has been totally ignored.

2. In these circumstances, it is felt appropriate to undertake a comprehensive review of the situation for taking necessary corrective measures. Therefore, as directed by the competent authority, NCTE is hereby directed under section 29 of the NCTE Act, 1993 that recognition may henceforth not be granted to any teacher training institutions/courses/ Additional intake falling within the Jurisdiction of the Western Regional of NCTE till a comprehensive review is made or till further orders, whichever is earlier.

3. Necessary instruction to this order may accordingly be conveyed to the Western Regional Committee of NCTE. A compliance report may be sent to this Department at the earliest.

Your sincerely

(Simmi Choudhary)
Deputy Secretary to Government
Govt. of India"

9.2 The NCTE sent letter dated 22.8.2007 to the Regional Director, Western Regional Committee incorporating therein the direction issued by the Central Government. That letter reads as under:

"August 22, 2007

To,

Dr. OVS Sikarwar,
Regional Director

Western Regional Committees
Manas Bhawar (Near Air)
Shyamala Hills,
Bhopal : 162002

Subject: Directions under Section 29 of the NCTE Act, 1993 to withhold the grant of Recognition to institutions Courses /Additional intake falling under the Jurisdiction of Western Regional Committee of NCTE.

Sir,

I am directed to say that directions have been received from the competent authority under Section 29 of the NCTE Act, 1993 on August 21, 2007 that recognition may henceforth not be granted to any teacher training institutions Courses/Additional intake falling within the Jurisdiction of the Western Regional Committee of NCTE till a comprehensive service to be undertaken or till further orders, whichever is earlier.

2. In view of the above, you are directed to ensure that the above directions are complied with and immediate steps are taken to ensure that no action taken for grant of recognition and also no meeting of the Western Regional Committee is held. The Chairperson and members of the Western Regional Committee may immediately be suitably informed in this regard.

Yours Faithfully,
Sd/-
(V.C. Tewari)
Members Secretary"

9.3 The directions issued by the Central Government were challenged by Amrit Vidyapeeth B.Ed. College, Siddhi in Writ Petition No. 14227 of 2007 filed before the Madhya Pradesh High Court. A large number of other private collages and institutions (198) which were desirous of starting teacher training

courses. They pleaded that even though the applications filed by them for recognition were complete in all respects and they had already got 'No Objection Certificates' from the State Government and affiliation from the examining bodies, the Western Regional Committee was not entertaining their applications because of the restriction imposed by the Central Government. All the writ petitions were dismissed by the Division Bench of the High Court vide its order dated 29.11.2007. The Division Bench adverted to the scheme of the 1993 Act, referred to the judgments of this Court in Food Corporation of India v. Bhanu Lodh (2005) 3 SCC 618 and State of Maharashtra v. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya (2006) 9 SCC 1 and held that the Central Government has the power to issue the directions impugned in the writ petitions. The reasons assigned by the Division Bench for arriving at this conclusion are contained in paragraph 32 of order dated 29.11.2007, which is extracted below:

> "32. Regard being had to the aforesaid pronouncements of law, if we look at the language employed under section 29 of the Act we have no scintilla of doubt that the Central Government could have issued such a direction as has been issued inasmuch as sub-section (1) of Section 29 makes it crystal clear that the Council is bound by such directions on questions of policy as the Central Government may give in writing from time to time and further sub-section (2) of section 29 lays a postulate that the decisions of the Central Government as to whether the question is one of the policy or shall be final. Be it noted in the letter dated 20.8.2007 there is mention of the fact that it has come to the notice of school education and Literacy that there has been uneven and disproportionate growth in the number of recognition granted to various courses of the institutions in the State falling under the Western Regional Committee of NCTE and while granting recognition the actual demand of teaches in the particular State has been totally ignored. It is also perceivable from

> the letter that the Department has felt is appropriate to make comprehensive review of the situation for taking necessary corrective measures. The tenor of the letter and the grounds mentioned therein and keeping in view the language employed in section 29 of the Act there can be no trace of doubt that the Central Government has taken a decision which by no stretch of imagination can not be said to be a policy decision under the scheme of the Act. It is because the purpose of the Act is to provide for establishment of a National Council for Teacher Education with a view to achieve planned and co-ordinated development of the teacher education system throughout the country. That apart, Regulation 4 deals with eligibility and Regulation 8 deals with the conditions for grant of recognition. We have already referred to Section 12 of the Act. In view of the object and reasons and the role assigned to the Council and the power conferred on the Central Government we come to the irresistible conclusion that the direction issued by the Central Government is within the ambit and sweep of its powers and not de hors the statutory exercise of power."

The plea that the students who had taken admission should be permitted to appear in the examination was rejected by the Division Bench by making the following observations:

> "36. Presently to the legitimate expectation and interest, it is submitted by the learned counsel for the petitioners that the institutions have given admission and if eventually the institutions are granted recognition the students should be permitted to appear in the examination. Learned Single Judge of this Court while passing the interim order had clearly stated that institutions may admit students provisionally at their own risk without accepting fees from them and if they accept fees from the students they would be ready to face the consequences if the petition is decided against them in view of the aforesaid order no equity can ever flow in favour of the institutions. We would

like to place it on record that an institution which is desirous of imparting B.Ed. and M.Ed. education or introducing a course meant for teachers is under obligation to be aware of the provisions contained under the 1993 Act. The said Act has been engrafted with a sacrosanct purpose. Grant of recognition is the condition precedent before any institution proceeds in any other matter like affiliation from the examination body. Whether the affiliation has to be granted automatically or not we have already refrained from dwelling upon the said issue, but an onerous one, it is inconceivable how an institution without recognition can nurture the idea to admit students. A day dreamer can build a castle in the air or for that matter castle in Spain, but it is absolutely inapposite on the part of aspirants registered bodies or institutions to admit students and pyramid the foundation relying on the bedrock of legitimate expectation that the students would be treated as students who have been admitted in such institutions in such course which are valid in law. An educational institution has to conduct itself in an apple pie order. It has to maintain the sacredness of the concept behind imparting education. They are under obligation to keep in mind that commercialization of course under 1993 Act is impermissible. Quite apart from the above it is totally imprudent and in a way quite audacious to build a superstructure without an infrastructure. If we allow ourselves to say so, perception has been blinded and in the ultimate eventuate a cataclysm has been unwarrantedly invited. We may say without any fear of contradiction that it is a perceptible deception and fraud on law Ergo. The stance that they have to be given the benefit of legitimate expectation and their interest should be protected, is devoid of any substance and we unhesitatingly repel the same."

9.4 Another batch of 18 writ petitions with the lead case *Pitambra Peeth Shiksha Prasarani Samiti v. State of M.P.*

and others W.P. (C) No. 15276 of 2007, filed for quashing the decision of the State Government to hold common entrance examination for admission to B.Ed. courses was disposed of by the Division Bench of the High Court vide order dated 14.12.2007. The Division Bench referred to the provisions of the 1993 Act as well as the M.P. B.Ed. Examination Rules, 2007, order dated 29.11.2007 passed in Writ Petition No.14227 of 2007 and batch, took cognizance of the fact that some of the students had taken admissions in the unrecognized institutions and proceeded to observe:

> "....Regard being had to the peculiar facts and circumstances of the case and the nature of litigation which had cropped up and the time consumed we think it appropriate to direct the students who have taken admission in the non-recognised colleges/institutions, if so desired, can take admission in the recognised institutions/ colleges. The State Government and the University shall not cause any impediment in the same and make an endeavour to facilitate the same by allotting them to colleges which have recognition, if the students approach the Central Agency, the respondent No.3. The State Government is directed to publish the notification within a period of seven days fixing a date seven days thereafter so that they can be allotted colleges.
>
> As far as the counseling of the candidates who have passed the entrance examination is concerned, a date should be notified within a period of seven days and counselling be done within a period of seven days thereafter and the candidates appearing in the counseling shall also be allotted recognised colleges/institutions."

The Division Bench rejected the petitioners' plea for permission to hold college level counseling and observed:

> "The next facet that requires to be dealt with whether there should be permission for grant of college level counselling.

Submission of the learned counsel for the petitioners is that the seats should not lie vacant and college level counselling should be allowed. It is urged that the State Government has illegally introduced the centralized counselling. In this context we may refer to clause 3.2 of NCTE Norms which reads as under:

"3.2 Eligibility

3.2.1 Candidates with at least 50% marks either in the Bachelor's Degree and/or in the Master's Degree or any other qualification equivalent thereto, are eligible for admission to the programme.

3.2.2 There shall be relaxation of marks/reservation of seats for candidates belonging to SC/ST/OBC communities and other categories as per the Rules of the Central/State Government/UT Administration concerned.

3.3 Admission Procedure

Admission shall be made on merit on the basis of marks obtained in the qualifying examination and/or in the entrance examination or any other selection process as per the policy of the State Government/U.T. Administration and the University."

As is demonstrable from clause 3.2 it deals with the eligibility of a candidate and clause 3.3 deals with the admission procedure. The State Government has taken mode of common entrance examination. This is a policy decision taken by the State Government. As is manifest, the NCTE has deliberately introduced norms and left it to the discretion of the State Government and hence, holding of the entrance test cannot be found fault with. Once the said mode has been taken recourse to the college level counselling should not be allowed. Therefore, the aforesaid submission of the learned counsel for the petitioners leaves

us unimpressed and we repel the same."

The conclusions recorded by the Division Bench of the High Court in the aforesaid batch of cases are extracted below:

"(a) The candidates who have taken admission in the non-recognised institutions should be called by the Central Agency as well as the State Government by notifying a date within a period of seven days fixing a date after 7 days so that the candidates can be allotted to the recognised colleges/institutions as per norms.

(b) The students who have qualified in the entrance examination but could not appear in the counsel ling should be called for counselling by a date which wou d be notified within a period of seven days and the said dat would be after seven days as a result of which the couns lling would become convenient. (c) The a

lotment of seats should be made strictly on the basis of norms keeping in view the concept of proportionalit so that the grievance is put to rest. (d) The college leve counselling is not permissible as the State Government has taken recourse to the mode of common entrance examination."

9.5 The State of Madhya Pradesh challenged the aforesaid order in SLP(C) No. 3269 of 2008, etc., which were disposed of by this Court on 18.2.2008 in the following terms:

"It has been stated that for taking admission in B.Ed. course within the State of Madhya Pradesh after exhausting the State quota, 8411 seats are lying vacant. According to the State, pursuant to the direction of the High Court in Paragraph 19 of the impugned order, 5142 seats would be required to be filled up by admitting the students but 3269 seats in B.Ed. course would be still lying vacant. The State Government is directed to take steps for

fresh centralized counselling for filling up all the unfilled seats in the recognized colleges for which steps must be taken within fifteen days from today."

9.6 One more batch of 55 writ petitions with the lead case Jan Seva Shiksha Samiti v. State of Madhya Pradesh and others W.P. No. 12133 of 2007 was filed questioning the alleged interference of the State Government in the matter of grant of recognition for establishing teacher training colleges. In those petitions, it was pleaded that the 1993 Act and the Regulations framed thereunder do not envisage any role for the State Government and, therefore, the grant of recognition cannot be made conditional on the production of 'No Objection Certificate' from the State Government. In the counter affidavit filed on behalf of the State Government, it was averred that in terms of Regulation 7(2)(iv) of the 2005 Regulations, it had a significant role in the matter of setting up of teachers training institutions and as such the institutions seeking recognition were bound to obtain 'No Objection Certificate'. The NCTE supported the stand taken by the petitioners and pleaded that the State Government cannot interfere in the matter of recognition, which is the exclusive preserve of the Regional Committee. The High Court referred to the provisions of Sections 14 to 16, 20, 21, 29 and 32 of the 1993 Act and Regulations 3, 5, 6 and 7 of the 1995 Regulations, different types of orders passed by Western Regional Committee under Section 14(1) and (3) and 15(1) of the 1993 Act for grant of recognition to different institutions as also the directions given by the Central Government under Section 29 of the 1993 Act, report submitted by the Committee headed by Mrs. Anita Kaul and issued the following directions:

"(a) Though the letters of recognition issued by the NCTE are couched in different phraseology in various cases, yet the same lead to one inescapable conclusion that they are conditional recognitions.

(b) The conditional recognitions could have been ripened

after satisfying certain statutory requirements like appointment of teaching and non-teaching staff and other conditions enumerated/provided in regulations 7 & 8 of the Regulations as they are conditions precedent and relate to fundamental realm of recognition.

(c) Certain conditions are relatable to the institutions after they become functional but on that foundation it cannot be construed that the orders of recognition are totally unconditional.

(d) The State Government cannot refuse 'No Objection Certificate' relying on the M.P. Vishwavidyalaya Adhiniyum, 1973 in view of the decision of the Apex Court rendered in the case of *Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya* (Supra).

(e) The institutions are bound to follow the regulations of the NCTE and the Universities are required to respect regulations as they have overriding effect on the University statues.

(f) As the Union of India has interfered with the pending applications and the present cases do constitute a hybrid category, it is apposite that the Apex body of the NCTE shall look into the matter from all spectrums including calling for recommendation from the State Government within a specified span of time.

(g) If the Apex Body of NCTE grants unconditional recognition the University shall extend the benefit of affiliation and in case conditional recognition is granted by the NCTE the University shall grant affiliation on satisfaction of the conditions enumerated in th orde

itself and shall not entrench or encroach upon the fil d by taking recourse to its Act or its statues. (h) T e University shall be totally bound by the conditions impose

in the order and shall not travel beyond them.

(i) The institutions who have admitted students de hors the Act and the regulations and admitted students without proper recognition and affiliation cannot be extended the benefit of equity and the students who have been admitted can be imparted education afresh after recognition and affiliation are granted.

(j) If the institutions are eventually granted recognition and affiliation fees collected from the students shall be adjust for fresh course which would commence after recognition and affiliation.

(k) If the students do not intend to prosecute studies in the institution they would entitled to claim refund of their fees and the institution shall be bound to refund the fees to the said students on receipt of proper application, as the institutions have admitted the students at their own risk."

9.7 S.R. College of Education filed Writ Petition No. 4016 of 2008 for quashing the decision of the university not to grant affiliation on the ground that it did not have NOC from the Higher Education Department of the State Government. The University took up the stand that the college cannot participate in the counseling because it did not have recognition or affiliation. The Division Bench of the High Court noticed the judgment in Jan Seva Shiksha Samiti's case and held:

"In view of the aforesaid the college could not have admitted the students without affiliation and recognition. The Apex Court by order dated 18.02.2008 directed the State Government to take steps for centralized counseling for filling up unfilled seats in the recognized colleges. By that day the petitioner college was not recognized. Quite apart from the above, the petitioner college has not yet been affiliated. There can be no scintilla of doubt, as has been held by this Court, a college which does not have

recognition and affiliation cannot admit the students. An attempt has been made to give admission to the students in respect of the academic session 2007-08. Their Lordships have stated to hold centralized counseling for recognized colleges. As the present institution had neither got recognition till 21.02.2008 nor does it have the affiliation at present, it cannot claim as a matter of right to admit the students and participate in the centralized counseling. The recognition granted has to be prospective. If affiliation is granted by the University as per the conditions enumerated in the order of recognition and the role ascribed to the Universities by the NCTE Regulations, 2005, then only the college can participate in the centralized counseling. The institution cannot claim that it can admit students by participating in centralized counseling for the academic session 2007-08. It can do so after obtaining affiliation for the academic session 2008-09.

9.8 Akhil Bhartiya Shiksha Avam Prashikshan Mahavidhyalaya filed Writ Petition No. 4847 of 2008 questioning the direction given by the State Government to Barkatullah University that it shall seek guidance by sending details and documents in respect of those institutions which had obtained recognition from NCTE but did not have NOC. During the course of hearing, learned counsel appearing for the State conceded that in view of the order passed in Jan Seva Shiksha Samiti's case, the State was not entitled to insist upon production of the NOC from the State Government. After taking note of his statement, the High Court held:

"16. We understand the anxiety of the petitioner that the State Government has issued a letter circular insisting upon the NOC. That part has already been dealt with in earlier decisions. The competent authority of the State Government should not have behaved in a callous, reckless and high-handed manner by incorporating the

same. The University also could have been well advised to bring it to the notice of the State Government about the law in the field specially when both of them were parties to the earlier litigation instead of following the decision of the State Government in a mechanical manner. It is understandable had the institutions obtained recognition from the NCTE and faced difficulty in getting affiliation from the University because of insistence of the State Government for NOC in its whim and fancy, the matter would have been different. We reiterate the legal position that the State Government cannot insist for NOC as has been held in the earlier judgment, and we command the State Government to modify the letter circular in consonance with the judgments delivered by us in *Jan Seva Shiksha Samiti* (supra), *S.R. College of Science and Technology* (supra) and other connected matters.

17. Though we have so directed, the petitioner remains in the state where it was when it last approached this Court in the earlier writ petition. We are really shocked how a prayer could have been made to allow the petitioner to participate in the re-counseling of B.Ed., without insisting for NOC by the State Government. The said stage has not yet come into existence. A litigant is supposed to know whether he has a real grievance or he has made an effort to build a castle in the air. An educational institution which is supposed to impart, education in B.Ed., course has to have legal opinion in the field but as it seems all norms are thrown to the winds and the writ petition is filed by picking a straw either from here to there. This does not help. When the petitioner had approached this court and no relief was granted and it was clearly held that all the institutions would be governed by the directions contained in paragraph 42 of *Jan Seva Shiksha Samiti* (supra), it is really shocking that such an ambitious petition, is filed. It would not be out of place to say that the State Government has acted contrary to the judgments but the institutions

which, could have been aggrieved by such action could have filed the writ petitions and that would have been a sanguine grievance. But the petitioner institutions do not fall in the said category. Under the circumstances, we are disposed to think an ingenious effort is made to build up an edifice to have the relief which has already been etherized. Almost six decades back, it was said by Agnes E. Benedict, 'the only thing better than education is more education,' but the present case demonstrates a situation where one can say with certitude that it smells of foul play and drafts out a mephitic ambition. The institutions which are concerned with education should have ethicality, probity, propriety, parity, righteousness, ability, honesty, rectitude acclaimed virtues and not unnecessary and unwarranted excitement, glee to achieve glory in any mariner, elation at the cost of legality, jubilation at the murder of all norms and rapture by chartering away all normative guidelines.

18. In view of our aforesaid analysis, while holding that the State Government could not have insisted for NOC as per the law laid down in the case of *Jan Seva Shiksha Samiti* (supra), we conclude and hold that the petitioner institutions in each case are not entitled to any relief and the petitions are dismissed. We may further state here that we would have imposed exemplary costs as it was within the special knowledge of the petitioners that they could not have got the relief without further action being taken by the Apex Body of the NCTE and without the affiliation, yet we restrain from, doing so for the present as we treat this spate of litigations as a manifestation of unwarranted and uncalled for anxiety on the part of the persons who are in the management of the said institutions."

9.9 In *Rajendra Katare Shiksha Mahavidyalaya v. State of M.P. and others* W.P. No. 3679 of 2008 the High Court held that the petitioner cannot make admission without obtaining

recognition from the competent authority and affiliation from the concerned University. The High Court also observed that recognition and affiliation will be prospective and any authority making an effort to take steps contrary to the directions given by it would be liable for contempt.

9.10 In *Siddhi Vinayak College, Bhind v. State of M.P. and others* W.P. No. 1558 of 2008, the Division Bench of the High Court referred to the interim directions issued by the learned Single Judge and observed:

"11. The submissions of Mr. Dinesh Upadhyay, learned counsel appearing for the petitioner are basically based on the order passed by the learned Single Judge. It is vehemently contended by him that because of the interim order of this Court, the institution has admitted the students. The Division Bench of this Court had already dealt with the said facet. When in the final order the relief was denied the petitioner cannot claim any benefit on the basis of the interim order and more so, when this Court has expressed, the opinion that it was inconceivable how an institution without recognition can nurture the idea to admit students. The imperative guidelines for imparting of training for 180 days are not disputed before us. The examination is scheduled, to be held in May-June, 2008. Recognition has been granted on 28-12-2007/11-01-2008. By the principle of sheer arithmetics 180 days training is not possible and hence, the order passed by the respondent no. 2 cannot be faulted."

9.11 In Sheetla Shiksha Mahavidyalaya, Gwalior v. State of M.P. and others Writ Petition No. 6716 of 2008 the petitioner challenged the decision of the Board of Secondary Education not to grant affiliation. The Court noticed the affidavit filed on behalf of the NCTE and held that the recognition granted under the 1993 Act is prospective and no institution can admit students without having recognition from the competent authority.

9.12 Vikramaditya Mahavidhyalaya, Jabalpur filed Writ Petition No. 6113 of 2008 impleading the Union of India, the NCTE, Western Regional Committee of NCTE, the State of M.P. and six universities of Madhya Pradesh as party respondents and prayed for issue of direction to the universities to withdraw the affiliation granted to non-deserving colleges and to restrain them from declaring the result of the students admitted in such colleges. It was further prayed that the universities be directed not to conduct the examination for the students of non-deserving colleges. That petition was disposed of by the Division Bench of the High Court vide order dated 31.7.2008. While disapproving the actions of the universities to grant affiliation by overlooking the fact that the institutions had not complied with the mandate of Regulation 7(9), (11) and (12), the Division Bench gave several directions, some of which are reproduced below:

"(a) The State Government cannot refuse 'No Objection Certificate' relying on the M.P. Vishwavidyalaya Adhiniyam, 1973 in view of the decision of the Apex Court rendered in the case of *Sant Dnyaneshwar Shikshan Shastro Mahavidyalaya* (supra).

(b) The institutions are bound to follow the Regulations of the NCTE and the Universities are required to respect the Regulations and act accordingly.

(c) The Institutions/Colleges can give admissions only after they obtain the order of recognition from the Regional Committee concerned under Regulation 7(I) and affiliation from the concerned examining body.

(d) The order of recognition is always prospective.

(e) On the basis of the order of recognition, the institution is entitled to obtain affiliation from the examining body after fulfilling the criteria mentioned in the NCTE Act and Regulations and thereafter admit the students.

(f) The NCTE cannot pass an order of recognition retrospectively.

(g) The order of recognition itself does not enable the institution to treat the recognition as a blanket order and violate other requirements that may be prescribed by the affiliating examining body which is in accord with the 1993 Act and Regulations.

(i) The State Government shall positively reply to the Apex Body of the NCTE within a week hence, failing which it would be presumed that it has no recommendation to make.

(j) The universities shall forward the documents received by them to the NCTE for verification with regard to the status of recognition and their queries within a week hence by special messengers.

(k) The Apex Body shall scrutinize the recognition order and the documents brought on file and take a decision whether those institutions are recognized or not. The said decision shall be taken within a period of seven days therefrom, i.e., seven days from the receipt of the documents from the universities. The Apex Body shall also scrutinize the recognitions which were not the subject matter of the litigation before this Court to find out whether the said recognitions were valid as per the NCTE Act and the Regulations framed thereunder.

(l) The Apex Body shall communicate to the universities and the State Government about the recognition facet positively within a week therefrom.

(m) The universities shall scrutinize the norms for the purpose of grant of affiliation in terms of the order of recognition and the provisions contained in the Regulations, regard being had to the decisions of this

Court within seven days and issue letters of affiliation wherever justified.

(p) If any admission has already been given, the same shall be kept in abeyance.

(q) The case of the petitioner-college shall also be scrutinized by the Apex Body of the NCTE as well as by the concerned university."

The details of the orders passed in Writ Petition No. 6146 of 2008 and connected cases

10.1 Subhash Rahangdale filed Writ Petition No.6146 of 2008 by way of Public Interest Litigation and prayed for issue of direction to the NCTE, State of M.P., Barkatullah University and others for ensuring proper maintenance of norms and standards in the teacher education system in various colleges run by different educational societies / entities or the institutions financed by Central / State Government or Union Territory Administration or the universities including the deemed universities and self-financed educational institutions established and operated by non-profit making societies and trusts registered within the State. He prayed for appointment of an expert team of NCTE for conducting inspection of all the recognized institutions under Section 13 and 17 of the 1993 Act and also for issue of a direction to Western Regional Committee to take action in light of the report of the expert team. Another prayer made by him was for directing the universities and examining bodies not to take examination of the students who did not satisfy the conditions of eligibility.

10.2 The Division Bench of the High Court passed interim orders dated 14.10.2008; 23.10.2008 and 15.12.2008 and directed the NCTE to prepare exhaustive lists of recognized colleges and re-scrutinize those lists and verify whether norms and procedures were followed at the time of appointment of faculty members and whether they were still continuing in the

colleges. On 17.12.2008 the High Court passed a detailed order, paragraph 54 of which is extracted below:

"54. Regard being had to the aforesaid factual scenario we proceed to enumerate our directions in seriatim:

a) The students who have prosecuted studies in the colleges which have been cleared by the NCTE are entitled to appear in the examination for the academic session 2007-08.

b) The University Teaching Department and the Colleges which have been cleared and have held the examinations, the results shall be published.

c) The Colleges which have been cleared and where we have stated that affiliation should not have been discontinued and where a fresh affiliation is necessary because all formalities were completed if any other formalities remain to be complied with as required by the University, the same shall be complied with within a period of 15 days from the date of intimation by the concerned University.

d) As far as other colleges in respect of which inspection have carried out by the NCTE and have not been cleared, the inspection shall be completed on University-wise basis by 20.01.2009.

e) The NCTE shall make a college-wise report and behave like a statutory body with responsibility by enclosing the documents so that it will be properly appreciated.

f) The students who have prosecuted studies in the colleges which have been cleared must have completed the period of study as per the norms of Regulations, 2007, i.e., 180 days. If the period of study is found to be inadequate, the students would not be allowed to appear in the examination.

g) The students who have prosecuted their studies in UDT and Government colleges would be entitled to appear subject to compliance of norms of Regulation 2007.

h) The examination in respect of aforesaid students shall be held in the last week of February, 2009.

10.3 Swavittiya Ashaskiya Mahavidyalaya Vikas Sangh challenged the order dated 17.12.2008 in SLP (C) No. 5485 of 2009. Vidyavati College and others also challenged that order in SLP(C) Nos. 5486 of 2009. Initially, this Court passed an order of stay on 14.01.2009 but the same was modified on 19.01.2009 in the following terms:

"Adjourned by two weeks.

Interim order dated 14.01.2009 is vacated.

As regards the direction for conducting of examination is stayed until the High Court consider the matter and pass further orders."

10.4 Thereafter, the High Court considered report dated 27.1.2009 prepared by the Committee of the NCTE which had undertaken detailed scrutiny of the status of various institutions engaged in conducting teacher training courses. The Committee divided the institutions in the following four categories:

Category 01

Clearly recognized institutions who are recognized and their recognition is to continue (This includes some cases where inspection of the new building constructed is pending despite application/ depositing of fee to WRC).

Category 02

Cases recognized upto 2007-08 and they are subjected

to proceedings to withdraw the recognition from 2008-09 onwards.

Category 03

Cases which are to be recognized from 2008-09 onwards and Universities are required to affiliate, if not already done.

Category 04

Institutions which are not recognized during 2007-08 due to not having staff during sessions or due to decisions of Hon'ble Court in Amrit Vidyapeeth Case.

10.5 After noticing the categorization done by the Committee, the High Court issued the following directions:

"(i) The colleges which have been cleared by the NCTE as they have recognition and affiliation, the students of said colleges are entitled to undertake the examination for the academic session 2007-08.

(ii) The colleges which have been granted recognition and affiliation after the said academic session they shall be prospective and would not have any retrospective applicability.

(iii) The colleges which were the parties in *Amrit Vidya Peeth* (supra) and claimed to impart B.Ed, education will be entitled to be considered for participating in the examination for the academic session 2007-08.

(iv) The colleges/ institutions which were eligible for imparting B.Ed. Course but not M.Ed. Course and were parties in *Amrit Vidya Peeth* (supra) and are not presently cleared by the NCTE for the said reason shall be scrutinized by the NCTE for B.Ed. course and a report in that regard be submitted on the next date of hearing.

(v) Submission of Mr. Naman Nagrath, learned counsel for interveners, to the effect that the students who had prosecuted their studies in the colleges on the basis of certain orders issued by the NCTE would also be entitled to appear in the examination sans substance inasmuch as the cases of said colleges were rejected in *Amrit Vidya Peeth* (supra) as there was actually no recognition.

(vi) The colleges which have been cleared after scrutiny as per the direction in Jan Seva Shiksha Samiti (supra) and in this case are eligible to undertake the examination.

(vii) The NCTE shall not extend the benefit to any college by granting recognition in a retrospective manner.

(viii) The institutions which have intervened and have not been visited with the order of rejection may make representation to the NCTE for inspection or scrutiny within a period of one week and the same shall be done as undertaken by Mr. BD Silve, learned senior counsel.

(ix) The colleges whose cases have been rejected for recognition may prefer an appeal under Section 18 of the Act within a period of three weeks. Their appeals shall be disposed of on merits ascribing cogent and germane reasons.

(x) The rest of the colleges in respect of which the inspection is in progress shall be completed as undertaken by Mr. BD Silva in quite promptitude. The inspection shall be carried out university-wise and the report be submitted to this Court so that this Court can be apprised of the colleges which have been recognized and affiliated.

(xi) While carrying out the inspection it needs no special emphasis to state the NCTE shall keep in view the norms and standards as also the provisions enshrined under the Act and Regulations. It should be kept in mind that

education cannot be crucified, or guillotined at the alter of fancy, whim or the propensity of a demagogue."

10.6 Clause (3) of the above noted directions was substituted on 30.1.2009 with the following:

"The colleges which were parties in *Amrit Vidya Peet* (supra) and claimed to impart B.Ed. education shall not be entitled to be considered for participation in the examination for the academic session 2007-08."

10.7 In furtherance of the directions given by the High Court, the Committee of the NCTE conducted inspection of majority of the 364 institutions of which the details were furnished by 7 universities of the State and found that the students of 221 institutions were eligible to take the examinations for academic session 2007-08 and more than 55 institutions were covered by the directions given in Amrit Vidyapeeth and Jan Seva Shikshan Samiti cases. The High Court also noted that the Committee had prepared a separate list of 17 colleges in respect of which some doubts were expressed and another list of 22 colleges which were not scrutinized earlier and proceeded to observe:

"In the ordinary course of things, the clearance given by the NCTE after due inspection should have put the controversy to rest, but unfortunately it is not so inasmuch as the NCTE while submitting the list has not taken care of the earlier decisions rendered by this Court, despite categorical conclusions and the said position was conceded to by Mr. Brian Da' Silva, learned senior counsel on earlier date of hearing. We think it apt to clarify the position. In the case of *Amrit Vidya Peeth* (supra), the institutions did not have recognition and affiliation. The Institution availed an interim order to admit students but the Division Bench while dealing with it had not accepted the plea of legitimate expectation. A submission was put forth while hearing the present writ petitions that in *Amrit Vidya*

Peeth (supra), certain Institutions had recognition for B.Ed. and affiliation for the said course by the University but had no recognition and affiliation for M.Ed. Course. In view of the same, a recognition and affiliation in respect of B.Ed. course should be cleared and the Institutions which do not have recognition and affiliation should not be extended the benefit at all. The NCTE, as it appears, has scrutinized the same taking into consideration the parameters on that score in respect of Institutions.

We have already referred to in detail the facts of *Jan Seva Shiksha Samiti* (supra). The institutions had admitted the students though they had not been given affiliation by the University. Affiliation had not been given because they did not have unconditional recognition and they not appointed the faculty members. Keeping that in view, this Court had issued directions which we have reproduced hereinbefore.

On a plain reading of the same, it will be clear as a noon day that the grant of recognition and affiliation would be prospective. Thus, the cases which are covered under the *Jan Seva Shiksha Samiti* (supra) and similar cases cannot be conceived of having recognition and affiliation. In *Jan Seva Shiksha Samiti* (supra), this Court had clearly held that an Institution which does not have unconditional recognition, which includes the faculty members and does not have affiliation, could not have admitted the students. As it appears, the NCTE has cleared certain Colleges for the academic session 2007-08 by mis-interpreting *Jan Seva Shiksha Samiti* (supra). An institution or a college which is covered by *Jan Seva Shiksha Samiti* (supra), in our considered opinion, cannot be treated to be recognized and affiliated institution for the academic session 2007-08."

10.8 The Division Bench of the High Court observed that the recognition granted after scrutiny by the NCTE and the universities in the light of the directions given in the earlier

cases including Vikramaditya Mahavidhyalaya's case should be treated as prospective, i.e., for the year 2008-2009. The High Court then referred to the schemes of Sections 14, 15 and 17 of the 1993 Act, Regulations 7(9), (11) and (12), 8(1), (5), (8), (10) and (11) of the 1995 Regulations, Regulations 7(7), (9) and (11) and 8 of the 2007 Regulations and recorded its conclusions and directions in para 60, which are extracted hereunder:

"(a) Section 14 (3) of the Act lays down postulates with regard to certain parameters for grant of recognition and stipulates certain conditions which are pre-conditions and since qua non for grant of recognition and also deal with certain conditions which are futuristic in nature.

(b) Unless the requirement as provided under Section 14 (3) of the Act are fulfilled the Western Regional Committee cannot confer the benefit of recognition.

(c) There cannot be any kind of compromise or relaxation with regard to imperative conditions as prescribed under sub-section 14 (3) of the Act.

(d) No examining body can grant affiliation unless there is recognition by the NCTE as contemplated under Section 16 of the Act.

(e) If an educational institution is aggrieved by the order of refusal of recognition by the Regional Committee it can submit a representation to the said Committee.

(f) If a decision is taken against the affected institution by the Committee, an appeal can be preferred under Section 18 of the Act to the Council, and said remedies are alternative and efficacious.

(g) The grant of recognition and benefit of extension of affiliation are always prospective. Neither the NCTE nor the University can make it retrospective in nature.

(h) Section 14 (5) is relatable only to the institutions which were offering a course or training in teacher education at the commencement of the Act.

(i) Section 17 (1) of the Act basically and fundamentally deals with the withdrawal of recognition of such recognized institutions.

(j) As far as the withdrawal is concerned the same shall come into force only with effect from the end of the academic session inasmuch as the withdrawal relates to an already recognized institutions and hence, statutory protection has been granted.

(k) The terms "refusing recognition" used in second proviso to Section 17 (1) can alone relate to sub-section (1) and (5) of Section 14 to give a purposeful meaning to the same and regard being had to the scheme of provisions occurring the said chapter.

(l) The contention that students could have been admitted without proper recognition and affiliation by the educational institution is sans substratum.

(m) The list of colleges which have been cleared by the NCTE are treated as recognized institutions under the Act but the institution which are covered on the principle of Jan Seva Shika Samit (supra) cannot be allowed to undertake the examination for the academic session 2007-08 since at the time of admitting the students they did not have recognition in terms of Section 14 (3) of the Act and affiliation from the concerned Universities.

(n) The students who had admitted in the said colleges, if the said Colleges have been cleared by the NCTE in its list, can prosecute the studies as per the norms of the NCTE and thereafter appear in the examination.

(o) The claim put forth by the students that they should be

equitably dealt with and be permitted to appear in the examination keeping in view the prosecution of their studies in such colleges is negative since their studying in the unrecognized colleges/institutions cannot be regarded as prosecution of studies as per the norms laid down by the NCTE and such an order would tantamount to grant of premium to the educational institutors.

(p) If any student has felt betrayed or deceived by educational institution it is open to him to take appropriate steps claiming compensation.

(q) The institutions which had collected fees from the students for the academic Session 2007-08 and the students are not in a position to avail the benefit of such studies, the Colleges are under an obligation to refund the fees and the amount which had been collected from the students, if the students so desired. This is without prejudice to the claim of the students who put forth their stand and stance for claiming compensation.

(r) The NCTE shall bifurcate the recognized colleges on the parameter of *Jan Sevan Shiksa Samit* (supra) which are fit to undertake 2007-08 examination on the basis of education imparted and other colleges which are to be recognized for the subsequent academic session.

(s) The institution which are aggrieved by the action of refusal or recognition or withdrawal of recognition shall be communicated by the order by the competent authority of the NCTE, if not done so far, within three weeks and it would be open to said institutions to take statutory remedy as contemplated under Sections 14 and 18 of the Act.

(t) It would be open to the institutions to put forth their stand from all spectrums and the authorities concerned would be under an obligation to pass cogent and speaking order.

(u) The educational institutions in respect of which withdrawal of recognition is sought for, the same has to be in accord with Section 17 (1) of the Act and that would be as per the second proviso to the said section.

(v) The Colleges in respect of which results have been published shall reap the benefit of such declaration."

The grounds of challenge

11. The appellants have challenged the impugned orders on the following grounds:

(i) The High Court committed grave error by entertaining Writ Petition No. 6146 of 2008 filed in the name of public interest litigation without making an inquiry into the background of the petitioner and his special interest in the field of teacher education.

(ii) The directions given by the High Court are vitiated due to violation of the rules of natural justice because none of the appellants was impleaded as party to Writ Petition No. 6146 of 2008 and they did not get opportunity to show that they were duly recognized by the Western Regional Committee and they had also obtained affiliation from the examining body or that they were eligible and entitled to get recognition and affiliation.

(iii) The High Court has usurped the powers vested in the NCTE under the 1993 Act and the Regulations framed thereunder and has issued directions in disregard of the observations made by this Court in State of Maharashtra v. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya (supra) that the NCTE is the sole guardian and custodian of maintaining and sustaining the standard of teacher education.

(iv) That the High Court misinterpreted the provisions of Sections 14 and 17 of the 1993 Act and the Regulations framed thereunder and erroneously assumed that an order refusing recognition would operate with retrospective effect. The withdrawal of recognition by the Regional Committee in the light of the directions given by the High Court in Jan Seva Shiksha Samiti v. State of Madhya Pradesh (supra) should be treated as prospective and the students admitted before withdrawal of recognition should be held entitled to appear in the examination conducted by the examining body.

(v) Since the Government failed to fill up the vacant seats through the centralised counselling, the appellants did not commit any illegality by admitting the students on the basis of institutional counselling.

(vi) The 2007 Regulations are not retrospective and the same cannot be relied upon for refusing recognition to the institutions which had applied prior to the coming into force of those regulations.

(vii) The students who had been admitted prior to the decisions of the cases referred to in the impugned order cannot be denied the right to appear in the examination to be conducted by the competent body and the respondents are duty bound to declare the result of those who have already appeared in the examination.

12. In furtherance of the liberty given by the Court the counsel for the appellants filed written submissions on behalf of self-financed private B.Ed. institutions, the salient features of the written submissions are:

(i.) The State Government had failed to fill up the vacant seats and only very few students had been admitted

through centralized counselling. It had also not prescribed a cut off mark for the pre-B.Ed. examination for 2007-08. Even the students who secured zero marks were allotted to the colleges through centralised counselling. In view of this, the appellants made provisional admissions for the approved intake and in light of the minimum eligibility prescribed by the NCTE norms. It was very difficult for private unaided institutions to maintain the infrastructure, staff and other requirement as stated by the NCTE without the students.

(ii.) The State Government failed to fill up vacant seats for 2007-08 even though it was directed to do so by the Supreme Court vide order dated 18.2.2008 in SLP (C) No. 3269/2008 "State of MP v. PP Prasarsarni Samiti & rs." and order dated 7.3.2008 passed in IA No. 5 in SLP (C) No. 17093 of 2007.

(iii.) The respondents should be directed to declare the result of the students who were provisionally admitted and were allowed to take part in the examination pursuant to the interim orders passed by the High Court and the Supreme Court.

(iv.) In its affidavit dated 24.7.2010 the NCTE has treated as valid the recognition granted to various institutions for the session 2007-08 and has also stated that the withdrawal of recognition under Section 17 of the 1993 Act would operate prospectively and would not affect the students already admitted.

(v.) Some of the petitioners have not been granted affiliations by their respective Universities for academic session 2007-08, although requisite fee has been accepted for this academic session. The practice in some of the Universities have been that

once the affiliation order is granted for a particular session, then the requisite fee has been asked to pay but without issuing any affiliation order. In fact, this situation is beyond the control of the institutions seeking affiliations.

13. In paragraph 8 of the written submissions, it has been stated that the self-financed private B.Ed. colleges undertake not to admit any student in future except through centralised counselling for any of the academic session.

14. In the counter affidavit filed on behalf of the State of Madhya Pradesh in SLP(C) No. 14020/2009 and other SLPs, the following significant averments have been made:

(i.) The controversy before the High Court was only in relation to the academic session 2007-2008 and not for the academic sessions 2005-2006, 2006-2007 or 2008-2009 and all the universities had already conducted examinations for the academic sessions 2005-2006 and 2006-2007.

(ii.) The appellants have deliberately flouted all the rules and regulations and admitted students for the academic session 2007-2008 at their own level and not through the centralized counseling and even those students who did not pass Pre-B.Ed. Examination 2007 were admitted by the institutions on their own by taking advantage of the conditional interim order dated 13.9.2007 passed in Writ Petition No. 12889 of 2007.

(iii.) The appellants cannot seek a direction in the matter of students admitted for the Sessions 2005-06, 2006-07 and 2008-09 and no direction may be issued for declaring the result of the students admitted for the Sessions 2005-06 and 2006-07. More so because the admissions were made by

the private institutions for the Session 2008-09 in total disregard of the orders passed by the High Court.

15. In the counter affidavits filed by Rani Durgawati University, Jabalpur, Barkatullah University, Bhopal and Dr. Hari Singh Gour University, Sagar in SLP(C) No. 35300/2009, it has been pleaded that the appellants deliberately flouted the rules relating to admission and admitted the students de hors the procedure contained in Annexure 1 appended to the Regulations and the interim order passed by the High Court on 13.9.2007. A large number of students were admitted without passing the entrance examination conducted in 2007 and without appearing for centralized counselling. Barkatullah University had allotted 25256 students to different institutions through centralized counseling held for the Session 2007-08 but 28106 appeared in the examinations in furtherance of the interim orders passed by the Courts.

CONSIDERATION

16. In the light of the above, we shall first consider whether the High Court committed an error by entertaining the writ petition filed by Subhash Rahangdale as public interest litigation. This Court has, time and again, laid down guiding principles for entertaining petitions filed in public interest. However, for the purpose of deciding the appellants' objection it is not necessary to advert to the plethora of precedents on the subject because in *State of Uttaranchal v. Balwant Singh Chaufal* (2010) 3 SCC 402, a two-Judge Bench discussed the development of law relating to public interest litigation and reiterated that before entertaining such petitions, the Court must feel satisfied that the petitioner has genuinely come forward to espouse public cause and his litigious venture is not guided by any ulterior motive or is not a publicity gimmick. In paragraphs 96 to 104, the Bench discussed Phase-III of the public interest litigation in the context of transparency and probity in governance, referred to the judgments in *Vineet*

Narain v. Union of India (1998) 1 SCC 226, *Centre for Public Interest Litigation v. Union of India* (2003) 7 SCC 532, *Rajiv Ranjan Singh "Lalan" (VIII) v. Union of India* (2006) 6 SCC 613, *M.C. Mehta v. Union of India* (2007) 1 SCC 110, *M.C. Mehta v. Union of India* (2008) 1 SCC 407 and observed:

> "These are some of the cases where the Supreme Court and the High Courts broadened the scope of public interest litigation and also entertained petitions to ensure that in governance of the State, there is transparency and no extraneous considerations are taken into consideration except the public interest. These cases regarding probity in governance or corruption in public life dealt with by the courts can be placed in the third phase of public interest litigation."

17. Reference also deserves to be made to the judgment of the three-Judge Bench in *Shivajirao Nilangekar Patil v. Dr. Mahesh Madhav Gosavi* (1987) 1 SCC 227 in which a new dimension was given to the power of the Superior Courts to make investigation into the issues of public importance even though the petitioner may have moved the Court for vindication of a private interest. In that case the High Court had entertained a writ petition filed by Assistant Medical Officer of K.E.M. Hospital, Bombay questioning the assessment of answer sheets of the Post Graduate Medical Examinations held by the Bombay University in October 1985. He alleged malpractices in the evaluation of the answer sheets of the daughter of the appellant who, at the relevant time, was Chief Minister of the State. The learned Single Judge held that altering and tampering of the grade sheets was done by Dr. Rawal at the behest of the Chief Minister. The Division Bench affirmed the order of the learned Single Judge with some modification. While rejecting the objection raised on behalf of the appellant that the writ petition filed by the respondent cannot be treated as a petition filed in public interest, this Court observed:

> "The allegations made in the petition disclose a lamentable

> state of affairs in one of the premier universities of India. The petitioner might have moved in his private interest but enquiry into the conduct of the examiners of the Bombay University in one of the highest medical degrees was a matter of public interest. Such state of affairs having been brought to the notice of the Court, it was the duty of the Court to the public that the truth and the validity of the allegations made be inquired into. It was in furtherance of public interest that an enquiry into the state of affairs of public institution becomes necessary and private litigation assumes the character of public interest litigation and such an enquiry cannot be avoided if it is necessary and essential for the administration of justice."
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> (emphasis supplied)

18. What the respondent had done by filing the writ petition was to highlight grave irregularities committed by the Western Regional Committee of NCTE in granting recognition to private institutions who did not fulfill the mandatory conditions relating to financial resources, accommodation, library, laboratory and other physical infrastructure and qualified staff and admitted students who had either not passed the entrance test or had not appeared for the centralised counselling conducted under the directions issued by the State Government. The respondent derived support from the orders passed by the High Court in various cases. The statement made by Shri Hasib Ahmad, Member Secretary, NCTE, who appeared before this Court on 21.7.2010, that effective steps have been taken after discovery of irregularities in the grant of recognition to various private colleges in the State of Madhya Pradesh and other States falling within the Western Region also gives credence to the respondents' assertion that all was not well with the Western Regional Committee. In the pleadings filed before this Court, the appellants have not suggested that the respondents had filed the writ petition to settle score with any institution or with some ulterior motive. Learned counsel for the appellants also did not

make any such argument. Therefore, it cannot be said that the High Court committed error by entertaining the writ petition and ordering an inquiry into the allegations of irregularities committed in the matter of recognition and affiliation of self-financed private institutions and admission of the students by such institutions. If the High Court had not ordered re-scrutiny of the recognition/affiliation granted to the private institutions, the irregularities committed by Western Regional Committee may never have seen the light of the day and we do not see any reason to nullify the exercise undertaken by the High Court to ensure that the provisions of the 1993 Act and the Regulations thereunder are strictly followed by the authorities entrusted with the task of granting recognition and affiliation to the institutions and colleges engaged in conducting teacher training courses.

19. The next question, which merits consideration is whether the impugned order is contrary to the rules of natural justice, i.e., audi alteram partem. In this context, it is apposite to note that in the impugned order, the High Court has not discussed eligibility or entitlement of any particular institution to get recognition or affiliation. What High Court has done is to interpret the relevant statutory provisions in light of the judgments of this Court and orders passed by it in other writ petitions. After examining the provisions of the 1993 Act and the Regulations, the High Court held that sub-section (3) of Section 14 and clauses of Regulations 7 and 8 of the Regulations are mandatory and that recognition can be granted to an institution intending to undertake teacher training course only if the mandatory conditions are fulfilled. The High Court also held that the examining body cannot grant affiliation to any institution unless it is recognized by the NCTE. The High Court highlighted the distinction between refusal to grant recognition under Section 14(3)(b) and withdrawal of the recognition under Section 17 and held that any person aggrieved by the decision of the competent authority refusing to grant recognition or to withdraw the recognition already granted is entitled to avail

remedy of appeal. In our view, the conclusions recorded by the High Court and the directions contained in the impugned order are of general application and do not target any particular college or institution. Therefore, the appellants cannot be heard to make a grievance that the impugned order is violative of the rules of natural justice.

20. We shall now examine whether the State Government has any say in the matter of grant of recognition to the private institutions desirous of conducting teacher training courses. In this context, it will be appropriate to notice Regulation 7(2) and (3) of the 2005 and 2007 Regulations, which lay down that a copy of the application form submitted by the institution(s) shall be sent by the office of the Regional Committee to the State Government/Union Territory Administration concerned and the latter shall furnish its recommendations within 60 days from receipt of the copy of the application. If the State Government/ Union Territory Administration does not make favourable recommendations, then it is required to provide detailed reasons/grounds with necessary statistics. While deciding the application made for recognition, the Regional Committee is duty bound to consider the recommendations of the State Government / UT Administration. The last portion of Regulation 7(3) contains a deeming provision and lays down that if no communication is received from the State Government/Union Territory Administration within 60 days, then it shall be presumed that the concerned State Government/Union Territory Administration has no recommendation to make. The rationale of these provisions is discernable from the guidelines issued by the NCTE vide letter dated 2.2.1996, the relevant portions of which are extracted below:

> "1. The establishment of teachers' training institutions by Government, private managements or any other agencies should largely be determined by assessed need for trained teachers. This need should take into consideration the supply of trained teachers from existing institutions, the

requirement of such teachers in relation to enrolment projections at various stages, the attrition rates among trained teachers due to superannuation, change of occupation, death, etc. and the number of trained teachers on the live register of the employment exchanges seeking employment and the possibility of their deployment. The States having more than the required number of trained teachers may not encourage opening of new institutions for teacher education or to increase the intake.

2. The States having shortage of trained teachers may encourage establishment of new institutions for teacher education and to increase intake capacity for various levels of teacher education institutions keeping in view the requirements of teachers estimated for the next 10-15 years.

3. Preference might be given to institutions which tend to emphasise the preparation of teachers for subjects (such as Science, Mathematics, English, etc.) for which trained teachers have been in short supply in relation to requirement of schools.

4. Apart from the usual courses for teacher preparation, institutions which propose to concern themselves with new emerging specialities (e.g. computer education, use of electronic media, guidance and counselling, etc.) should receive priority. Provisions for these should, however, be made only after ensuring that requisite manpower, equipment and infrastructure are available. These considerations will also be kept in view by the institution intending to provide for optional subjects to be chosen by students such as guidance and counselling, special education, etc.

5. With a view to ensuring supply of qualified and trained teachers for such specialities such as education of the disabled, non-formal education, education of adults, pre-

school education, vocational education, etc. special efforts and incentives may be provided to motivate private managements/voluntary organisations for establishment of institutions, which lay emphasis on these areas.

6. With a view to promoting professional commitment among prospective teachers, institutions which can ensure adequate residential facilities for the Principal and staff of the institutions as well as hostel facilities for a substantial proportion of its enrolment should be encouraged.

7. Considering that certain areas (tribal, hilly regions, etc.) have found it difficult to attain qualified and trained teachers, it would be desirable to encourage establishment of training institutions in those areas.

8. Institutions should be allowed to come into existence only if the sponsors are able to ensure that they have adequate material and manpower resources in terms, for instance, of qualified teachers and other staff, adequate buildings and other infrastructure (laboratory, library, etc.), a reserve fund and operating funds to meet the day-to-day requirements of the institutions, including payment of salaries, provision of equipment, etc. Laboratories, teaching science methodologies and practicals should have adequate gas plants, proper fittings and regular supply of water, electricity, etc. They should also have adequate arrangements. Capabilities of the institution for fulfilling norms prepared by NCTE may be kept in view.

9. In the establishment of an institution preference needs to be given to locations which have a large catchment area in terms of schools of different levels where student teachers can be exposed to demonstration lessons and undertake practice teaching. A training institution which has a demonstration school where innovative and experimental approaches can be demonstrated could be given preference."

21. The question whether the State Government has any role in the matter of grant of recognition to the private institutions who want to conduct teacher training course was considered in *St. Johns Teachers Training Institute v. Regional Director, NCTE* (2003) 3 SCC 321. The Court noticed Section 14(3) of the 1993 Act and Regulation 5(e) and (f) of the 2002 Regulations and observed:

> "Sub-section (3) of Section 14 casts a duty upon the Regional Committee to be satisfied with regard to a large number of matters before passing an order granting recognition to an institution which has moved an application for the said purpose. The factors mentioned in sub-section (3) are that the institution has adequate financial resources, accommodation, library, qualified staff, laboratory and that it fulfils such other conditions required for proper functioning of the institution for a course or training in teacher education as may be laid down in the Regulations. *As mentioned earlier, there are only four Regional Committees in the whole country and, therefore, each Regional Committee has to deal with applications for grant of recognition from several States. It is therefore obvious that it will not only be difficult but almost impossible for the Regional Committee to itself obtain complete particulars and details of financial resources, accommodation, library, qualified staff, laboratory and other conditions of the institution which has moved an application for grant of recognition. The institution may be located in the interior of the district in a faraway State. The Regional Committee cannot perform such Herculean task and it has to necessarily depend upon some other agency or body for obtaining necessary information. It is for this reason that the assistance of the State Government or Union Territory in which that institution is located is taken by the Regional Committee and this is achieved by making a provision in Regulations 5(e) and (f) that the application made by the institution for grant of recognition has to be accompanied with an NOC from the State or Union Territory concerned. The impugned Regulations in fact facilitate the job of the Regional Committees in discharging their responsibilities."*
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> (emphasis supplied)

While rejecting the plea that no guidelines had been laid down for the State Government to make recommendations in terms of the relevant Regulations, the Court referred to guidelines dated 2.2.1996 issued by the NCTE to the State Governments and observed:

> "A perusal of the guidelines would show that while considering an application for grant of an NOC the State Government or the Union Territory has to confine itself to the matters enumerated therein like assessed need for trained teachers, preference to such institutions which lay emphasis on preparation of teachers for subjects like Science, Mathematics, English etc. for which trained teachers are in short supply and institutions which propose to concern themselves with new and emerging specialities like computer education, use of electronic media etc. and also for speciality education for the disabled and vocational education etc. It also lays emphasis on establishment of institutions in tribal and hilly regions which find it difficult to get qualified and trained teachers and locations which have catchment area in terms of schools of different levels where student teachers can be exposed to demonstration lessons and can undertake practice teaching. Para 8 of the guidelines deals with financial resources, accommodation, library and other infrastructure of the institution which is desirous of starting a course of training and teacher education. The guidelines clearly pertain to the matters enumerated in sub-section (3) of Section 14 of the Act which have to be taken into consideration by the Regional Committee while considering the application for

granting recognition to an institution which wants to start a course for training in teacher education. The guidelines have also direct nexus to the object of the Act, namely, planned and coordinated development of teacher education system and proper maintenance of norms and standards. It cannot, therefore, be urged that the power conferred on the State Government or Union Territory, while considering an application for grant of an NOC, is an arbitrary or unchannelled power. The State Government or the Union Territory has to necessarily confine itself to the guidelines issued by the Council while considering the application for grant of an NOC. In case the State Government does not take into consideration the relevant factors enumerated in sub-section (3) of Section 14 of the Act and the guidelines issued by the Council or takes into consideration factors which are not relevant and rejects the application for grant of an NOC, it will be open to the institution concerned to challenge the same in accordance with law. But, that by itself, cannot be a ground to hold that the Regulations which require an NOC from the State Government or the Union Territory are ultra vires or invalid."

22. In *Government of Andhra Pradesh v. J.B. Educational Society* (2005) 3 SCC 212, this Court considered the question whether the provision contained in Section 20(3)(a)(i) of the Andhra Pradesh Education Act, 1982 under which obtaining of permission of the State Government was made sine qua non for establishing an institution for technical education was ultra vires the provisions of the All India Council for Technical Education Act, 1987 and the Regulations framed thereunder. While rejecting the challenge, this Court referred to Articles 245, 246 and 254(2) and Entries 66 of List I and 25 of List III of the Seventh Schedule to the Constitution and observed:

"The provisions of the AICTE Act are intended to improve technical education and the various authorities under the Act have been given exclusive responsibility to coordinate

and determine the standards of higher education. It is a general power given to evaluate, harmonise and secure proper relationship to any project of national importance. Such a coordinate action in higher education with proper standard is of paramount importance to national progress. Section 20 of the A.P. Act does not in any way encroach upon the powers of the authorities under the Central Act. Section 20 says that the competent authority shall, from time to time, conduct a survey to identify the educational needs of the locality under its jurisdiction notified through the local newspapers calling for applications from the educational agencies. Section 20(3)(a)(i) says that before permission is granted, the authority concerned must be satisfied that there is need for providing educational facilities to the people in the locality. The State authorities alone can decide about the educational facilities and needs of the locality. If there are more colleges in a particular area, the State would not be justified in granting permission to one more college in that locality. Entry 25 of the Concurrent List gives power to the State Legislature to make laws regarding education, including technical education. Of course, this is subject to the provisions of Entries 63, 64, 65 and 66 of List I. Entry 66 of List I to which the legislative source is traced for the AICTE Act, deals with the general power of Parliament for coordination, determination of standards in institutions for higher education or research and scientific and technical educational institutions and Entry 65 deals with the union agencies and institutions for professional, vocational and technical training, including the training of police officers, etc. The State has certainly the legislative competence to pass the legislation in respect of education including technical education and Section 20 of the Act is intended for general welfare of the citizens of the State and also in discharge of the constitutional duty enumerated under Article 41 of the Constitution.

The general survey in various fields of technical education contemplated under Section 10(1)(a) of the AICTE Act is not pertaining to the educational needs of any particular area in a State. It is a general supervisory survey to be conducted by the AICTE Council, for example, if any IIT is to be established in a particular region, a general survey could be conducted and the Council can very much conduct a survey regarding the location of that institution and collect data of all related matters. But as regards whether a particular educational institution is to be established in a particular area in a State, the State alone would be competent to say as to where that institution should be established. Section 20 of the A.P. Act and Section 10 of the Central Act operate in different fields and we do not see any repugnancy between the two provisions."

23. In *State of Maharashtra v. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya* (supra), this Court considered the provisions of the 1993 Act and the 2002 Regulations and held:

"In the instant case, admittedly, Parliament has enacted the 1993 Act, which is in force. The preamble of the Act provides for establishment of National Council for Teacher Education (NCTE) with a view to achieving planned and coordinated development of the teacher-education system throughout the country, the regulation and proper maintenance of norms and standards in the teacher-education system and for matters connected therewith. With a view to achieving that object, the National Council for Teacher Education has been established at four places by the Central Government. It is thus clear that the field is fully and completely occupied by an Act of Parliament and covered by Entry 66 of List I of Schedule VII. It is, therefore, not open to the State Legislature to encroach upon the said field. Parliament alone could have exercised the power by making appropriate law. In the

circumstances, it is not open to the State Government to refuse permission relying on a State Act or on "policy consideration"."

The Court also observed that it is for the NCTE to deal with applications for establishing new B.Ed. colleges or allowing any increase in intake capacity keeping in view the 1993 Act and it is neither open to the State Government nor to a university to consider the local conditions or apply State policy for refusing such permission. The Court also referred to the earlier judgment in *St. Johns Teachers Training Institute v. Regional Director, NCTE* (supra) and observed that once the decision is taken by NCTE, it has to be implemented by all authorities in the light of the provisions of the 1993 Act and the law declared by this Court.

24. Recently, the same question was considered in *National Council for Teacher Education v. Shri Shyam Shiksha Prashikshan Sansthan* (2011) 3 SCC 238. After noticing the guidelines issued by the NCTE on 2.2.2006 and various judgments including those referred to hereinabove, this Court observed:

"The consultation with the State Government/Union Territory Administration and consideration of the recommendations/suggestions made by them are of considerable importance. The Court can take judicial notice of the fact that majority of the candidates who complete BEd and similar courses aspire for appointment as teachers in the government and government-aided educational institutions. Some of them do get appointment against the available vacant posts, but a large number of them do not succeed in this venture because of non-availability of posts. The State Government/Union Territory Administration sanctions the posts keeping in view the requirement of trained teachers and budgetary provisions made for that purpose. They cannot appoint all those who successfully pass BEd and like courses every year.

Therefore, by incorporating the provision for sending the applications to the State Government/Union Territory Administration and consideration of the recommendations/ suggestions, if any made by them, the Council has made an attempt to ensure that as a result of grant of recognition to unlimited number of institutions to start BEd and like courses, candidates far in excess of the requirement of trained teachers do not become available and they cannot be appointed as teachers. If, in a given year, it is found that adequate numbers of suitable candidates possessing the requisite qualifications are already available to meet the requirement of trained teachers, the State Government/ Union Territory Administration can suggest to the Regional Committee concerned not to grant recognition to new institutions or increase intake in the existing institutions. If the Regional Committee finds that the recommendation made by the State Government/Union Territory Administration is based on valid grounds, it can refuse to grant recognition to any new institution or entertain an application made by an existing institution for increase of intake and it cannot be said that such decision is ultra vires the provisions of the Act or the Rules."

25. The above survey of precedents makes it clear that under Regulation 7(2) and (3), the State Government/Union Territory Administration is entitled to make recommendations on the application made for grant of recognition and the same are required to be considered by the concerned Regional Committee before taking a final decision on the application.

26. Learned counsel for the appellants did not seriously contest the position that the provisions contained in Sections 14(3) and 15(3) read with Regulation 7(2), (3),(4), (5) and (9) are mandatory and the Regional Committee cannot grant recognition unless it is satisfied that the applicant has fulfilled the mandatory conditions prescribed in the 1993 Act and the Regulations. They also did not dispute that in view of Section

16, examining body cannot grant affiliation, whether provisional or permanent to any institution or hold examination for the courses of training conducted by a recognized institution unless the institution concerned has obtained recognition under Section 14 or permission for a course or training under Section 15. What needs to be emphasised is that no recognition/ permission can be granted to any institution desirous of conducting teacher training course unless the mandatory conditions enshrined in Sections 14(3) or 15(3) read with the relevant clauses of Regulations 7 and 8 are fulfilled and that in view of the negative mandate contained in Section 17A read with Regulation 8(10), no institution can admit any student unless it has obtained unconditional recognition from the Regional Committee and affiliation from the examining body.

27. The next issue which requires examination is, whether the private institutions could have made admissions de hors the entrance examination conducted by the State Government. The High Court has answered this question in the negative by relying upon the admission procedure contained in para 3.3 of Appendix-I, which contains the Norms and Standards for Secondary Teachers Education Programme. The appellants have not questioned the vires of the admission procedure. Therefore, they cannot contend that they were entitled to admit students de hors the list prepared on the basis of entrance examination conducted under the directions of the State Government.

28. The question which remains to be considered is, whether the students who had taken admission in unrecognized institutions or the institutions which had not been granted affiliation by the examining body have the right to appear in the examination and whether the Court can issue a mandamus for declaration of the result of such students simply because they were allowed to provisionally appear in the examination in compliance of the interim orders passed by the High Court and/ or this Court. An ancillary question, which would require

consideration is, whether the students who had not completed the requirement of minimum teaching days were entitled to appear in the examination and a direction can be given for declaration of their result.

29. A somewhat similar question was considered in *A.P. Christians Medical Educational Society v. Government of Andhra Pradesh* (1986) 2 SCC 667. In that case, one Professor C.A. Adams, who was signatory to the Memorandum of Association of the appellant-society created fake documents for starting a medical college for Christian students at Vikarabad in Rangareddy district of Andhra Pradesh. When the appellant sought affiliation with Osmania University, the latter made some queries and asked for certain documents. The appellant did not furnish the requisite information and documents. In the meanwhile, 60 students were admitted in the first year MBBS course. In July 1985, the Government of Andhra Pradesh informed the appellant that permission to start a private medical college was not granted in view of the policy of the Government of India and Medical Council of India. The appellant then filed a writ petition before the High Court, which was dismissed in limine by a speaking order. Before this Court, it was contended that the appellant was a minority institution and, as such, it was not required to take permission for starting a medical college. This Court negatived the appellant's plea and confirmed the order passed by the High Court. While dealing with the question, whether the students who had already been admitted by the appellant should be allowed to participate in the examination conducted by the University, this Court observed:

> "We do not think that we can possibly accede to the request made by Shri Venugopal on behalf of the students. Any direction of the nature sought by Shri Venugopal would be in clear transgression of the provisions of the University Act and the regulations of the University. We cannot by our fiat direct the University to disobey the statute to which it owes its existence and the regulations made by the University itself. We cannot imagine anything more destructive of the rule of law than a direction by the court to disobey the laws."
>
> (emphasis supplied)

30. In *N.M. Nageshwaramma v. State of Andhra Pradesh,* (1986) Supp. SCC 166, this Court considered the question whether the students admitted by the private teacher training institutes which had not been granted permission and recognition under the Andhra Pradesh Education Act, 1982 were entitled to appear in the examination and answered the same in the following words:

> "One of the writ petitions before us (Writ Petition 12697 of 1985) was filed by a student claiming to have undergone training in one of the privately managed institutes. It was argued that the students of the institute in which she had undergone training were permitted in previous years to appear at the Government examination and as in previous years she may be allowed to appear at the examination this year. A similar request was made by Shri Garg that the students who have undergone training for the one year course in these private institutions may be allowed to appear at the examination notwithstanding the fact that permission might not be accorded to them. We are unable to accede to these requests. These institutions were established and the students were admitted into these institutes despite a series of press notes issued by the Government. If by a fiat of the court we direct the Government to permit them to appear at the examination we will practically be encouraging and condoning the establishment of unauthorised institutions. It is not appropriate that the jurisdiction of the court either under Article 32 of the Constitution or Article 226 should be frittered away for such a purpose."
>
> (emphasis supplied)

31. In *State of Maharashtra v. Vikas Sahebrao Roundale* (supra), this Court noted that there was mushroom growth of ill-equipped, under-staffed and unrecognised education l institutions in Andhra Pradesh, Bihar, Tamil Nadu and Mah rashtra and that an interim order was passed by the Hig Court for allowing the students to appear in the examinat on and proceeded to observe: "Slackening the standa d and judicial fiat to control the mode of education and examini g system are detrimental to the efficient management o the education. The directions to the appellants to disobey the law is subversive of the rule of law, a breeding ground for corruption and feeding source for indiscipline. The High Court, therefore, committed manifest error in law, in exercising its prerogative power conferred under Article 226 of the Constitution, directing the appellants to permit the students to appear for the examination etc.

32. In *St. Johns' Teachers Training Institute (for Women), Madurai v. State of Tamil Nadu* (supra), this Court adversely commented upon the practice of passing interim orders like the one passed by the learned Single Judge of the Madhya Pradesh High Court in some of these cases, referred to the judgment in *Christians Medical Educational Society v. Government of Andhra Pradesh* (supra) and observed:

> "In view of the aforesaid pronouncement of this Court, the High Court should not have passed, interim order directing the respondents to allow the teachers of unrecognised institutions to appear at the examinations in question. Such teachers cannot derive any benefit on basis of such interim orders, when ultimately the main writ applications have been dismissed by the High Court, which order is being affirmed by this Court. The same view has been expressed by this Court, in connection with the minority unrecognised Teachers Training Institutions in the State of Tamil Nadu itself, in the case of *State of T.N. v. St. Joseph Teachers Training Institute* (1991) 3 SCC 87. As such no equity or legal right can be pleaded on behalf of the

> teachers admitted for training by such minority institutions, for publication of their results, because they were allowed to appear at the examinations concerned, during the pendency of the writ applications before the High Court, on the basis of interim orders passed by the High Court; which were in conflict with the view expressed by this Court in the aforesaid cases."

33. As a sequel to the above discussion, we hold that the impugned orders do not suffer from any legal infirmity warranting interference by this Court. We also reiterate that:

(i) The Regional Committees established under Section 20 of the 1993 Act are duty bound to ensure that no private institution offering or intending to offer a course or training in teacher education is granted recognition unless it satisfies the conditions specified in Section 14(3)(a) of the 1993 Act and Regulations 7 and 8 of the Regulations. Likewise, no recognised institution intending to start any new course or training in teacher education shall be granted permission unless it satisfies the conditions specified in Section 15(3)(a) of the 1993 Act and the relevant Regulations.

(ii) The State Government / UT Administration, to whom a copy of the application made by an institution for grant of recognition is sent in terms of Regulation 7(2) of the Regulations, is under an obligation to make its recommendations within the time specified in Regulation 7(3) of the Regulations.

(iii) While granting recognition, the Regional Committees are required to give due weightage to the recommendations made by the State Government/UT Administration and keep in view the observations made by this Court in St. Johns

Teachers Training Institute v. Regional Director, NCTE (2003) 3 SCC 321 and National Council for Teacher Education v. Shri Shyam Shiksha Prashikshan Sansthan, which have been extracted in the earlier part of this judgment.

(iv) The recognition granted by the Regional Committees under Section 14(3)(a) of the 1993 Act read with Regulations 7 and 8 of the Regulations and permission granted under Section 15(3)(a) read with the relevant Regulations shall operate prospectively, i.e., from the date of communication of the order of recognition or permission, as the case may be.

(v) The recognition can be refused by the Regional Committee under Section 14(3)(b), in the first instance, when an application for recognition is made by an institution. Likewise, permission can be refused under Section 15(3)(b).

(vi) If the recognition is refused under Section 14(3)(b) after affording reasonable opportunity to the applicant to make a written representation, the concerned institution is required to discontinue the course or training from the end of the academic session next following the date of receipt of the order.

(vii) Once the recognition is granted, the same can be withdrawn only under Section 17(1) if there is a contravention of the provisions of the Act or the Rules, or the Regulations, or orders made therein, or any condition subject to which recognition was granted under Section 14(3)(a) or permission was granted under Section 15(3)(a).

(viii) The withdrawal of recognition becomes effective

from the end of the academic session next following the date of communication of the order of withdrawal.

(ix) Once the recognition is withdrawn under Section 17(1), the concerned institution is required to discontinue the course or training in teacher education and the examining body is obliged to cancel the affiliation. The effect of withdrawal of the recognition is that the qualification in teacher education obtained pursuant to the course or training undertaken at such institution is not to be treated as valid qualification for the purpose of employment under the Central Government, any State Government or University or in any educational body aided by the Central or the State Government.

(x) In view of the mandate of Section 16, no examining body, as defined in Section 2(d) of the 1993 Act, shall grant affiliation unless the applicant has obtained recognition from the Regional Committee under Section 14 or permission for starting a new course or training under Section 15.

(xi) While granting affiliation, the examining body shall be free to demand rigorous compliance of the conditions contained in the statute like the University Act or the State Education Board Act under which it was established or the guidelines / norms which may have been laid down by the concerned examining body.

(xii) No institution shall admit any student to a teacher training course or programme unless it has obtained recognition under Section 14 or permission under Section 15, as the case may be.

(xiii) While making admissions, every recognised institution is duty bound to strictly adhere to para 3.1 to 3.3 of the Norms and Standards for Secondary/Pre-School Teacher Education Programme contained in Appendix-1 to the Regulations.

(xiv) If any institution admits any student in violation of the Norms and Standards laid down by the NCTE, then the Regional Committee shall initiate action for withdrawal of the recognition of such institution and pass appropriate order after complying with the rules of natural justice.

(xv) The students admitted by unrecognised institution and institutions which are not affiliated to any examining body are not entitled to appear in the examination conducted by the examining body or any other authorised agency.

(xvi) The students admitted by the recognised institutions otherwise than through the entrance/ eligibility test conducted in accordance with the admission procedure contained in para 3.3 of Appendix-1 of the Regulations are also not entitled to appear in the examination conducted by the examining body or any other authorised agency.

(xvii) The NCTE shall issue direction for mandatory inspection of recognised institutions on periodical basis and all the Regional Committees are duty bound to take action in accordance with those directions.

(xviii) In future, the High Courts shall not entertain prayer for interim relief by unrecognised institutions and the institutions which have not been granted affiliation by the examining body and/or the students

admitted by such institutions for permission to appear in the examination or for declaration of the result of examination. This would also apply to the recognised institutions if they admit students otherwise than in accordance with the procedure contained in Appendix-1 of the Regulations.

34. So far as these appeals are concerned, we deem it proper to give the following directions:

(i) Within one month from today, the concerned examining body shall declare the result of the students who were admitted for the session 2007-2008 keeping in view the directions contained in the impugned orders. This would mean that result of the students admitted for the session 2007-2008 by the institutions whose cases were scrutinised by the NCTE pursuant to the directions given by the High Court and who were found to have been validly recognised after compliance with the mandatory conditions specified in Section 14(3)(a) of 1993 Act and Regulations 7 and 8 of the Regulations shall be declared.

(ii) The result of the students admitted by an unrecognized institution or by an institution which had not been granted affiliation by the examining body shall not be declared. The result of the students who were admitted without qualifying the entrance examination shall also not be declared. In other words, the students admitted by the private institutions on their own shall not be entitled to declaration of their result. If any private institution had not complied with the requirements of completing the prescribed training, then the result of students of such institution shall also not be declared.

(iii) The directions contained in the preceding clause shall not be used for dealing with the admissions made for the sessions 2005-2006, 2006-2007 or 2008-2009. The admissions made for those years shall be dealt with by the Western Regional Committee and the concerned examining body in accordance with the relevant statutory provisions.

(iv) Any institution aggrieved by the decision of the Western Regional Committee to reject the application for recognition or for permission to start a new course or training or withdrawal of recognition under Section 17 shall be free to avail remedy of appeal under Section 18 of the 1993 Act. If any such appeal is filed by the aggrieved party within 30 days from today, then the Appellate Authority shall entertain and decide the same on merits.

(v) If the Western Regional Committee has taken any action in furtherance of the directions given by the High Court, then the aggrieved person shall be entitled to challenge the same by availing remedy of appeal under Section 18 of the 1993 Act.

35. Subject to the above observations and directions, the appeals are dismissed. The parties are left to bear their own costs.

D.G. Appeals dismissed.

RAMESHBHAI DABHAI NAIKA
v.
STATE OF GUJARAT & OTHERS
(Civil Appeal No. 654 of 2012)

JANUARY 18, 2012

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

*SOCIAL STATUS CERTIFICATE: Scheduled Caste/ Tribe - Status of a person, one of whose parents belongs to the Scheduled Caste/Tribe and the other comes from the upper castes, or more precisely does not come from Scheduled Caste/Tribe and entitlement of a person from such parents to the benefits of affirmative action sanctioned by the Constitution - Held: Rule laid down in *Valsamma Paul, **Punit Rai and ***Anjan Kumar is not an inflexible rule of general application that in all cases and regardless of other considerations, the offspring of an inter-caste marriage or a marriage between a tribal and a non-tribal would take his/her caste from the father - A careful examination of these cases together with some other decisions of Supreme Court would clearly show that what was said in Valsamma in a certain context was rather mechanically and inappropriately extended and applied to different other fact situations as the law laid down in Valsamma - In an inter-caste marriage or a marriage between a tribal and a non-tribal, the determination of the caste of the offspring is essentially a question of fact to be decided on the basis of the facts adduced in each case - In such marriages, there may be a presumption that the child has the caste of the father - This presumption may be stronger in case where in the inter-caste marriage or a marriage between a tribal and a non-tribal the husband belongs to a forward caste - But by no means, the presumption is conclusive or irrebuttable and it is open to the child of such marriage to lead evidence to show that he/she was brought*

up by the mother who belonged to the scheduled caste/ scheduled tribe - In such situation, merely by virtue of being the son of a forward caste father, he did not have any advantageous start in life but on the contrary suffered the deprivations, indignities, humilities and handicaps like any other member of the community to which his/her mother belonged - In the case in hand the tribal certificate of the appellant was cancelled without adverting to any evidences and on the sole ground that he was the son of a Kshatriya father - The orders passed by the High Court and the Scrutiny Committee, therefore, cannot be sustained - Matter remitted to Scrutiny Committee to take fresh decision - Evidence - Presumption.

The mother of the appellant was a Nayak, one of the scheduled tribes and the appellant himself and his other siblings were also married to Nayaks. His father was a non-tribal. The Scrutiny Committee cancelled the tribal certificate earlier obtained by the appellant on the sole ground that his father was a non-tribal, belonging to the Hindu caste Kshatriya. The High Court proceeded on the basis that the issue was settled by the decisions of the Supreme Court in *Valsamma Paul v. Cochin University followed by **Punit Rai v. Dinesh Chaudhary and ***Anjan Kumar v. Union of India and upheld the order of the Committee.

The question which arose for consideration in the instant appeal was as to what would be the status of a person, one of whose parents belongs to the scheduled castes/scheduled tribes and the other comes from the upper castes, or more precisely does not come from scheduled castes/scheduled tribes and what would be the entitlement of a person from such parents to the benefits of affirmative action sanctioned by the Constitution.

Allowing the appeal, the Court

HELD: 1.1. The orders passed by the High Court and the Scrutiny Committee are set aside and the case is remitted to the Scrutiny Committee to take a fresh decision on the basis of the evidences that might be led by the two sides. The High Court seemed to have read the decisions in *Valsamma Paul, **Punit Rai and ***Anjan Kumar as laying down the rule that in all cases and regardless of other considerations, the offspring of an inter-caste marriage or a marriage between a tribal and a non-tribal would take his/her caste from the father. In the three decisions, there were indeed observations (though by no means forming the ratio of the decisions) that may lend credence to such a view but the question is whether it can be said to flow from those decisions, as an inflexible rule of general application, that in every case of inter-caste marriage or marriage between a tribal and a non-tribal, the offspring must take his/her caste from the father. The clear answer is in the negative. A careful examination of the three cases together with some other decisions of this Court would clearly show that what was said in *Valsamma in a certain context has been rather mechanically and inappropriately extended and applied to different other fact situations as the law laid down in *Valsamma. [Paras 4, 44]

Valsamma Paul v. Cochin University and others,* **(1996) 3 SCC 545: 1996 (1) SCR 128; ***Punit Rai v. Dinesh Chaudhary* **(2003) 8 SCC 204: 2003 (2) Suppl. SCR 743;** ****Anjan Kumar v. Union of India and others* **(2006) 3 SCC 257: 2006 (2) SCR 212 - relied on.**

Constitutional Law of India Fourth Edition By Seervai - referred to.

1.2. The view expressed in *Valsamma judgment that in an inter-caste marriage or a marriage between a tribal and a non-tribal the woman must in all cases take her caste from the husband, as a rule of Constitutional Law

is a proposition, the correctness of which is not free from doubt. And in any case it is not the ratio of the *Valsamma decision and does not make a binding precedent. Taking it to the next logical step and to hold that the off-spring of such a marriage would in all cases get his/her caste from the father is bound to give rise to serious problems. Take for instance the case of a tribal woman getting married to a forward caste man and who is widowed or is abandoned by the husband shortly after marriage. She goes back to her people and the community carrying with her an infant or may be a child still in the womb. The child is born in the community from where her mother came and to which she went back and is brought up as the member of that community suffering all the deprivations, humiliations, disabilities and handicaps as a member of the community. It is difficult to hold that the child would have the caste of his father and, therefore, not entitled to any benefits, privileges or protections sanctioned by the Constitution. In an inter-caste marriage or a marriage between a tribal and a non-tribal the determination of the caste of the offspring is essentially a question of fact to be decided on the basis of the facts adduced in each case. In an inter-caste marriage or a marriage between a tribal and a non-tribal there may be a presumption that the child has the caste of the father. This presumption may be stronger in the case where in the inter-caste marriage or a marriage between a tribal and a non-tribal the husband belongs to a forward caste. But by no means the presumption is conclusive or irrebuttable and it is open to the child of such marriage to lead evidence to show that he/she was brought up by the mother who belonged to the scheduled caste/scheduled tribe. By virtue of being the son of a forward caste father he did not have any advantageous start in life but on the contrary suffered the deprivations, indignities, humilities and handicaps like any other member of the community to which his/her mother belonged. Additionally, that he

was always treated a member of the community to which her mother belonged not only by that community but by people outside the community as well. In the case in hand the tribal certificate has been taken away from the appellant without adverting to any evidences and on the sole ground that he was the son of a Kshatriya father. The orders passed by the High Court and the Scrutiny Committee, therefore, cannot be sustained. [Paras 35-37, 43-44]

Rajendra Shrivastava vs. State of Maharashtra **(2010) 112 Bom LR 762;** *Indira v. State of Kerela* **AIR 2006.Kel.1;** *Kendriya Vidyalaya Sangathan v. Shanti Acharya Sisingi* **176(2011) DLT 341 - approved.**

Sobha Hymavathi Devi v. Setti Gangadhara Swamy & Others **(2005) 2 SCC 244: 2005 (1) SCR 848;** *Bhoobum Moyee Debia v. Ram Kishore Acharj Chowdhry* **(1865) 10 MIA 279;** *Lulloobhoy Bappoobhoy Cassidass Moolchund v. Cassibai* **(1879-80) 7IA 212;** *V.V. Giri v. Dippala Suri Dora and others* **(1960) 1 SCR 426;** *Indra Sawhney v. Union of India* **1992 supp (3) SCC 217: 1992 (2) Suppl. SCR 454;** *State of A.P. v. M. Radha Krishna Murthy* **(2009) 5 SCC 117: 2009 (4) SCR 67;** *Arabinda Kumar Saha v. State of Assam* **2001 (3) GLT 45 - referred to**

Case Law Reference:

1996 (1) SCR 128	**relied on**	**Para 2**
2003 (2) Suppl. SCR 743	**relied on**	**Para 2**
2006 (2) SCR 212	**relied on**	**Para 2**
2005 (1) SCR 848	**referred to**	**Para 10**
2003 (2) Suppl. SCR 743	**referred to**	**Para 14**
(1865) 10 MIA 279	**referred to**	**Para 23**
(1879-80) 7IA 212	**referred to**	**Para 23**

(1960) 1SCR 426	**referred to**	**Para 29**
(2010) 112 Bom LR 762	**approved**	**Para 31**
1992 (2) Suppl. SCR 454	**referred to**	**Para 33**
2009 (4) SCR 67	**referred to**	**Para 33**
AIR 2006.Kel.1	**approved**	**Para 38**
176(2011) DLT 341	**approved**	**Para 41**
2001 (3) GLT 45	**referred to**	**Para 42**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 654 of 2012.

From the Judgment & Order dated 11.01.2010 of the High Court of Gujarat at Ahmedabad in LPA No. 392 of 2008.

Aman Ahluwalia (A.C.), Sanjay R. Hegde, S. Nithin, Tenzin Tsering, Anil Kumar Mishra, Sanjeev Kumar, Jitender K. Pandey, Rajiv Pandey, Venkateswara Rao Anumolu, Hemantika Wahi, Jesal, Suveni Banerjee, Rojabin Pradhan for the appearing parties.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Leave granted.

2. The question that once again arises before this Court is what would be the status of a person, one of whose parents belongs to the scheduled castes/scheduled tribes and the other comes from the upper castes, or more precisely does not come from scheduled castes/scheduled tribes and what would be the entitlement of a person from such parents to the benefits of affirmative action sanctioned by the Constitution. The Gujarat High Court has proceeded on the basis that the issue is settled by the decisions of this Court in *Valsamma Paul v. Cochin University and others,* (1996) 3 SCC 545 followed by Punit Rai v. Dinesh Chaudhary, (2003) 8 SCC 204 and *Anjan Kumar v. Union of India and others,* (2006) 3 SCC 257. On the strength of those three decisions the High Court upheld the order passed by the Scrutiny Committee cancelling the tribal certificate earlier obtained by the appellant on the sole ground that his father was a non-tribal, belonging to the Hindu caste Kshatriya. The High Court did not advert to the fact that the mother of the appellant was undeniably a Nayak, one of the scheduled tribes and the appellant himself and his other siblings were also married to Nayaks. The High Court also did not refer to the evidences adduced by the appellant on the question of his upbringing as a member of the Nayak community and his acceptance in that community (or for that matter the contra evidence produced by the respondent questioning his claim to be a member of the scheduled tribe). In view of the fact that his father was a non-tribal, the High Court deemed everything else as of no relevance and declined to record any finding on whether the appellant was, in fact, brought up as a tribal and, consequently, shared all the indignities and handicaps and deprivations normally suffered by the tribal communities.

3. The appellant, thus, lost his tribal certificate and the Fair Price shop that was allotted to him on that basis. He has now brought the matter to this Court making the grievance that the High Court order does not impact him alone but as a result of the order of the High Court his children too, though undisputedly born to a tribal mother, are bound to lose their tribal identity.

4. The High Court seems to have read the decisions in Valsamma Paul, Punit Rai and Anjan Kumar as laying down the rule that in all cases and regardless of other considerations the offspring of an inter-caste marriage or a marriage between a tribal and a non-tribal would take his/her caste from the father. In the three decisions there are indeed observations (though by no means forming the ratio of the decisions) that may lend credence to such a view but the question is whether it can be said to flow from those decisions, as an inflexible rule of general application, that in every case of inter-caste marriage

or marriage between a tribal and a non-tribal, the offspring must take his/her caste from the father. The clear answer, to our mind, is in the negative. A careful examination of the three cases together with some other decisions of this Court would clearly show that what was said in Valsamma in a certain context has been rather mechanically and inappropriately extended and applied to different other fact situations as the law laid down in Valsamma.

5. Valsamma was a Syrian Catholic woman (forward caste) who married a Latin Catholic man (backward class) and the question arose whether by virtue of her marriage she was entitled to appointment to a post of lecturer that was reserved for Latin Catholics (Backward Class Fishermen). The full bench of the Kerala High Court held that though Valsamma was married according to the Canon law, being a Syrian Christian by birth, she could not by marriage with a Latin Catholic become a member of that class nor could she claim the status of backward class by marriage. Dealing with the consequences of a woman marrying outside her caste the Court relied upon two old Privy Council decisions of the nineteenth century and came to hold that when a woman marries outside her caste, she becomes a member of the caste of the husband's family. In paragraph 31 of the judgment in Valsamma the Court said:

> "It is well-settled law from *Bhoobum Moyee Debia v. Ram Kishore Acharj Chowdhry* (1865) 10 MIA 279: 3 WR 15 that judiciary recognized a century and a half ago that a husband and wife are one under Hindu law, and so long as the wife survives, she is half of the husband. She is 'Sapinda' of her husband as held in *Lulloobhoy Bappoobhoy Cassidass Moolchund v. Cassibai* (1879-80) 7IA 212 . It would, therefore, be clear that be it either under the Canon law or the Hindu law, on marriage the wife becomes an integral part of husband's marital home entitled to equal status of husband as a member of the

> family. Therefore, the lady, on marriage, becomes a member of the family and thereby she becomes a member of the caste to which she moved. The caste rigidity breaks down and would stand no impediment to her becoming a member of the family to which the husband belongs and she gets herself transplanted."
>
> (emphasis added)

6. Having said that in an inter-caste marriage the woman takes on the caste of her husband, the Court proceeded to consider the next question which was, "whether a lady marrying a Scheduled Caste, Scheduled Tribe or OBC citizen, or one transplanted by adoption or any other voluntary act, ipso facto, becomes entitled to claim reservation under Article 15(4) or 16(4) as the case may be?" This question the Court firmly answered in the negative and in paragraph 34 of the judgment observed and held as follows:-

> "In *Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde* 1995 supp. (2) SCC 549 and *R. Chandevarappa v. State of Karnataka* (1995) 6 SCC 309: JT (1995) 7 SC 93, this Court had held that economic empowerment is a fundamental right to the poor and the State is enjoined under Articles 15(3), 46 and 39 to provide them opportunities. Thus, education, employment and economic empowerment are some of the programmes the State has evolved and also provided reservation in admission into educational institutions, or in case of other economic benefits under Articles 15(4) and 46, or in appointment to an office or a post under the State under Article 16(4). Therefore, when a member is transplanted into the Dalits, Tribes and OBCs, he/she must of necessity also have had undergone the same handicaps, and must have been subjected to the same disabilities, disadvantages, indignities or sufferings so as to entitle the candidate to avail the facility of reservation. A candidate who had the

advantageous start in life being born in Forward Caste and had march of advantageous life but is transplanted in Backward Caste by adoption or marriage or conversion, does not become eligible to the benefit of reservation either under Article 15(4) or 16(4), as the case may be. Acquisition of the status of Scheduled Caste etc. by voluntary mobility into these categories would play fraud on the Constitution, and would frustrate the benign constitutional policy under Articles 15(4) and 16(4) of the Constitution. "

(emphasis added)

7. Proceeding further, in paragraph 35 of the judgment, the Court expressly held that acceptance by the community, a test that was earlier applied by the Court in cases of conversion and reconversion, would have no application to judge Valsamma's claim to the post reserved for Latin Catholics by virtue of her marriage in that caste.

8. The court, thus, gave two reasons for disallowing Valsamma, the benefit of reservation under Articles 15 & 16 of the Constitution; first, being born in a forward caste she had an advantageous start in life and she had not gone through the same disabilities, disadvantages, indignities or sufferings as other members of the backward class and secondly claiming the benefits of reservation by getting transplanted into a backward class by means of marriage, that is to say, through voluntary mobility would amount to a fraud on the Constitution.

9. On a careful reading of the judgment it becomes clear that the ratio of the Valsamma decision lies in paragraph 34 of the judgment as quoted above. What was said earlier in paragraph 31 of the judgment was in the facts of that case and it would be an error to take it as the ratio of the decision. More importantly, it would be very wrong to take paragraph 31 of the Valsamma judgment as a premise for drawing the corollary or the deduction that the child born from an inter-caste marriage

or a marriage between a tribal and a non-tribal would invariably take his caste from the father. But before examining Valsamma in any greater detail it would be useful to see how it was used, applied and "improved upon" in later decisions of the Court.

10. Valsamma was a case of reservation under Articles 15 & 16 of the Constitution. A case of reservation of seats in the Legislative Assembly under Article 332 of the Constitution came to be considered by a three judge bench of the Court in *Sobha Hymavathi Devi v. Setti Gangadhara Swamy & Others* (2005) 2 SCC 244. The case of Sobha Hymavathi Devi, in certain aspects on facts, is very similar to Valsamma. The election of Sobha to the Andhra Pradesh Legislative Assembly from a constituency reserved for Scheduled Tribes was challenged on the ground that she belonged to a forward community, Patnaik Sistu Karnam, and was, therefore, not qualified to contest the election from the constituency reserved for Scheduled Tribes. Denying the allegations of the election petitioner Sobha raised three pleas; first, both her parents belonged to Scheduled Tribes; secondly, in case her father was held to come from a forward caste she was actually brought up by her mother, who undeniably belonged to a scheduled tribe, as a member of the tribal community and thirdly she married a Scheduled Tribe person and, therefore, became a member of the Scheduled Tribe. She had, therefore, the status of a Scheduled Tribe and was qualified to contest the election from the constituency reserved for the Scheduled Tribes. The Court examined Sobha's first and second pleas fully in light of the factual evidence and came to reject the two pleas on the basis of the findings of fact. Dealing with the second plea, in paragraph 8 of the judgment, the Court held and observed as follows:-

"Elaborating her argument, learned counsel for the appellant contended that even though the appellant was born to Murahari Rao, a Sistu Karnam, she was still being treated as a member of the Bhagatha community to which

her mother belonged and that she had married a person belonging to the Bhagatha community; that the Bhagatha community had always accepted her as belonging to that community and in such a situation, she must be considered to belong to the Bhagatha community, a Scheduled Tribe and hence eligible to contest from a constituency reserved for the Scheduled Tribes. That the appellant had married Appala Raju, her maternal uncle belonging to the Bhagatha community, is not in dispute. But the claim of the appellant that she was being brought up and was being recognised as a member belonging to the Bhagatha community, cannot be accepted in the face of the evidence discussed by the High Court including the documentary evidence relied on by it. The document Ext. 10 and the entry therein marked as Ext. X-11 relating to the appellant, show her caste as Sistu Karnam and not as Bhagatha. This entry was at an undisputed point of time. Moreover, the evidence also shows that she was always being educated at Vishakhapatnam and she was never living as a tribal in Bhimavaram village to which her mother's family belongs. There is no reason for us to differ from the conclusion of the High Court on this aspect."

(emphasis added)

11. It was only then that the Court considered the third plea of Sobha that having married a person belonging to a Scheduled Tribe she had acquired membership of that community and consequently she must be treated as a member of the Scheduled Tribe. Dealing with this plea the Court referred to the decision in Valsamma and applied it to the case of reservation of a seat in the Legislative Assembly under Article 332 of the Constitution. In Paragraph 10 of the judgment the Court held and observed as follows:-

"Even otherwise, we have difficulty in accepting the position that a non-tribal who marries a tribal could claim to contest a seat reserved for tribals. Article 332 of the Constitution

speaks of reservation of seats for Scheduled Tribes in Legislative Assemblies. The object is clearly to give representation in the Legislature to Scheduled Tribe candidates, considered to be deserving of such special protection. To permit a non-tribal under cover of a marriage to contest such a seat would tend to defeat the very object of such a reservation. The decision of this Court in Valsamma Paul v. Cochin University supports this view. Neither the fact that a non-backward female married a backward male nor the fact that she was recognised by the community thereafter as a member of the backward community, was held to enable a non-backward to claim reservation in terms of Article 15(4) or 16(4) of the Constitution. ...Thereafter, this Court noticed that recognition by the community was also important. Even then, this Court categorically laid down that the recognition of a lady as a member of a backward community in view of her marriage would not be relevant for the purpose of entitlement to reservation under Article 16(4) of the Constitution for the reason that she as a member of the forward caste, had an advantageous start in life and a marriage with a male belonging to a backward class would not entitle her to the facility of reservation given to a backward community. The High Court has applied this decision to a seat reserved in an election in terms of Article 332 of the Constitution. We see no reason why the principle relating to reservation under Articles 15(4) and 16(4) laid down by this Court should not be extended to the constitutional reservation of a seat for a Scheduled Tribe in the House of the People or under Article 332 in the Legislative Assembly."

(emphasis added)

12. What is of importance in Sobha Hymavathi Devi is that the Court did not take the fact that Sobha's father was a man of forward caste as conclusive of her caste status. The Court

did not shut out the plea raised by Sobha that she must be considered as belonging to the scheduled tribe because her mother who was herself a tribal brought her up as a member of her community and raised her as a tribal even though her father might have come from a forward caste. On the contrary the Court examined the plea raised by Sobha in light of evidences adduced by the parties and negated it on the basis of a pure finding of fact. Though the Court referred to and approved Valsamma for rejecting Sobha's plea that she had acquired the status of a tribal by virtue of her marriage to a tribal man, it did not take Valsamma as an authority that in a marriage between a tribal and a non-tribal, the caste of the father would be determinative of the caste of the child.

13. The third plea raised by Sobha in support of her being a tribal and the claim of Valsamma were both based on their voluntary action in marrying a tribal man. In both cases the Court held that getting transplanted into the tribal community through voluntary mobility cannot be the basis for the Forward caste/ non-tribal woman to avail of the benefits of reservation under Article 15 & 16 (in Valsamma) or under Article 332 of the Constitution (in Sobha Hymavathi Devi). But in neither of the two cases the question of a child born of an inter-caste marriage or a marriage between a tribal and a non-tribal was directly in issue.

14. This question came up directly for consideration in *Punit Rai v. Dinesh Chaudhary* (2003) 8 SCC 204. The election of Dinesh Chaudhary (the respondent in the appeal before this Court) to Bihar Legislative Assembly from a constituency reserved for scheduled castes was challenged on the ground that he was born to Kurmi parents and he did not belong to any scheduled castes. The respondent did not deny that his father Bhagwan Singh was a Kurmi and he was married to a Kurmi woman. He, however, set up the case that Bhagwan Singh had taken a second wife Deo Kumari Devi who was a Pasi (scheduled caste) and he was born to Deo Kumari Devi

from Bhagwan Singh and he was, thus, fully eligible to contest from the reserved constituency. He also relied upon a circular issued by the State of Bihar according to which a child born to a non-scheduled caste father and a scheduled caste mother would be counted in the category of scheduled caste. A three-judge bench of the Court before which the case came up for hearing handed down two separate, though concurring, judgments, one by Brijesh Kumar, J., speaking for himself and for V.N. Khare, CJ, and the other by Sinha, J. It is significant to note that the judgment by Brijesh Kumar,J. is based on the finding that the respondent failed to establish that Bhagwan Singh had taken a Pasi woman as the second wife and he was born to her from Bhagwan Singh. The Court held that the fact that Bhagwan Singh was a Kurmi and he was married to a Kurmi woman being admitted, the election petitioner had discharged the onus and the burden now lay upon the respondent to establish that Bhagwan Singh had married second time and his second wife was a Pasi who had given birth to the respondent and the respondent had completely failed to establish that. In paragraphs 14 and 15 of the judgment by the two judges it was observed and held as follows:

> "14. The case of the parties is clear from their pleadings and the evidence adduced by them as indicated above. The petitioner challenged the status of respondent Dinesh Chaudhary as a Scheduled Caste person belonging to the SC community. Precisely what was indicated in support of that case is that the father of Dinesh Chaudhary and Naresh Chaudhary is Bhagwan Singh who is Kurmi by caste married to Jago Devi, also a Kurmi lady. The High Court has also observed that a person born in a Kurmi family normally would be presumed that he is Kurmi by caste. In this background the initial burden of the petitioner would stand discharged and it would shift upon the respondent to prove his case which, in normal course of things, would be and is within his special knowledge. A case which has been set up by the respondent through his

witnesses as well, that his father had taken a fancy to Deo Kumari Devi, a resident of Village Adai, who is Pasi by caste and married her, who gave birth to two children including the respondent, would normally be not in the knowledge of the people in general, particularly when according to the case of the respondent himself Jago Devi lived in another village and she was never brought from there by Bhagwan Singh. More so, when Bhagwan Singh, a Kurmi by caste, is living with his wife Jago Devi, also a Kurmi, in their village Jehanabad. The best evidence, as also according to the High Court to prove the case of the respondent, was to produce Bhagwan Singh and Deo Kumari Devi but they have been withheld after being cited as witnesses for the respondent. These facts clearly make out a case for drawing an adverse inference that in case they had been produced they would not have supported the case of the respondent. *Kundan Lal Rallaram v. Custodian, Evacuee Property* AIR 1961 SC 1316, *T.S. Murugesam Pillai v. M.D. Gnana Sambandha Pandara Sannadhi* AIR 1917 PC 6 and *Thiru John v. Returning Officer* (1977) 3 SCC 540, may also be referred on the point.

15. ……Apart from the above, the appellant had also discharged his burden by proving the fact that the father of Respondent 1 is Bhagwan Singh, a Kurmi by caste married to Jago Devi, also a Kurmi by caste. The natural inference in such circumstances would be that the respondent would, in normal course of events, be a Kurmi by caste. If there is anything contrary to the normal course of events, as pleaded in this case, of another marriage of Bhagwan Singh in some other village, namely, Adai with Deo Kumari Devi who never came to live with Bhagwan Singh in his village nor Bhagwan Singh ever lived there. Such facts in the special knowledge of the respondent have to be proved by him alone. The respondent was under duty to prove his case both ways, namely, in view of the special

knowledge of facts pleaded and again in view of the fact that the appellant had discharged his initial burden of showing that the respondent was Kurmi by caste being the son of Bhagwan Singh, a Kurmi married to Jago Devi, also a Kurmi. The other decision which has been referred to on behalf of the respondent is reported in Dolgobinda Paricha v. Nimai Charan Misra AIR 1959 SC 914. It in connection with the fact that the evidence of the brother of Deo Kumari Devi that Bhagwan Singh had married her, was relevant for the purposes of relationship of one person to another since the brother of Deo Kumari Devi, is a person who is a member of the family or otherwise has special means of knowledge of the particular relationship. The decision is in reference to Section 50 of the Evidence Act. It may be observed that the evidence of persons who belong to Village Adai including the brother of Deo Kumari Devi have been examined by the respondent to establish the allegation of marriage between Bhagwan Singh and Deo Kumari Devi. Undoubtedly, the evidence of the brother of Deo Kumari Devi would be relevant for the relationship between Bhagwan Singh and Deo Kumari Devi but his evidence would not be of any help, in view of the adverse inference drawn under Section 114(g) of the Evidence Act due to withholding of the best evidence available on the point. When the persons concerned are not coming forward to the Court to depose about the alleged relationship and an adverse inference has been drawn that if they had come to the Court to depose, their evidence would have gone against the respondent, in such circumstances, there is no occasion to act upon the statement of DW 5, the brother of Deo Kumari Devi or other witnesses."

(emphasis added)

15. Once again it is to be seen that the judgment by the two judges went into the facts of the case in detail and considered the effect of the evidences led (or rather not led!)

by the respondent in support of his case. And again it was on a finding of fact that the Court held that the respondent failed to establish his scheduled caste status. The judgment by two judges, like the decision in Sobha Hymavathi Devi, did not proceed on the basis that the respondent would get his caste from his father and his father being admittedly Kurmi the respondent could not have a caste status other than Kurmi. The Court did not disallow the respondent from taking the plea tha he was the child of a Pasi mother and, thus, belonged to a schedul ed caste. But in that endeavour the respondent failed on a fi ding of fact. 16. It is equally important to note that the j dgment by the two judges does not rule out the possibility of the child from an inter-caste marriage taking his/her cast status from the mother, if such a provision was made

> in a circular issued by the Government and, in paragraph of the judgment, made the following observations:- "A pers n born in a Kurmi family, which details have been provided, would normally be taken to be a Kurmi by caste. But it is only in special circumstances, as may have been provided under a circular of the Government of Bihar, that the caste of the mother would be taken as the caste of the children, if she happens to be a Scheduled Caste, married to a non-Scheduled Caste."

17. Sinha,J., the third member on the Bench wrote a separate, though concurring judgment. He applied the test of acceptance by the community for rejecting the respondent's claim that he qualified as a 'Pasi' (scheduled caste). In paragraphs 33 and 34 of the judgment Sinha,J. observed as follows-

> "33. In the instant case there is nothing on record to show that the respondent has ever been treated to be a member of the Scheduled Caste. In fact evidence suggests that he has not been so treated. He as well as his brothers and other members of his family are married to persons belonging to his own caste i.e. "Kurmi".

> 34. There was no attempt on the part of the respondent herein to bring on record any material to the effect that he was treated as a member of the "Pasi" community. Furthermore, no evidence has been brought on record to show that the family of the respondent had adopted and had been practicing the customary traits and tenets of the "Pasi" community."

Sinha, J., however, proceeded to make certain other observations and in paragraph 27 of the judgment he said as follows:-

> "27. The caste system in India is ingrained in the Indian mind. A person, in the absence of any statutory law, would inherit his caste from his father and not his mother even in a case of inter-caste marriage."
>
> (emphasis added)

And in paragraphs 41 and 42 of the judgment as under:-

> "41. Determination of caste of a person is governed by the customary laws. A person under the customary Hindu law would be inheriting his caste from his father. In this case, it is not denied or disputed that the respondent's father belonged to a "Kurmi" caste. He was, therefore, not a member of the Scheduled Caste. The caste of the father, therefore, will be the determinative factor in absence of any law."

Here there is no reference to Valsamma but the connection is obvious. It is only the next logical step to what was said in paragraph 31 of Valsamma. If as a result of inter-caste marriage the woman gets transplanted into the family of the husband and takes her husband's caste it would logically follow that the child born from the marriage can take his/her caste only from the father. We shall presently consider the highly illogical

consequences of this logical derivation but before that it needs to be noticed that Sinha, J. rejected the government circular also that provided that the caste of the mother might be taken as the caste of the child. In the same paragraph (41) Sinha,J. observed:

" Reliance, however, has been placed upon a circular dated 3-3-1978 said to have been issued by the State of Bihar which is in the following terms:

"Subject: Determination of the caste of a child born from a non-Scheduled Caste Hindu father and a Scheduled Caste mother.

Sir,

In the aforesaid subject as per instruction I have to state for the determination of a child born from a non-Scheduled Caste father and a Scheduled Caste mother, upon deliberation it has been decided that the child born from such parents will be counted in the category of Scheduled Caste.

2. In such cases before the issue of caste certificate there will be a legible enquiry by the Block Development Officer, Circle Officer/Block Welfare Officer."

42. The said circular letter has not been issued by the State in exercise of its power under Article 162 of the Constitution of India. It is not stated therein that the decision has been taken by the Cabinet or any authority authorized in this behalf in terms of Article 166(3) of the Constitution of India. It is trite that a circular letter being an administrative instruction is not a law within the meaning of Article 13 of the Constitution of India. (See *Dwarka Nath Tewari v. State of Bihar* AIR 1959 SC 249)."

(emphasis added)

18. He, thus, rejected the circular issued by the State of Bihar as invalid and of no consequence. However, the judgment by the two judges, as seen above expressly acknowledged that in special circumstances, as may be provided in the Government Circular, the caste of the mother may be taken as the caste of the children. Therefore, the view taken by Sinha J. on the circular is clearly at variance with the judgment of the two Judges on that issue. On the question of the child inheriting the caste of the mother the judgment by the two judges is silent as the question did not arise for consideration in view of the finding of fact that the respondent's father, a kurmi, had not married the pasi woman. It is, therefore, difficult to clothe the observation by Sinha J. on this point with precedent value, especially in view of the fact that the question did not arise at all after the decision of the majority of two judges. Seervai in his Constitutional Law of India, Fourth Edition, pages 2669-2673 esp. Para 25.102 explains that a 'decision' refers to the determination of each question of law which arose and was decided in that case. In Punit Rai's case, the question did not arise at all, and moreover, there was no majority concurrence on the question that a child inherits his caste from the father. Thus, the concurring judgment of Sinha J. must be interpreted by reference to Paragraphs 33, 34 and 47 of the judgment, where the learned Judge concurs with the majority on the question of fact. The other observations in the concurring judgment cannot be said to constitute binding precedent.

19. The question of the status of a child born to a scheduled tribe mother from a forward caste father again came up before the Court in *Anjan Kumar v. Union of India and others,* (2006) 3 SCC 257. Anjan Kumar, was the son of a scheduled tribe mother and a Kayastha (forward caste) father. The question was whether he could be considered to belong to the scheduled tribe. On the facts of the case, the Court found that though the mother of the child indeed belonged to a scheduled tribe, the child was brought up in the environment of forward caste community and he did not suffer any social disabilities or

backwardness. In paragraph 6 and 7 of the judgment the Court observed as follows:-

"6.Undisputedly, the marriage of the appellant's mother (tribal woman) to one Lakshmi Kant Sahay (Kayastha) was a court marriage performed outside the village. Ordinarily, the court marriage is performed when either of the parents of bride or bridegroom or the community of the village objects to such marriage. In such a situation, the bride or the bridegroom suffers the wrath of the community of the village and runs the risk of being ostracised or excommunicated from the village community. Therefore, there is no question of such marriage being accepted by the village community. The situation will, however, stand on different footing in a case where a tribal man marries a non-tribal woman (forward class) then the offshoots of such wedlock would obviously attain the tribal status. However, the woman (if she belongs to a Forward Class) cannot automatically attain the status of tribal unless she has been accepted by the community as one of them, observed all rituals, customs and traditions which have been practiced by the tribals from time immemorial and accepted by the community of the village as a member of tribal society for the purpose of social relations with the village community. Such acceptance must be by the village community by a resolution and such resolution must be entered in the Village Register kept for the purpose. Often than not, such acceptance is preceded by feast/rituals performed by the parties where the elders of the village community participated. However, acceptance of the marriage by the community itself would not entitle the woman (forward class) to claim the appointment to the post reserved for the reserved category. It would be incongruous to suggest that the tribal woman, who suffered disabilities, would be able to compete with the woman (forward class) who does not suffer disabilities wherefrom she belongs but by reason of marriage to tribal husband and such marriage is

accepted by the community would entitle her for appointment to the post reserved for the Scheduled Castes and Scheduled Tribes. It would be a negation of constitutional goal.

7. It is not disputed that the couple performed court marriage outside the village; settled down in Gaya and their son, the appellant also born and brought up in the environment of forward community did not suffer any disability from the society to which he belonged. Mr. Krishnamani, learned Senior Counsel contended that the appellant used to visit the village during recess/holidays and there was cordial relationship between the appellant and the village community, which would amount to the acceptance of the appellant by the village community. By no stretch of imagination, a casual visit to the relative in other village would provide the status of permanent resident of the village or acceptance by the village community as a member of the tribal community."

20. The Court in paragraph 6 of the judgment, as quoted above, applied the test of acceptance in the community in which the woman gets married. But more importantly in paragraph 7 of the judgment went into the specifics of the case on the question of upbringing of the appellant Anjan Kumar and recorded a finding of fact that he was "brought up in the environment of forward community (and) did not suffer from any disability from the society to which he belonged". Having arrived at the aforesaid finding of fact the Court proceeded to refer to several decisions, including Valsamma and the judgment of Sinha, J. in Punit Rai (in particular paragraph 27 of the judgment) and in paragraph 14 came to observe and hold as follows:-

"14. In view of the catena of decisions of this Court, the questions raised before us are no more res integra. The condition precedent for granting tribe certificate being that one must suffer disabilities wherefrom one belongs. The

offshoots of the wedlock of a tribal woman married to a non-tribal husband - Forward Class (Kayastha in the present case) cannot claim Scheduled Tribe status. The reason being such offshoot was brought up in the atmosphere of Forward Class and he is not subjected to any disability. A person not belonging to the Scheduled Castes or Scheduled Tribes claiming himself to be a member of such caste by procuring a bogus caste certificate is a fraud under the Constitution of India. The impact of procuring fake/bogus caste certificate and obtaining appointment/admission from the reserved quota will have far-reaching grave consequences. A meritorious reserved candidate may be deprived of reserved category for whom the post is reserved. The reserved post will go into the hands of non-deserving candidate and in such cases it would be violative of the mandate of Articles 14 and 21 of the Constitution."

(emphasis added)

21. Here the Court said that, "the offshoot of the wedlock of a tribal woman married to a non-tribal husband - Forward Class (Kayestha in the present case) cannot claim Scheduled Tribe status". But it was not on the reasoning of Valsamma that in an inter-caste marriage or in a marriage between a tribal and a non-tribal the woman gets transplanted into the community of the husband and gets her caste from the husband (paragraph 31 of the judgment) or the reasoning in Sinha J's judgment that in the absence of any statutory law a person would inherit his caste from his father and not his mother even in a case of inter-caste marriage". Here the reasoning is that, "..such offshoot was brought up in the atmosphere of Forward Class and he is not subjected to any disability. That is exactly the reasoning of Valsamma in paragraph 34 of the judgment and that as noted above is the true ratio of the decision in Valsamma.

22. It is, thus, clear that it is wrong and incorrect to read Valsamma, Punit Rai and Anjan Kumar as laying down the rule

that in an inter-caste marriage or a marriage between a tribal and a non-tribal, the child must always be deemed to take his/her caste from the father regardless of the attending facts and circumstances of each case. Now, we propose to consider why the observation in Valsamma to the effect that an inter-caste marriage or a marriage between a tribal and a non-tribal the woman becomes a member of the family of her husband and takes her husband's caste (Paragraph 31 of the judgment) is not the ratio of that decision and more importantly what inequitable and anomalous results would follow if that proposition is taken to its next step to hold that the offspring of such a marriage would in all cases take the caste from the father.

23. For the proposition that on marriage the woman takes the caste of her husband Valsamma relied on two nineteenth century Privy Council decisions, one in *Bhoobum Moyee Debia v. Ram Kishore Acharj Chowdhry,* (1865) 10 MIA 279 and the other in *Lulloobhoy Bappoobhoy Cassidass Moolchund v. Cassibai,* (1879-80) 7IA 212. In Bhoobum Moyee Debia the respondent Chandrabullee Debia after the death of her son, who left behind an issueless widow (the appellant, Bhoobum Moyee Debia), in order to devest the widowed daughter-in-law, made an adoption on the strength of a deed of permission of adoption that was executed in her favour by her deceased husband (Gaur Kishore Acharj Chaudhary). The adopted son filed a suit claiming the entire estate of Gaur Kishore Acharj Chaudhary, trying to defeat the claim of the appellant and devest her of the estate. He succeeded before the Sudder Dewanny Adawlut of Calcutta. But in appeal the Privy Council held that under the Hindu Law an adopted son takes by inheritance and not by device and as by that law in the case of inheritance, the person to succeed must be the heir of the full owner. In the facts of the case, the deceased son of Gaur Kishore Acharj Chaudhary and Chandrabullee Debia who was the husband of the appellant was the last full owner and at his death his wife, the appellant,

succeeded as his heir to her widow's estate. Consequently, the adoption by Chandrabullee Debia was void as the power was incapable of execution. After reaching this conclusion the Privy Council further noted that an additional difficulty in holding the estate of the widow to be devested "may perhaps be found in the doctrine of Hindoo Law, that the husband and wife are one and that as long as the wife survives, one half of the husband survives; but it is not necessary to press this objection".

24. The second decision of the Privy Council in Lulloobhoy Bappoobhoy Cassidass Moolchund, raised the question whether the widow of a paternal first cousin of the deceased became - by her marriage - a Gotraja-sapinda of the deceased, and whether she was, therefore, entitled to succeed to the estate in preference to male gotraja-sapindas who were more distant heirs. The Privy Council, based on an interpretation of the Mitakshara law as it prevailed in Bombay at that time, affirmed the widow's right of inheritance. The Privy Council observed, "It is not disputed that on her marriage the wife enters the gotra of her husband, and it can scarcely be doubted that in some sense she becomes a sapinda of his family. It is not necessary to cite authorities on this point…... Whether the right to inherit follows as a consequence of this sapinda relationship is the question to be considered?" The Privy Council cited a passage from the Achara Kanda of the Mitakshara which suggested that sapinda relationship depended on having the particles of the body of some ancestor in common. However, "the wife and the husband are sapinda relations to each other, because they together beget one body (the son)". It was further observed; "If then, as already pointed out, the wife upon her marriage enters the gotra of her husband and, thus, becomes constructively in consanguinity or relationship with him, and through him, with his family, there would appear to be nothing incongruous in her being allowed to inherit as a member of that family under a scheme of inheritance which did not adopt the principle of the general incapacity of women to inherit. But, though it may be consisted with this theory of sapinda relationship to admit the

widow so to inherit, the existence of the right has still to be established."

25. In the first of the two Privy Council decisions, the issue of sapinda relationship did not really arise and the case was decided on an altogether different basis. In the second decision, it is only observed that the wife enters the gotra of the husband. There may be many gotras within a certain caste, and it is unclear if this doctrine of Hindu Customary law can be applied in the post-Constitution era to determine the caste of a child from an inter-caste marriage or a marriage between a tribal and non-tribal.

26. Without any disrespect, it seems a matter of grim irony that two nineteenth century decisions of the Privy Council that were rendered in their time to advance and safeguard the interests of Hindu widows should be relied upon and used for complete effacement of the caste and the past life of a woman as a result of her marrying into a different caste. The Privy Council decisions were rendered about a century and a quarter ago in cases of inheritance, in a completely different social and historical milieu, when cases of inter-caste marriage would be coming to the court quite rarely. We are not quite sure of the propriety or desirability of using those decisions in a totally different context in the post-Constitutional, independent India where there is such great consciousness and so much effort is being made for the empowerment of women and when instances of inter-caste marriage are ever on the increase. It also needs to be considered how far it would be proper to invoke the customary Hindu law to alter the caste status of a woman in an inter-caste marriage or a marriage between a tribal and non-tribal and to assign to the woman the caste of her husband when such a marriage may itself be in complete breach of the Hindu customary law.

27. We may also recall that Valsamma Paul was a case where a Syrian Catholic woman (forward caste) had married a Latin Catholic man (backward class). The parties were

Christians but the Court applied the Hindu Customary law observing, "It would, therefore, be clear that be it either under the Canon law or the Hindu law, on marriage the wife becomes an integral part of husband's marital home entitled to equal status of husband as a member of the family. The Court, thus, put the Canon law at par with the Hindu Customary law. Now, surely the same reasoning cannot apply if a Muslim of a forward caste marries a Muslim tribal e.g. a Lakshdweep Gaddi or a Bakriwal from Jammu and Kashmir. One wonders whether in those cases too the woman can be said to take the caste of her husband applying the reasoning of Valsamma.

28. Further, whether and to what extent the Hindu Customary law would govern members of scheduled tribes (as opposed to scheduled castes) would depend on the extent to which the given tribe was hinduised prior to the adoption of the Constitution of India.

29. The view expressed in *Valsamma* that in inter-caste marriage or in a marriage between a tribal and a non-tribal the woman gets transplanted into the family of her husband and takes her husband's caste is clearly not in accord with the view expressed by the Constitution Bench of the Court in *V.V. Giri v. Dippala Suri Dora and others,* (1960) 1 SCR 426 that it is well nigh impossible to break or even to relax the inflexible and exclusive character of the caste system. In V.V. Giri the election of the returned candidate was challenged on the ground that he had ceased to be a member of the Scheduled Tribe and had become a Kashtriya. In support of the allegation evidences were led that from 1928 onwards he had described himself and the members of his family as belonging to the Kashtriya caste. Oral evidence was led to show that he had for some years past adopted the customs and rituals of the Kashtriya caste and marriages in his family were celebrated as they would be among the Kashtriya and homa was performed on such occasions. It was also shown that his family was connected by marriage ties with some Kashtriya families, that a Brahmin priest officiated at the religious ceremonies performed by him and he

wore the sacred thread.

30. Rejecting the contention of the election petitioner Gajendragadkar J. (as his Lordship then was) speaking for himself and three other Honourable Judges on the Bench observed in Paragraph 25 of the judgment as follows:

> "In dealing with this contention it would be essential to bear in mind the broad and recognized features of the hierarchical social structure prevailing amongst the Hindus. It is not necessary for our present purpose to trace the origin and growth of the caste system amongst the Hindus. It would be enough to state that whatever may have been the origin of Hindu castes and tribes in ancient times, gradually castes came to be based on birth alone. It is well known that a person who belongs by birth to a depressed caste or tribe would find it very difficult, if not impossible, to attain the status of a higher caste amongst the Hindus by virtue of his volition, education, culture and status. The history of social reform for the last century and more *has shown how difficult it is to break or even to relax the rigour of the inflexible and exclusive character of the caste system*[1]. It is to be hoped that this position will change, and in course of time the cherished ideal of casteless society truly based on social equality will be attained under the powerful impact of the doctrine of social justice and equality proclaimed by the Constitution and sought to be implemented by the relevant statutes and as a result of the spread of secular education and the growth of a rational outlook and of proper sense of social values; but at present it would be unrealistic and utopian to ignore the difficulties which a member of the depressed tribe or caste has to face in claiming a higher status amongst his co-religionists."

1. In Valsamma (Para 31) a bench of two judges, using similar words said just the opposite:"The caste rigidity breaks down and would stand no impediment to her becoming a member of the family to which the husband belongs".

31. The observation made by Gajendragadkar J. half a century ago was tellingly shown to be true in *Rajendra Shrivastava vs. State of Maharashtra,* (2010) 112 BomLR 762, a case that came before the Full Bench of the Bombay High Court. In Rajendra Shrivastava a Scheduled Caste woman, who had married a man from an upper caste, accused her husband and his family members of subjecting her to cruelty and abusing her in the name of her caste. A case was accordingly instituted against the accused, including the husband, under Sections 498A, 406, 494, 34 of the Indian Penal Code read with the provisions of Section 3(1)(ii) and Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. In the anticipatory bail application filed on behalf of the husband it was contended that on getting married with him the complainant had assumed his caste and lost her identity as a Scheduled Caste person. She could, therefore, make no complaint under the provisions of the SC/ST (Prevention of Atrocities) Act. It goes without saying that in support of the contention raised on behalf of the husband strong reliance was placed upon the observations made in Valsamma in Paragraph 31 of the judgment.

32. The full bench before which the matter came up for consideration on reference framed the following issue as arising for consideration:

> "If a woman who by birth belongs to a scheduled caste or a scheduled tribe marries to a man belonging to a forward caste, whether on marriage she ceases to belong to the scheduled caste or the scheduled tribe?"

33. The full bench of the Bombay High Court examined Valsamma in light of two Constitutional Bench decisions of this Court, namely, *Indra Sawhney v. Union of India,* 1992 supp (3) SCC 217 and *V.V. Giri v. D. Suri Dora,* (supra). The full bench also considered the law of precedent and referred to the decision of this Court in *State of A.P. v. M. Radha Krishna Murthy,* (2009) 5 SCC 117. It finally came to hold that the

observations made in Paragraph 31 of the decision in Valsamma cannot be read as the ratio laying down that on marriage, a wife is automatically transplanted into the caste of her husband. In Paragraph 12 of the judgment it held as follows:-

> "When a woman born in a scheduled caste or a scheduled tribe marries to a person belonging to a forward caste, her caste by birth does not change by virtue of the marriage. A person born as a member of a scheduled caste or a scheduled tribe has to suffer from disadvantages, disabilities and indignities only by virtue of belonging to the particular caste which he or she acquires involuntarily on birth. The suffering of such a person by virtue of caste is not wiped out by a marriage with the person belonging to a forward caste. The label attached to a person born into a scheduled caste or a scheduled tribe continues notwithstanding the marriage. No material has been placed before us by the applicant so as to point out that the caste of a person can be changed either by custom, usage, religious sanction or provision of law."

34. We fully endorse the view taken by the Bombay High Court and we feel that in the facts of the case that was the only correct view.

35. In light of the discussion made above it is clear that the view expressed in Paragraph 31 of the Valsamma judgment that in an inter-caste marriage or a marriage between a tribal and a non-tribal the woman must in all cases take her caste from the husband, as a rule of Constitutional Law is a proposition, the correctness of which is not free from doubt. And in any case it is not the ratio of the Valsamma decision and does not make a binding precedent.

36. It is also clear to us that taking it to the next logical step and to hold that the off-spring of such a marriage would in all cases get his/her caste from the father is bound to give rise to

serious problems. Take for instance the case of a tribal woman getting married to a forward caste man and who is widowed or is abandoned by the husband shortly after marriage. She goes back to her people and the community carrying with her an infant or may be a child still in the womb. The child is born in the community from where her mother came and to which she went back and is brought up as the member of that community suffering all the deprivations, humiliations, disabilities and handicaps as a member of the community. Can it still be said that the child would have the caste of his father and, therefore, not entitled to any benefits, privileges or protections sanctioned by the Constitution.

37. Let us now examine how the issue has been dealt with by some of the High Courts.

38. A full bench decision of the Kerala High Court in *Indira v. State of Kerala,* AIR 2006 Ker. 1, is a case in point.

39. The Government of Kerala had issued G.O. (Ms) No. 298 dated 23/6/1961 stating that children born of inter-caste marriages would be allowed all educational concessions if either of the parents belonged to scheduled caste/scheduled tribe. Later, on a query made by the Kerala Public Service Commission, the Government clarified vide a G.O. (Ms) dated 25/1/1977 that the Government Order dated 23/6/1961 could be adopted for determining the caste of the children born of such inter-caste marriage for all purposes. Resultantly, such children were treated as belonging to scheduled caste or scheduled tribe if either of their parents belonged to SC/ST. After the decision of this Court in Punit Rai (supra) and in light of the separate though concurring judgment of Sinha J. the State of Kerala cancelled the earlier G.O. (Ms) dated 23/6/1961 and its clarification dated 25/1/1977 and replaced it by another order G.O. (Ms) No. 11/2005/SCSTDD dated 20/6/2005 directing that the competent authorities would issue Scheduled Caste/Scheduled Tribe community certificates to the children born from inter-caste marriage only as per the caste/community

of his/her father subject to the conditions of acceptance, customary traits and tenets as stipulated in the judgments of the Supreme Court. The validity of the Government Order dated 20/6/2005 came up for consideration before the full bench of the Kerala High Court. The High Court considered the decisions of this Court in a number of cases including Valsamma, Sobha Hymavathi Devi and Punit Rai and in Paragraph 21 of the judgment came to hold as follows:

> "The Government, vide order G.O. (Ms) No. 25/2005/ SCSTDD dated 20/6/2005 directed the competent authority to issue SC/ST community certificates to the children born out of intercaste married couples as per the caste/community of the father subject to the conditions of acceptance, customary traits and tenets stipulated in Punit Rai's case and Sobha Hymavathi Devi's case. *The above government order would also be applicable to the children born out of intercaste married couple if the mother belongs to SC/ST community.* Subject to the above direction, rest of the directions contained in G.O. (Ms) No. 11/05/ and G.O. (Ms) No. 25/2005 would stand."

40. We are in agreement with the view taken by the Kerala High Court.

41. A division bench of the Delhi High Court in Kendriya Vidyalaya Sangathan v. Shanti Acharya Sisingi, 176(2011) DLT 341, after considering a number of decisions of this Court summed up the legal position as to the offspring of an inter-caste marriage or a marriage between a tribal and a non-tribal in clauses 3 and 4 under Paragraph 30 of the judgment as follows:

> "III The offshoot of wedlock between Scheduled Caste/ Scheduled Tribe male and a female belonging to forward community can claim Scheduled Caste/Scheduled Tribe status for Indian society is patriarchal society where the child acquires the caste of his father.

IV The offshoot of wedlock between Scheduled Caste/ Scheduled Tribe female and a male belonging to forward community cannot claim Scheduled Caste/Scheduled Tribe status unless he demonstrates that she has suffered the disabilities suffered by the members of the community of his mother."

42. In *Arabinda Kumar Saha v. State of Assam,* 2001 (3) GLT 45 a division bench of the Gauhati High Court had a case before it in which a person whose father belonged to the upper caste and mother to a scheduled caste claimed scheduled caste status. The court found and held that though the father of the writ petitioner was admittedly a forward caste man he was brought up as a member of the scheduled caste. This was evident from the fact that the writ petitioner had not only been the office holder of Anushchit Jati Karamchari Parishad but the scheduled caste community treated the appellant as belonging to scheduled caste and even the non-scheduled caste people treated him as scheduled caste, in as much as in his college career and in his service career he was treated as a person belonging to a scheduled caste.

43. In view of the analysis of the earlier decisions and the discussion made above, the legal position that seems to emerge is that in an inter-caste marriage or a marriage between a tribal and a non-tribal the determination of the caste of the offspring is essentially a question of fact to be decided on the basis of the facts adduced in each case. The determination of caste of a person born of an inter-caste marriage or a marriage between a tribal and a non-tribal cannot be determined in complete disregard of attending facts of the case. In an inter-caste marriage or a marriage between a tribal and a non-tribal there may be a presumption that the child has the caste of the father. This presumption may be stronger in the case where in the inter-caste marriage or a marriage between a tribal and a non-tribal the husband belongs to a forward caste. But by no means the presumption is conclusive

or irrebuttable and it is open to the child of such marriage to lead evidence to show that he/she was brought up by the mother who belonged to the scheduled caste/scheduled tribe. By virtue of being the son of a forward caste father he did not have any advantageous start in life but on the contrary suffered the deprivations, indignities, humilities and handicaps like any other member of the community to which his/her mother belonged. Additionally, that he was always treated a member of the community to which her mother belonged not only by that community but by people outside the community as well.

44. In the case in hand the tribal certificate has been taken away from the appellant without adverting to any evidences and on the sole ground that he was the son of a Kshatriya father. The orders passed by the High Court and the Scrutiny Committee, therefore, cannot be sustained. The orders passed by the High Court and the Scrutiny Committee are, accordingly, set aside and the case is remitted to the Scrutiny Committee to take a fresh decision on the basis of the evidences that might be led by the two sides. It is made absolutely clear that this Court is not expressing any opinion on the merits of the case of the appellant or the private contesting respondent.

45. Before parting with the records of the case, we would like to put on record our appreciation for the assistance that we got from Mr. Sanjay R. Hegde counsel appearing for the appellant and Mr. Sanjeev Kumar counsel appearing for respondent No. 6. The assistance we received from the amicus curiae, Mr. Aman Ahluwalia was especially invaluable.

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

SUDEVANAND
v.
STATE THROUGH CBI
(Criminal Appeal No. 174 of 2012)

JANUARY 19, 2012

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Code of Criminal Procedure,1973: ss.311, 391 - Summoning of approver for cross-examination - Permission for - Arrest of appellant and other accused in connection to attempt on the life of the then Chief Justice of India - Two months prior to that, Railways Minister was killed - Appellant and PW-1 in connection with said case - While on remand, PW-1 made a confessional statement and requested to be allowed to become an approver - He was produced before a Magistrate, before whom he made a statement u/s.164 and became approver - Subsequently approver made retraction in 1978 in jail disowning his earlier statements - Conviction of appellants u/ss.115, 307/120B, IPC r/w s.4(b) of Explosive Substances Act, 1908 - Applications by appellants praying to call for and taking on appeal record, the statement made by approver, in jail and to summon the approver for further cross-examination - Rejected by High Court - On appeal, held: High Court erred in refusing to summon the approver for his further examination as prayed for on behalf of appellants - Delay in filing the applications ought not have been sole ground for rejecting the same - Appellants were anyway not responsible for the inordinate delay in their appeals, that remained pending since 1976, being taken up for hearing - As long as the appeals were pending, High Court ought to have considered the appellants' request for summoning approver for further cross-examination on merits, and in light of the relevant legal provisions - High Court directed to summon approver for his further examination by the appellants - Penal

Code, 1860 - ss.115, 307/120B - Explosive Substances Act, 1908 - s.4(b).

The prosecution case was that on March 20, 1975, the car in which the then Chief Justice of India was travelling, along with others stopped at the crossing and two live hand grenades were lobbed inside the car. The grenades, however, did not explode and the occupants of the car, including the Chief Justice of India, escaped unharmed. A case was registered and investigation was started by the Crime Branch of the Delhi Police. The case was handed over to the CBI. About two and a half months before the attempt on the life of the Chief Justice of India, 'LNM', the Minister of Railways was killed in a bomb blast. In connection with that case, 'Su' (appellant) and one 'V' were arrested at Bhagalpur. On July 27, 1975 they were also arrested in the instant case relating to the attempt on the life of the Chief Justice and were brought to Delhi where they were sent on police remand from July 31, 1975 to August 14, 1975. While on remand, 'V' made a confessional statement and requested to be allowed to become an approver. He was produced before a Magistrate on August 14, 1975, before whom he made a statement under Section 164, Cr.P.C. giving the details of the conspiracy to kill the Chief Justice of India. He was again produced before the Magistrate on August 22, 1975 before whom he made a similar statement for grant of pardon under Section 306 Cr.P.C.

The CBI completed investigation of the case and submitted charge-sheet against the three accused including the appellants and they were put on trial. The trial court convicted appellants 'Su' and 'Sa' under Sections 115, 307/120B, IPC and under Section 4(b) of the Explosive Substances Act, 1908.

All the convicts filed appeals before the High Court. During pendency of the said appeal, certain

developments took place in 'LNM' murder case. That case was also investigated by the CBI and in that case too 'Su' and 'Sa' (along with others) were accused and in that case also 'V' was granted pardon on becoming an approver. An inquiry was made into the circumstances in which 'V' made the confessional statement and was tendered pardon to become approver. Following the enquiry, on September 30, 1978 the statement of 'V' was recorded at Danapur jail where he was lodged at that time. The statement was recorded in the presence of the Superintendent and the Jailor. The statement was also recorded on a tape recorder. In this statement 'V' retracted from his earlier statements incriminating himself and the other accused in the case. He stated that his earlier statements were obtained by the CBI by subjecting him to great mental and physical torture. The retraction made by 'V' was placed before the Chief Minister who requested 'T', a former judge of the Bombay High Court to give a report. The former judge of the Bombay High Court gave his opinion that the conviction of all the accused in the Chief Justice's case was based on fabricated evidence of the approver and, therefore, the High Court should be requested to consider the appeals of the three accused keeping aside the approver's evidence. Meanwhile, the trial of the 'LNM' murder case was transferred from Bihar to Delhi. In the 'LNM' murder case, 'V' was examined by the prosecution as PW.2 and in course of his deposition before the court he said that the statement made by him at Danapur jail was not voluntary and was made on the basis of a statement prepared and given to him in writing by the State Government officers.

Both 'Su' and 'Sa' were released on bail in 1986 after remaining in jail for almost 11 years. In 1997-1998, that is 11 years after coming out of jail, the appellants filed three criminal miscellaneous applications in the pending

appeals praying to call for and taking on the appeal record, the statement made by 'V', the approver, in Danapur jail on September 30, 1978, the affidavits of the officials of the Bihar Government filed in the transfer petition before the Supreme Court and the enquiry report of 'T'; to summon 'V', the approver (PW.1 in the case), for further cross-examination in terms of Section 145 of the Evidence Act and to call the evidence of 'V' recorded in the trial of 'LNM' murder case.

The High Court noted that it was within the knowledge of the appellants that the approver had made the retraction in the year 1978 disowning his earlier statements but the three applications in question were filed after a lag of more than 20 years and primarily for that reason did not allow all the prayers made in the three applications but granted the appellants only a limited and partial relief. The application for considering the record, certified copies etc. under Section 80 and other provisions under the Evidence Act, report of 'T' and other documents which may be admissible under the Evidence Act was permitted. The applications for leading further evidence which would have entailed further time were dismissed, but the third application for considering those documents which were already placed on the record as per law was permitted. The instant appeals were filed challenging the order of the High Court.

Allowing the appeals, the Court

HELD: 1. The delay in filing the applications should not have been the sole ground for rejecting the appellants' applications before the High Court. The High Court did not say that the appellants were in anyway responsible for the inordinate delay in their appeals, that remained pending since 1976, being taken up for hearing. That being the position, as long as the appeals were pending, the High Court should have considered the

appellants' request for summoning PW.1 for further cross-examination on merits, and in light of the relevant legal provisions. Any further cross-examination of PW.1 would not have taken more than two or three days and would not have contributed to any further delay in the disposal of the appeal in any material way. [Para 18]

2. Not only 'V' who made diametrically opposite statements but the CBI and the State (CID) seemed to be at loggerheads with the one accusing the other of manipulating and using 'V' for its own designs. It is an unusual case by any reckoning. It is obvious that one of the two statements of 'V' is false. But it is very difficult to say at this stage which of the statements is true and which of the statement was made under the influence, threat or coercion by the State officials or the CBI. The position may be clear in case he is subjected to further examination with reference to his statement made in Danapur jail on September 30, 1978. Section 391, Cr.P.C. is not limited to recall of a witness for further cross-examination with reference to his previous statement. The Appellate

Court may feel the necessity to take additional evidence or any number of reasons to arrive at the just decisio in the case. The law casts a duty upon the court to arrive at the truth by all lawful means. [paras 27, 28, 30] *Mishrilal v. S ate of M.P.* **(2005) 10 SCC 701: 2005 (1) Suppl. SCR 259;** *Hanuma Ram v. State of Rajasthan and others* **(2008) 15 SCC 652: 20 8 (14) SCR 348 - Distinguished. 3. The contention may be right that statement of 'V' to have been made in jail has no leg l sanctity and it came to be made and recorded in a manner completely unknown to law but on that ground alone it would not be co rect and proper to deny the application of Section 391, Cr.P.C. If on the testimony of the approver, a person is convicted by the trial court under Section 302 and 120-B etc., IPC and is sentenced to a life term and while the**

convict's appeal is pending before the High Court, the 'approver' is found blabbering and boasting among his friends that he was able to take the Court for a ride and settled his personal score with the convict by sending him to jail to rot at least for 14 years. Such a statement would also be completely beyond the legal framework but can it be said that in light of such a development the convicted accused may not ask the High Court for recalling the approver for further examination. As a matter of fact, if some later statement, has come to be made in some legal ways, it may be admissible on its own without any help from Section 311 or Section 391 of the Cr.P.C. It is only such statement or development which is otherwise not within the legal framework that would need the exercise of the Court's jurisdiction to bring it before it as part of the legal record. The High Court was in error in refusing to summon 'V', the approver (PW.1) for his further examination as prayed for on behalf of the appellants. Accordingly, that part of the High Court order is set aside and the High Court is directed to summon 'V' (PW.1) for his further examination by the appellants and if so desired by the CBI. The High Court may direct a member of the Registry of the rank of a Sessions Judge/ Additional Sessions Judge to record the additional evidence of (PW.1). The examination of the witness by the appellants and the CBI must not go beyond two working days each so that the recording of his evidence should be complete in not more than four days. The Registrar recording the evidence would certify it and place before the Court and the Court shall then proceed to dispose of the appeals. [paras 31-33]

5. The case relating to the attempt on the life of the CJI remains stuck up at the stage of the appeal even after about 37 years of the occurrence. The other case of the killing of 'LNM' is still mired before the trial court. In so far as the instant case is concerned, the Chief Justice of

the Delhi High Court is requested to take notice of the inordinately long time for which these appeals are pending before the High Court and to put a tab on them so as to ensure that the appeals are disposed of without any further delay and in any case not later than six months from the date of the receipt/production of a copy of this order. [para 35]

Zahira Habibulla H. Sheikh v. State of Gujarat **(2004) 4 SCC 158: 2004 (3) SCR 1050;** *Pandit Ukha Kolhe v. State of Maharashtra* **1964 (1) SCR 926;** *Satyajit Banerjee v. State of W.B.* **(2005) 1 SCC 115**

Case Law Reference:

2004 (3) SCR 1050	**referred to**	**Para 15**
1964 (1) SCR 926	**referred to**	**Para 15**
(2005) 1 SCC 115	**referred to**	**Para 16**
2005 (1) Suppl. SCR 259	**Distinguished**	**Para 22**
2008 (14) SCR 348	**Distinguished**	**Para 23**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 174 of 2012.

From the Judgment and Order dated 22.11.2006 of the High Court of Delhi at New Delhi in Criminal Appeal No. 443 of 1976, Criminal Misc. No. 5786 of 1997 and 5700 of 1998.

WITH

Criminal Appeal Nos. 175 and 176 of 2012.

Arvind Kumar, Laxmi Arvind, Poonam Prasad, Pradeep Kumar Mathur, R.S. Sharma, Feroze Ahmad, Arvind Tiwary, Arvind Kumar, Arvind Kumar Tiwary (for S.C. Patel), M.L. Lahoty, Paban K. Sharma, Gargi B. Bharali, Sukumar Agarwal and Himanshu Shekhar for the Appellant.

P.P. Malhotra, ASG, P.K. Dey, T.A. Khan, M. Khairati, Chetan Chawla, Shanti Shalini and Arvind Kumar Sharma (for P. Parmeswaran) for the Respondent.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Leave granted.

2. On March 20, 1975, at about 4.15 p.m. when the car in which Mr. Justice A.N. Ray, holding the office of the Chief Justice of India at that time, was travelling, along with his son Shri Ajoy Nath Ray and a Jamadar Jai Nand and the driver Inder Singh, stopped at the intersection of Tilak Marg and Bhagwan Dass road, at a stone throw distance from the Supreme Court of India, two live hand grenades were lobbed inside the car. Fortunately, the grenades did not explode and the occupants of the car, including the Chief Justice of India, escaped unharmed.

3. A case was registered and investigation was started by the Crime Branch of the Delhi Police. But, as the police investigation did not make much headway, on June 30, 1975 the case was handed over to the CBI. On the same day, one Santoshanand Avadhoot (appellant in Criminal appeal arising out of SLP (Criminal) 6625 of 2006) was arrested followed by the arrest of an advocate, namely, Ranjan Dwivedi (appellant in criminal appeal arising out of SLP (Crl.) No.6800/2006) on July 6, 1975.

4. Here, it may be noted that about two and a half months before the attempt on the life of the Chief Justice of India, Shri L.N. Mishra, the Minister of Railways in the Union Cabinet was killed in a bomb blast taking place during a function on the platform of Samastipur Railway Station. In connection with that case, Sudevanand Avadhoot (appellant in criminal appeal arising out of SLP (Crl.) No.6489/2006) and one Vikram alias Jaladhar Das were arrested at Bhagalpur. On July 27, 1975 they were also arrested in the present case relating to the

attempt on the life of the Chief Justice and were brought to Delhi where they were sent on police remand from July 31, 1975 to August 14, 1975. While on remand, Vikram made a confessional statement and requested to be allowed to become an Approver. He was produced before a Magistrate on August 14, 1975, before whom he made a statement under Section 164 of the Code of Criminal Procedure (in short "Cr.P.C.") giving the details of the conspiracy to kill the Chief Justice of India. He was again produced before the Chief Judicial Magistrate on August 22, 1975 before whom he made a similar statement for grant of pardon under Section 306 Cr.P.C.

5. The CBI completed investigation of the case and submitted charge-sheet against the three accused, namely, Sudevanand, Santoshanand and Ranjan Dwivedi and they were put on trial in Sessions Case No.9/1976. Sudevanand and Santoshanand were charged under Section 307 read with Section 120-B of the Indian Penal Code and Section 4(b) of the Explosive Substances Act, 1908. So far as Ranjan Dwivedi is concerned, he was charged jointly with the other two accused under Section 120 B of the Penal Code only. At the conclusion of the trial, the Additional Sessions Judge, Delhi vide his judgment and order dated October 28, 1976 convicted Sudevanand and Santoshanand under Sections 115, 307/ 120B of the Penal Code and sentenced them to undergo rigorous imprisonment for 7 years under Section 115 read with 120-B(1), 10 years for attempting to kill Chief Justice A. N. Ray and three other occupants of the car and 7 years under Section 4(b) of the Explosive Substances Act, 1908. Ranjan Dwivedi was convicted under Section 115/120 B(1) of the Penal Code and was sentenced to 4 years rigorous imprisonment.

6. It may be noted here that Vikram, the Approver was examined by the prosecution as PW.1 and according to the appellants their conviction is mainly based on his evidence.

7. Against the judgment and order passed by the trial court,

Ranjan Dwivedi filed appeal before the High Court on December 6, 1976 which is registered as Criminal Appeal No.436/1976. Sudevanand and Santoshanand jointly filed a separate appeal which is registered as 443/1976.

8. After the appellants' trial was over, and they were convicted and sentenced by the trial court, as noted above, and after they had filed their appeals before the High Court against the judgment and order passed by the trial court, certain developments took place in the L. N. Mishra murder case. That case was also investigated by the CBI and in that case too Sudevanand and Santoshanand (along with others) were accused and in that case also Vikram was granted pardon on becoming an Approver. According to his statements made before the Magistrates both the killing of L. N. Mishra and the attempt on the life of Chief Justice of India were parts of a larger conspiracy, at the instance of the same organisation and a common group of persons.

9. On August 30, 1978, the Chief Minister of Bihar wrote a highly confidential letter to the Prime Minister of India, a copy of which was endorsed to the DIG (CID) Bihar. In pursuance of the Chief Minister's letter, the DIG (CID) is said to have made an inquiry into the circumstances in which Vikram @ Jaladhar Das had made the confessional statement and was tendered pardon to become Approver. Following the enquiry, on September 30, 1978 the statement of Vikram was recorded at Danapur jail where he was lodged at that time. The statement was taken in the question and answer form and it was recorded in the presence of Dr. D. Ram, Superintendent; Danapur Hospital, (Ex-officio Jail Superintendent) and Haider Ali, the Jailor. The statement was also recorded on a tape recorder. In this statement Vikram retracted from his earlier statements incriminating himself and the other accused in the case. He said that his earlier statements were obtained by the CBI by subjecting him to great mental and physical torture. He was beaten up and tortured to such an extent that he agreed to make

whatever statement CBI wanted him to make. The retraction made by Vikram was placed before the Chief Minister who requested Mr. Tarkunde, a former judge of the Bombay High Court to give a report in light of the statement made by Vikram in jail on September 30, 1978. Mr. Tarkunde is said to have given his opinion that the conviction of all the accused in the Chief Justice's case was based on fabricated evidence of the Approver and, therefore, the High Court should be requested to consider the appeals of the three accused keeping aside the Approver's evidence. We need not go any further in this matter, as all this was plainly outside the legal frame-work.

10. It needs, however, to be noted that upset by these developments, the CBI moved this Court in Transfer Petition (Crl.) No. 69/1979 praying for the transfer of the trial of the L.N. Mishra murder case outside Bihar. In the transfer petition though the State of Bihar was not formally made a party, a number of allegations were made against some of its officers. In those circumstances, the concerned officers after obtaining permission from the State Government, filed affidavits/ applications denying the allegations made against them in the transfer petition filed by the CBI and supporting the veracity of the retraction made by Vikram in Danapur jail on September 30, 1978 disowning the earlier statements made by him. In the overall facts and circumstances of the case, however, this Court deemed just and proper to transfer the trial of the L.N. Mishra murder case from Bihar to Delhi where it now remains pending as Sessions Case No. 1/2006 (after being renumbered) before the Additional Sessions Judge, Delhi.

11. It is curious to note that in the L.N. Mishra murder case Vikram was examined by the prosecution as PW.2 and in course of his deposition before the court he said that the statement made by him at Danapur jail was not voluntary but he was forced to make the statement under coercion and threats by the Chief Secretary, Law Secretary and Home Secretary, Government of Bihar and the SP and the DSP in

the State Police. He said in his deposition before the court that his statement in jail was made on the basis of a statement prepared and given to him in writing by the State Government officers.

12. Coming back to the appellant's appeal pending before the Delhi High Court, both Sudevanand and Santoshanand were released on bail in 1986 after remaining in jail for almost 11 years. In 1997-1998, that is to say 11 years after coming out of jail, the appellants filed three criminal miscellaneous applications in the pending appeals. Criminal miscellaneous application No. 5786/97 was filed on September 24, 1997 praying to call for and taking on the appeal record the statement made by Vikram, the Approver, in Danapur jail on September 30, 1978, the affidavits of the officials of the Bihar Government filed in the transfer petition before this Court and the enquiry report of Justice Tarkunde. The second application (criminal miscellaneous) No.5700/98 was filed on September 16, 1998 to summon Vikram, the Approver (PW.1 in the case), for further cross-examination in terms of Section 145 of the Evidence Act. The third application (criminal miscellaneous) No.6300/98 was filed on October 15, 1998 praying to call the evidence of Vikram, the Approver (PW.2), recorded in the trial of L.N. Mishra murder case.

13. The Delhi High Court took up all the three criminal miscellaneous applications and disposed them of by order dated November 22, 2006. The High Court noted that it was within the knowledge of the appellants that the Approver had made the retraction in the year 1978 disowning his earlier statements but the three applications in question were filed after a lag of more than 20 years and primarily for that reason did not allow all the prayers made in the three applications but granted the appellants only a limited and partial relief. In the operative portion of the order the High Court observed and directed as follows:

"The last application moved by the appellant for

considering the record, certified copies etc. u/s 80 and other provisions under the Evidence Act, report of justice V.M. Tarkunde and other documents which may be admissible under the Evidence Act has to be permitted. This prayer is being kept open and would be considered as per law.

Succinctly stated, the applications for leading further evidence which would have entailed further time are hereby dismissed, but the third application for considering those documents which have already been placed on the record as per law, is hereby permitted. This case is fixed for final arguments on 6th December, 2006 at 12.15 P.M. The case would be taken up on day to day basis."

Against the order passed by the High Court, the appellants have come to this Court in these appeals.

14. Mr. Lahoty and Mr. Arvind Kumar, counsel appearing for the appellants in the three appeals placed before the Court passages from the statement of Vikram recorded in Danapur jail on September 30, 1978 describing the manner in which his earlier statements, incriminating himself and the other accused, were obtained by the CBI. Referring to the latter statement of Vikram, counsel submitted that denial to further cross-examine him in light of his statement of September 30, 1978 would cause grave prejudice to the appellants and would lead to a miscarriage of justice. Mr. Lahoty stated that the accused in the L.N. Mishra murder case had earlier come to this court for quashing the trial proceedings and their appeal (Criminal Appeal No. 126 of 1987) was heard along with the case of Abdul Rehman Antulay and was disposed of by a common judgment reported in (1992) 1 SCC 225. In paragraph 98 of the judgment, the Court noted the submission made on behalf of the appellants that a very unusual feature of the case was the exchange of charges and counter charges between the CBI and the Bihar (CID) of false implication and frame up against each other. According to the Bihar (CID), the CBI was guilty of

frame up against the members of Anand Marg, while according to CBI, the Bihar (CID) had been deliberately proceeding against innocent persons while letting of the real culprits. Mr. Lahoty submitted that as a result of the Central Investigating Agency and the State Investigating Agency acting at cross purpose, the case had become highly murky to the great detriment of the appellants. He further submitted that in that situation if the appellants are not allowed the opportunity to further cross-examine Vikram, the Approver (PW.1), it would be highly unfair and unjust to them. He also submitted that the Delhi High Court was wrong in rejecting the applications made by the appellants on the ground of delay.

15. Mr. Arvind Kumar in support of the plea raised by the appellants placed reliance on the decision of this Court in *Zahira Habibulla H. Sheikh v. State of Gujarat,* (2004) 4 SCC 158, commonly known as the Best Bakery Case. He also pressed into service a decision of this Court in Pandit Ukha Kolhe v. State of Maharashtra, 1964 (1) SCR 926 (939-940).

16. So far as the Best Bakery Case is concerned, we see absolutely no application of that decision to the facts of the present case. Suffice to note here that in *Satyajit Banerjee v. State of W.B.,* (2005) 1 SCC 115, the Court explained the very exceptional nature of the Best Bakery Case and observed that the decision cannot be applied to all cases against the established principles of criminal jurisprudence (See paragraph 25 & 26 in Satyajit Banerjee).

17. We also fail to see how the decision in Pandit Ukha Kolhe might help the appellants in the present appeals.

18. We agree with Mr. Lahoty's submission that the delay in filing the applications should not have been the sole ground for rejecting the appellants' applications before the High Court. The High Court does not say that the appellants were in anyway responsible for the inordinate delay in their appeals, that remains pending since 1976, being taken up for hearing. That

being the position, as long as the appeals were pending, the High Court should have considered the appellants' request for summoning PW.1 for further cross-examination on merits, and in light of the relevant legal provisions. Mr. Lahoty is also right in submitting that any further cross-examination of PW.1 would not have taken more than two or three days and would not have contributed to any further delay in the disposal of the appeal in any material way.

19. But the question remains to be examined whether the law permits the summoning of PW.1 for the reason as stated on behalf of the appellants.

20. Mr. P.K. Dey, the counsel appearing for the CBI, strongly opposed the appellants' prayer for summoning Vikram, the Approver (PW.1), for further cross-examination in light of his statement recorded in Danapur jail on September 30, 1978. Learned counsel submitted that Vikram had made his confessional statements completely voluntarily and on three different occasions. He was produced before the Magistrate on August 14, 1975 for recording his statement under Section 164 Cr.P.C. He was then produced before the Chief Judicial Magistrate on August 22, 1975 for recording his statement for grant of pardon under Section 306 Cr.P.C. Finally, he was produced before the trial court as PW.1 where he was examined first by the prosecution and was then subjecte to a lengthy cross-examination on behalf of the accused. On one of the three occasions he made the slightest complaint hat his statements were obtained under coercion or threats. He was also produced before the Magistrate many times for the purp se of remand and for other purposes, such as taking cognizance, commitment of the case to the court of Sessions and also before the trial court where the trial proceeded and got concluded and at no point of time he gave any indication that his statements/evidence were given under any coercion, threats or inducement.

21. Mr. Dey also submitted that the statement of Vikram that was recorded in Danapur jail on September 30, 1978 had no legal sanctity, as it was recorded in a manner and by means completely unknown to law. It also did not qualify as the previous statement within the meaning of Section 145 of the Evidence Act as in fact, it was later in time than the deposition of PW.1 in this case before the trial court. He also referred to passages from the deposition of Vikram, the Approver, made in the trial of the L.N. Mishra murder case in which he was examined as PW.2 where he stated that his statement of September 30, 1978 recorded in Danapur jail was not voluntary but it was made under threats from the top officials of the State Government.

22. Mr. Dey submitted that the statement made by Vikram in jail on September 30, 1978 could never be the basis for summoning him for further cross-examination at the stage of the appeal and in support of this submission relied upon a decision of this Court in *Mishrilal v. State of M.P.,* (2005) 10 SCC 701. In that case, one of the prosecution witnesses (PW.2) had supported the prosecution case before the trial court but before the Juvenile Court that was trying some of the juvenile accused in the same case he did not support the prosecution case and as a result, the juvenile accused were acquitted of the charge under Section 307 IPC for having made an attempt on the life of this witness. After his evidence before the Juvenile Court, he was again summoned before the trial court where the other accused were facing trial and was confronted with the evidence he had given before the Juvenile Court. This Court found and held that the procedure adopted by the Sessions Judge was not in accordance with law and in paragraphs 5 and 6 of the judgment observed and held as follows:

> "5. The learned Counsel for the appellants seriously attacked the evidence of PW.2 Mokam Singh. This witness was examined by the Sessions Judge on 6-2-1991 and cross-examined on the same day by the defence counsel. Thereafter, it seems, that on behalf of the accused

persons an application was filed and PW.2 Mokam Singh was recalled. PW.2 was again examined and cross-examined on 31-7-1991. It may be noted that some of the persons who were allegedly involved in this incident were minors and their case was tried by the Juvenile Court. PW.2 Mokam Singh was also examined as a witness in the case before the Juvenile Court. In the Juvenile Court, he gave evidence to the effect that he was not aware of the persons who had attacked him and on hearing the voice of the assailants, he assumed that they were some Banjaras. Upon recalling, PW.2 Mokam Singh was confronted with the evidence he had given later before the Juvenile Court on the basis of which the accused persons were acquitted of the charge under Section 307 IPC for having made an attempt on the life of this witness.

6. In our opinion, the procedure adopted by the Sessions Judge was not strictly in accordance with law. Once the witness was examined-in-chief and cross-examined fully, such witness should not have been recalled and re-examined to deny the evidence he had already given before the court, even though that witness had given an inconsistent statement before any other court or forum subsequently. A witness could be confronted only with a previous statement made by him. At the time of examination of PW.2 Mokam Singh on 6.2.1991, there was no such previous statement and the defence counsel did not confront him with any statement alleged to have been made previously. This witness must have given some other version before the Juvenile Court for extraneous reasons and he should not have been given a further opportunity at a later stage to completely efface the evidence already given by him under oath. The courts have to follow the procedures strictly and cannot allow a witness to escape the legal action for giving false evidence before the court on mere explanation that he had given it under the pressure of the police or for some other reason.

Whenever the witness speaks falsehood in the court, and it is proved satisfactorily, the court should take a serious action against such witnesses."

23. The decision in Mishrilal was followed in *Hanuman Ram v. State of Rajasthan and others,* (2008) 15 SCC 652. The case of Mishrilal had come to this Court after the appeal court had maintained the conviction and sentence passed against the accused. But Hanuman Ram came at the intermediate stage when the trial court was directed by the High Court to recall two prosecution witnesses under Section 311 of the Cr.P.C. under similar circumstances. In Hanuman Ram too, two of the witnesses (PWs 3 and 5) who had supported the prosecution case before the trial court did not support the case of the prosecution before the Children's Court where one of the accused in the case who was a minor was being tried. Before the trial court an application was made under Section 311 Cr.P.C. for summoning those two witnesses for cross-examination with reference to their statements before the Children's Court. The trial court did not accept the prayer and rejected the petition. On an application in revision, the High Court intervened in favour of the accused and directed the trial court to recall and re-examine the two witnesses. In appeal against the High Court order, this Court following the earlier decision in Mishrilal, held that there was no legal foundation for recalling the witnesses under Section 311 Cr.P.C. and set aside the High Court judgment.

24. At first sight, the decisions in Mishrilal and Hanuman Ram seem to clinch the issue arising in the case. But, on a deeper examination, it would appear that the decision in Mishrilal did not interpret Section 311 Cr.P.C. defining the import, scope and ambit of the provision contained therein. It rather said that on the facts of the case, the provision had no application and the procedure adopted by the trial court was not strictly in accordance with law. Now, the interpretation of a legal provision and its application to a set of facts are two

different exercises requiring different approaches. "Interpretation" means the action of explaining the meaning of something. For interpreting a statutory provision, the court is required to have an insight into the provision and unfold its meaning by means of the well-established canons of interpretation, having regard to the object, purpose, historicism of the law and several other well-known factors. But, what is important to bear in mind is that the interpretation of a legal provision is always independent of the facts of any given case. "Application" means the practical use or relevance (of something to something); the application of a statutory provision, therefore, is by definition case related and as opposed to interpretation, the application or non-application of a statutory provision would always depend on the exact facts of a given case. Anyone associated with the process of adjudication fully knows that even the slightest difference in the facts of two cases can make a world of difference on the question whether or not a statutory provision can be fairly and reasonably applied to it. Keeping in mind what is said here if we read Mishrilal, it would be evident that in the over all facts of that case, the Court was satisfied that the statement of the witness (PW.2, Mokam Singh) before the Juvenile Court was for some extraneous reasons and, therefore, he should not have been allowed an opportunity to completely efface the evidence already given by him under oath. The Court with its vast experience of the way criminal justice system works in our country was in a manner commenting upon the serious and widespread malady of prosecution witness being won over by the accused. Once the Court came to realise that the witness was gained over before he was examined in the Juvenile Court, it naturally felt that at least he should not have been allowed to spoil the other case too and it would, therefore, logically follow that his recall and re-examination in the trial of the other accused before the Sessions Court was an abuse of Section 311 of the Cr.P.C. To us, it appears that it was mainly due to that reason that the Court frowned upon the latter evidence of

PW.2 taken by the Sessions Court on his recall after his examination before the Juvenile Court.

25. Moreover, in Mishrilal the question that came up for consideration before the Court was whether the deposition of Mokam Singh (PW.2) before the Juvenile Court would come within the meaning of "previous statement" under Section 145 of the Evidence Act so as to justify his recall for further cross-examination confronting him with his deposition before the Juvenile Court. The Court answered the question in the negative pointing out that at the time of his examination earlier before the Sessions Court there was no such statement with which he could be confronted by the defence.

26. In Hanuman Ram, on identical facts and for the same reasons the Court simply followed the decision in Mishrilal.

27. The facts of the case before us are quite different. It is not only Vikram who is making diametrically opposite statements but the CBI and the State (CID) seem to be at loggerheads with the one accusing the other of manipulating and using Vikram for its own designs. It is an unusual case by any reckoning.

28. It is obvious that one of the two statements of Vikram is false. But unlike *Mishrilal or Hanuman Ram* where the Court was able to sense without difficulty that the witnesses' depositions before the Juvenile Court and the Children's Court respectively were false, it is very difficult to say at this stage which of the statements is true and which of the statement was made under the influence, threat or coercion by the State officials or the CBI. The position may be clear in case he is subjected to further examination with reference to his statement made in Danapur jail on September 30, 1978.

29. The matter may be looked at from another angle. Section 391 of the Cr.P.C. provides as follows:

"391. Appellate Court may take further evidence or direct it to be taken.- (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry. "

30. It is, thus, to be seen that the provision is not limited to recall of a witness for further cross-examination with reference to his previous statement. The Appellate Court may feel the necessity to take additional evidence for any number of reasons to arrive at the just decision in the case. The law casts a duty upon the court to arrive at the truth by all lawful means. This is another reason why we feel any reliance on Mishrilal that considered the recall of a witness in the context of Section 145 of the Evidence Act is quite misplaced in the facts of this case.

31. Mr. Dey contended that Vikram's statement that he is alleged to have made in jail has no legal sanctity and it came to be made and recorded in a manner completely unknown to law. Mr Dey may be right but on that ground alone it would not be correct and proper to deny the application of Section 391 of the Cr.P.C. Take the case where, on the testimony of the Approver, a person is convicted by the trial court under Section

302 and 120-B etc. of the Penal Code and is sentenced to a life term. After the judgment and order passed by the trial court and while the convict's appeal is pending before the High Court, the 'Approver' is found blabbering and boasting among his friends that he was able to take the Court for a ride and settled his personal score with the convict by sending him to jail to rot at least for 14 years. Such a statement would also be completely beyond the legal framework but can it be said that in light of such a development the convicted accused may not ask the High Court for recalling the Approver for further examination.

32. As a matter of fact, if some later statement, has come to be made in some legal ways, it may be admissible on its own without any help from Section 311 or Section 391 of the Cr.P.C. It is only such statement or development which is otherwise not within the legal framework that would need the exercise of the Court's jurisdiction to bring it before it as part of the legal record.

33. In light of the discussions made above, we have no hesitation in holding that the High Court was in error in refusing to summon Vikram, the Approver (PW.1) for his further examination as prayed for on behalf of the appellants. We, accordingly, set aside that part of the High Court order and direct the High Court to summon Vikram (PW.1) for his further examination by the appellants and if so desired by the CBI. For the sake of convenience, the High Court may direct a member of the Registry of the rank of a Sessions Judge/Additional Sessions Judge to record the additional evidence of Vikram (PW.1). The examination of the witness by the appellants and the CBI must not go beyond two working days each so that the recording of his evidence should be complete in not more than four days. The Registrar recording the evidence would certify it and place before the Court and the Court shall then proceed to dispose of the appeals.

34. The appeals are thus allowed.

35. Before parting with the record of the case we are constrained to say that we are distressed beyond words to find that the case relating to the attempt on the life of the CJI remains stuck up at the stage of the appeal even after about 37 years of the occurrence. We are informed that the other case of the killing of Shri L.N. Mishra is still mired before the trial court. We do not wish to make any comment on that case as that is the subject matter of Writ Petition (Criminal) Nos. 200 and 203 of 2011 that remains pending before this Court. But so far as the present case is concerned, we would request the Chief Justice of the Delhi High Court with all the strength at our command to take notice of the inordinately long time for which these appeals (Criminal Appeal Nos.436 & 443 of 1996) are pending before the High Court and to put a tab on them so as to ensure that the appeals are disposed of without any further delay and in any case not later than six months from the date of the receipt/production of a copy of this order.

D.G. Appeals allowed.

M.P. RURAL ROAD DEVELOPMENT AUTHORITY & ANR.
v.
M/S. L.G. CHAUDHARY ENGINEERS & CONT.
(Civil Appeal No. 974 of 2012)

JANUARY 24, 2012

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

Arbitration: Whether the provision of Madhya Pradesh Arbitration Tribunal Act, 1983 which statutorily provides for the parties to the Works Contract to refer all disputes to the Arbitration Tribunal constituted u/s.7 of the 1983 Act will continue to operate in view of the provisions of Arbitration and Conciliation Act, 1996 which is a Central Act, subsequently enacted - In view of difference of opinion, matter referred to larger bench - Madhya Pradesh Arbitration Tribunal Act, 1983 - Arbitration and Conciliation Act, 1996.

The appellant had entered into a 'Works Contract' with the respondent for construction and maintenance of Rural Road Package. Clause 24 of the Contract contained the 'Dispute Redress Mechanism'. The case of the appellant was that in view of several breaches in Works Contract by the respondent, the appellant terminated the Works Contract and encashed the bank guarantee furnished by the respondent.

On 29.8.2008, the respondent submitted a representation to the appellant against the encashment of bank guarantee. Prior to that on 5.8.2008, respondent filed a writ petition challenging the encashment of bank guarantee and the writ petition was disposed of with a direction that the bank guarantee may not be encashed till the disposal of the representation. Thereafter, on 4.6.2009, the representation of the respondent was

rejected. In the pending dispute, the respondent submitted additional claim on 24.2.2010 and requested the appellant to appoint an Arbitrator for adjudicating the dispute between the parties. On 24.4.2010, the appellant replied that Clause 25 of the Works Contract specifically provided for adjudication of disputes by the Arbitral Tribunal under the Madhya Pradesh Arbitration Tribunal Act, 1983 (M.P. Act). Then on 24.6.2010 respondent filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 (A.C. Act 1996) for appointment of an Arbitrator before the High Court. On 8.9.2010, the High Court allowed the application of the respondent and appointed an arbitrator by placing reliance on a decision of the Supreme Court in *Va Tech Escher Wyass Flovel Ltd. Vs. MPSE Board.

The question which arose for consideration in the instant appeal was whether the provision of the Madhya Pradesh Arbitration Tribunal Act, 1983 which statutorily provides for the parties to the Works Contract to refer all disputes to the Arbitration Tribunal constituted under Section 7 of the Act will continue to operate in view of the provisions of Arbitration and Conciliation Act, 1996 which is a Central Act, subsequently enacted.

Referring the matter to larger bench, the Court

HELD:

Per Ganguli, J: 1. Perusal of Section 7 of the Madhya Pradesh Arbitration Tribunal Act, 1983 (M.P. Act) showed that the nature of the dispute between the parties in the instant case was covered by the definition under Section 2(d) read with Section 2(1). As such under Section 7 such a dispute has to be statutorily referred to Tribunal set up under the M.P. Act. Reading of Section 2(4) of A.C. Act 1996 would show that Part-I of A.C. Act 1996, which is from Section 2 to Section 43, shall, except sub-section 1

of Sections 40, 41 and 43, apply to every arbitration under any other enactment for the time being in force where the arbitration was pursuant to an arbitration agreement except insofar as the provisions of this Part i.e. Part-I are inconsistent with the other enactment or with any other rule made thereunder. Similar provision relating to statutory arbitration was also there in Section 46 of Arbitration Act, 1940. The provisions of M.P. Act are inconsistent with the provisions of A.C. Act 1996. The M.P. Act is a special law providing for statutory arbitration in the State of Madhya Pradesh even in the absence of arbitration agreement. Under the provisions of A.C. Act 1996, in the absence of an arbitration agreement, arbitration is not possible. There is also difference in the formation of arbitration tribunal as is clear from Section 2(1)(d) of A.C. Act 1996. Again under A.C. Act 1996, arbitral tribunal is defined under Section 2(1)(d) as a sole arbitrator or a panel of arbitrators. But under M.P. Act, such a tribunal is created under Sections 3 and 4 of the Act. Under the M.P. Act, dispute has a special meaning as defined under Section 2(1)(d) of the Act whereas dispute has not been defined under the A.C. Act 1996. [Paras 9, 23, 24, 25]

2. The M.P. Act provides for the establishment of a tribunal to arbitrate in disputes to which the State Government or a public undertaking [wholly or substantially owned or controlled by the State Government], is a party, and for matters incidental thereto or connected therewith. The structure of the tribunal under the M.P. Act is also different from the structure of a tribunal under the A.C. Act 1996. It is clear from Section 4 of the M.P. Act that the composition of tribunal and their qualification is statutorily provided. The term of office and salaries and allowances are also statutorily provided under Sections 5 and 6 of the M.P. Act. Section 8 provides for the procedure to be followed by the tribunal

on receipt of reference and Section 9 provides for the Constitution of Benches and Chairman's power of distribution of business. Under Section 16(2) of the M.P. Act, there is a time limit for giving the Award which is absent in A.C. Act 1996. Section 17-A of the M.P. Act confers inherent power on the Arbitral tribunal to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the tribunal. Section 17-B also provides for power conferred on the tribunal for correction of clerical or arithmetical mistakes. No such power is given to an arbitral tribunal under A.C. Act 1996. Section 19 of the M.P. Act gives High Court the suo motu power of revision. The High Court has also been given the power of revision to be exercised on an application made by an aggrieved party within three months of the award. While doing so, the High Court is to act like a revisional court under Section 115, CPC. It is clear from the said enumeration of the statutory provision that under the M.P. Act the parties' autonomy in the choice of arbitral tribunal is not there. In **State of Madhya Pradesh and another vs. Anshuman Shukla, this Court while referring to the M.P. Act and dealing with the nature of the arbitral tribunal constituted under the said Act held that the said Act is a special Act and provides for compulsory arbitration. It provides for a reference and the tribunal has been given the power of rejecting the reference at the threshold. It also held that the M.P. Act provides for a special limitation and fixes a time limit for passing an award. It has also been held that Section 14 of the M.P. Act provides that the award can be challenged under special circumstances and Section 17 provides for finality of the award, notwithstanding anything to the contrary contained in any other law relating to arbitration. All these features of the Act were pointed by this Court in **Anshuman Shukla to show that there is inconsistency between the provisions of A.C. Act 1996 and those of the M.P. Act. It is clear, therefore, that in view of the finding

of a co-ordinate Bench of this Court on the distinct feature of an arbitral tribunal under the said M.P. Act, the provisions of M.P. Act are saved under Section 2(4) of A.C. Act 1996. This Court while rendering the decision in *Va Tech did not either notice the previous decision of a co-ordinate Bench of this Court in **Anshuman Shukla or the provisions of Section 2(4) of A.C. Act 1996. Therefore, the decision of this Court in *Va Tech was rendered per incuriam. The decision in **Va Tech, having been rendered in per incuriam cannot be accepted as a precedent to decide the controversy in this case. [Paras 26, 27, 28, 29, 30, 41]

***State of Madhya Pradesh and another vs. Anshuman Shukla* **(2008) 7 SCC 487: 2008 (8) SCR 349;** *The Bengal Immunity Company Limited vs. The State of Bihar and others* **1955 (2) SCR 603;** *State of U.P. and another vs. Synthetics and Chemicals Ltd. and another* **(1991) 4 SCC 39;** *Municipal Corporation of Delhi vs. Gurnam Kaur* **(198) 1 SCC 101: 1988 (2) Suppl. SCR 929 - relied on.** ** a Tech Escher Wyass Flovel Ltd. Vs. MPSE Board & another* **201 (13) SCC 261 - per incurium** *Ravikant Bansal vs. M.P. Rural Road Development Authority and Anr.* **2012 (3) SCC 513 - referred to.**

Young vs. Bristol Aeroplane Company, Limited **1944 (1) K.B. 718;** *Young vs. Bristol Aeroplane Company, Limited* **1946 Appeal Cases 163;** *Morelle Ld. vs. Wakeling & another* **(1955) 2 QB 379 - referred to.**

4. The provision for repeal under Section 85 of A.C. Act 1996 does not show that there is any express repeal of the M.P. Act. Apart from that the provision of Section 2(4) of A.C. Act clearly militates against the said submissions. The argument of repugnancy is also not tenable. In view of Entry 13 of the Concurrent List in the VIIth Schedule of the Constitution, the State Government

is competent to enact laws in relation to arbitration. The M.P. Act of 1983 was made when the previous Arbitration Act of 1940 was in the field. That Act of 1940 was a Central Law. Both the Acts operated in view of Section 46 of 1940 Act. The M.P. Act 1983 was reserved for the assent of the President and admittedly received the same on 17.10.1983 which was published in the Madhya Pradesh Gazette Extraordinary dated 12.10.1983. Therefore, the requirement of Article 254(2) of the Constitution was satisfied. Thus, M.P. Act of 1983 prevails in the State of Madhya Pradesh. Thereafter, A.C. Act 1996 was enacted by Parliament repealing the earlier laws of arbitration of 1940. It has also been noted that A.C. Act 1996 saves the provisions of M.P. Act 1983 under sub-sections 2(4) and 2(5) thereof. Therefore, there cannot be any repugnancy. In the instant case, the latter Act made by the Parliament i.e. A.C. Act 1996 clearly showed an intention to the effect that the State Law of Arbitration i.e. the M.P. Act should operate in the State of Madhya Pradesh in respect of certain specified types of arbitrations which are under the M.P. Act 1983. This is clear from Sections 2(4) and 2(5) of A.C. Act 1996. Therefore, there is no substance in the argument of repugnancy and is accordingly rejected. Therefore, appeal is allowed and the judgment of the High Court which is based on the reasoning of *Va Tech is set aside. In that view of the matter the arbitration proceeding may proceed under M.P. Act of 1983 and not under A.C. Act 1996. [Paras 43-48]

T. Barai vs. Henry Ah Hoe and another **AIR 1983 SC 150** *M. Karunanidhi vs. Union of India and another* **(1979) 3 SCC 431: 1979 (3) SCR 254 - relied on.**

Per Gyan Sudha Misra, J: (Partly dissenting)

1. Perusal of Section 7 of the Madhya Pradesh Arbitration Tribunal Act showed that the matter in the event of existence of a dispute between the parties in

certain categories of cases where the State of Madhya Pradesh is a contracting party, the dispute shall be referred in writing to the tribunal irrespective of the fact whether the agreement contains an arbitration clause or not. From this provision, it is clearly apparent that reference of any dispute to the tribunal postulates an existence of a works contract and the definition of 'works contract' under Section 2(i) of the M.P. Arbitration Tribunal Act, 1983, it has clearly and unequivocally been specified as to what is a 'works contract' in relation to which the dispute is required to be referred in writing to the tribunal. Thus, on a perusal of the definition of 'works contract', it is manifestly clear that while the 'works contract' means an agreement pertaining to matters relating to the execution of any of the work enumerated in the definition of 'works contract', the same does not include the dispute pertaining to termination, cancellation or repudiation of works contract and the entire nature of transaction laid down therein relates to disputes which arise out of execution of the nature of work specified in the 'works contract'. However, the question whether the 'works contract' has been legally repudiated and rightly cancelled or not is the question or dispute pertaining to termination of works contract has not been incorporated even remotely within the definition of 'works contract'. In view of this, the legal and logical consequence which can be reasonably drawn from the definition of 'works contract' would be, that if there is a dispute between the contracting parties for any reason relating to works contract which include execution of any work, relating to construction, repair or maintenance of any building or super-structure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, workshop, power house, transformers or such other works of the State Government or Public Undertaking including an agreement for the supply of goods or material and all other matters relating to the execution of any of the said

works, the same would fall within the ambit of the definition of 'works contract' and hence all disputes pertaining or arising out of execution of the works contract will have to be referred to the M.P. State Arbitration Tribunal as envisaged under Section 7 of the Act of 1983. Hence, in addition to the reasons assigned in the judgment and order of Justice Ganguly, disputes arising out of execution of works contract has to be referred to the M.P. State Arbitration Tribunal and not under the Arbitration and Conciliation Act, 1996. [Paras 4, 5]

2. But in so far as the instant matter is concerned, the facts disclosed that the appellant M.P. Rural Road Development Authority cancelled the works contract itself which was executed in favour of the respondent. In that event, the works contract between the parties was not in existence at all which would operate as a statutory mandate for reference of the dispute to the M.P. State Arbitration Tribunal. It is no doubt true that if the matter were before an Arbitrator appointed under the Arbitration and Conciliation Act, 1996 for adjudication of any dispute including the question regarding the justification and legality as to whether the cancellation of works contract was legal or illegal, then the said Arbitrator in view of the ratio of the judgment of the Supreme Court in Maharshi Dayanand University & Anr. v. Anand Co-op L(C) Society as also in view of the persuasive reasoning assigned in the judgment and order reported in Heyman & Anr. Vs. Darwins, Limited would have had the jurisdiction to adjudicate the dispute regarding the justification and legality of cancellation of works contract also. But the same cannot be allowed to be raised under the M.P. Act of 1983 since the definition of 'works contract' unambiguously lays down in explicit terms as to what is the nature and scope of 'works contract' and further enumerates the specific nature of disputes arising out of

the execution of works contract which would come within the definition of a 'works contract'. However, the same does not even vaguely include the issue or dispute arising out of cancellation and termination of contract due to which this question would not fall within the jurisdiction of M.P. State Arbitration Tribunal so as to be referred for adjudication arising out of its termination. Fall out certainly would be otherwise if the matter were to be adjudicated by an Arbitrator appointed under the Arbitration and Conciliation Act, 1996 and that would be in view of the ratio of the decisions of the Supreme Court which held it permissible for the Arbitrator to adjudicate even the dispute arising out of cancellation or termination of an agreement or contract. This, however, cannot be allowed to broaden or expand the ambit and scope of the M.P. Act of 1983 where the State Legislature has passed a specific legislation in respect of certain specified types of arbitration determining as to what are the nature of disputes to be referred to the M.P. State Arbitration Tribunal and that specifically permits the reference of dispute arising out of execution of contract but clearly leaves out any dispute arising out of termination, cancellation or repudiation of 'works contract'. If the nature of dispute referred to the Arbitrator like the instant matter, related to a dispute pertaining to construction, repair, maintenance of any building super-structure, dam or for the reasons stated within the definition of 'works contract', the matter may be referred to the M.P. Tribunal in view of the fact that if there is a dispute in relation to execution of a works contract, then irrespective of the fact whether the agreement contains an arbitration clause or not, the dispute is required to be referred to the M.P. State Arbitration Tribunal for adjudication. But when the contract itself has been terminated, cancelled or repudiated as it has happened in the instant case, then the nature of dispute does not fall within the definition of 'works contract' for the sole reason that it does not

include any dispute pertaining to cancellation of a works contract implying that when the works contract itself is not in existence by virtue of its cancellation, the dispute cannot be referred to the M.P. State Arbitration Tribunal but may have to be decided by an Arbitrator appointed under the Arbitration and Conciliation Act, 1996. Hence, the nature of the dispute which falls within the definition of 'works contract' under Section 2(i) of the M.P. Act, 1983 and one of the contracting parties to the agreement is the State of M.P., then irrespective of an arbitration agreement the dispute will have to be referred to the Tribunal in terms of Section 7 of the Act of 1983. But if the works contract itself has been repudiated and hence not in existence at all by virtue of its cancellation/termination, then the dispute will have to be referred to an independent arbitrator to be appointed under the Arbitration and Conciliation Act, 1996 since the M.P. Act 1983 envisages reference of a dispute to the State Tribunal only in respect of certain specified types of arbitration enumerated under Section 2 (i) of the M.P. Act, 1983. [Paras 6-9]

3. The impugned order of the High Court by which the dispute relating to termination of works contract by the M.P. Rural Road Development Authority itself was referred to an independent arbitrator appointed by the High Court under the Arbitration and Conciliation Act, 1996 needs to be sustained and there is no need for a de novo reference of the dispute to the M.P. State Arbitration Tribunal. In the alternative, the consequence would have been otherwise and the matter could have been referred to the State Arbitration Tribunal if the dispute between the parties related to any dispute emerging out of execution of works contract which could fall within the definition of 'works contract' given out within the definition of 'works contract' under Section 2(i) of the M.P. Act of 1983. In order to avoid any ambiguity,

in view of cancellation of the works contract itself which is the position in the instant case, the proceedings before the Arbitrator appointed by the High Court cannot be treated as non-est so as to refer the same once again to the tribunal for adjudication as the dispute does not emerge or pertain to execution of works contract but relates to non-existence of works contract by virtue of its cancellation. The question as to whether the dispute would be referred to the M.P. Tribunal in terms of Section 7 of the M.P. Act of 1983 or to an independent arbitrator under the Arbitration and Conciliation Act, 1996 will depend upon the factum whether the works contract is existing between the parties or not out of which the dispute has arisen. In case, the works contract itself has been repudiated/cancelled, then, in view of its non-existence, Section 7 of the M.P. Act pertaining to reference of dispute to tribunal would not come into play at all by virtue of the fact that the dispute relating to execution of works contract alone can be referred to the tribunal in view of the specific nature of works contract enumerated within the definition of works contract under the Act of 1983. However, when the works contract itself becomes non-existent as a consequence of its cancellation, the matter will have to be referred to an independent arbitrator under the Arbitration and Conciliation Act, 1996 and not to M.P. State Arbitration Tribunal. Thus, while holding that the M.P. Act 1983 should operate in the State of M.P. in respect of certain specified types of arbitration, the appointment of an independent arbitrator by the High Court under the Arbitration and Conciliation Act, 1996 needs to be sustained since the works contract itself is not in existence by virtue of its cancellation and hence this part of the dispute could not have been referred to the M.P. State Tribunal. [Paras 10-12]

Maharshi Dayanand University & Anr. v. Anand Co-op

L(C) Society **2007 (5) SCC 295: 2007 (5) SCR 596 - relied on.**

Heyman & Anr. Vs. Darwins, Limited **1942 (1) All E.R. 337 - referred to.**

Case Law Reference

Asok Kumar Ganguly:

2011(13) SCC 261	**per incurium**	**Paras13-15, 19, 22, 30, 41,48**
2012 (3) SCC 513	**referred to**	**Para 21**
2008 (8) SCR 349	**relied on**	**Para 29,30**
1944 (1) K.B. 718	**referred to**	**Para 32,34**
1946 Appeal Cases 163	**referred to**	**Para 34,38**
1955 (2) SCR 603	**referred to**	**Para 36**
(1955) 2 QB 379	**referred to**	**Para 37**
(1991) 4 SCC 139	**relied on**	**Para 38**
1988 (2) Suppl. SCR 929	**relied on**	**Para 39**
AIR 1983 SC 150	**relied on**	**Para 46**
1979 (3) SCR 254	**relied on**	**Para 46**

Gyan Sudha Misra:

2007 (5) SCR 596	**relied on**	**Para 7**
1942 (1) All E.R. 337	**referred to**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 974 of 2012.

From the Judgment and Order dated 08.09.2010 of the High Court of M.P. at Indore in AC No. 14 of 2010.

K.K. Venugopal, Mishra Saurabh, Puja Dhar, Ankur Talwar, B.S. Banthia, Vias Upadhyay, Dr. Vipin Gupta, Anand Dixit and Pratyush Tripathi for the appearing parties.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. The question which falls for consideration in this appeal is whether the provision of Madhya Pradesh Madhyasthan Adhikaran Adhiniyam, 1983 (hereinafter, 'M.P. Act') which statutorily provides for the parties to the Works Contract to refer all disputes to the Arbitration Tribunal constituted under Section 7 of the Act will continue to operate in view of the provisions of Arbitration and Conciliation Act, 1996 (hereinafter 'A.C. Act 1996') which is a Central Act, subsequently enacted.

3. The facts leading to the aforesaid controversy be noted first.

4. The appellant-Madhya Pradesh Rural Road Development Authority and Anr., impugning the judgment of the High Court dated 8.9.2010 in this appeal, entered into a 'Works Contract' with the respondent for construction and maintenance of Rural Road Package No.1958, District Jhabua.

5. Clause 24 of the Contract contains the 'Dispute Redress Mechanism' and Clause 24.1 of the same provides as under:

"24.1 If any dispute or difference of any kind what-so-ever shall arise in connection with or arising out of this Contract or the execution of work of maintenance of the Works thereunder, whether before its commencement or during the progress of Works or after the termination, abandonment or breach of the Contract, it shall, in the first instance, be referred for settlement to competent authority,

described along with their powers in the Contract Data, above the rank of the Engineer. The competent authority shall, within a period of forty five days after being requested in writing by the Contractor to do so, convey his decision to the Contractor. Such decision in respect of every matter so referred shall, subject to review as hereinafter provided, be final and binding upon the Contract. In case the Works is already in progress, the Contractor shall proceed with the execution of the Works, including maintenance thereof, pending receipt of the decision of the competent authority as aforesaid, with all due diligence."

6. Under the 'M.P. Act' "dispute" has statutorily been defined under Section 2(d):

"2(d) "dispute" means claim of ascertained money valued at Rupees 50,000 or more relating to any difference arising out of the execution or non-execution of a works contract or part thereof"

7. "Works Contract" has also been defined under Section 2(i) of the M.P. Act:

"2(i) works contract" means an agreement in writing for the execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, workshop, powerhouse, transformers or such other works of the State Government or Public Undertaking as the State Government may, by notification, specify in this behalf at any of its stages, entered into by the State Government or by an official of the State Government or Public Undertaking or its official for and on behalf of such Public Undertaking and includes an agreement for the supply of goods or material and all other matters relating to the execution of any of the said works"

8. "Reference to Tribunal" is statutorily provided under

Section 7 of the M.P. Act:

"7. Reference to Tribunal - (1) either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Tribunal.

(2) Such reference shall be drawn up in such form as may be prescribed and shall be supported by an affidavit verifying the averments.

(3) The reference shall be accompanied by such fee as may be prescribed.

(4) Every reference shall be accompanied by such documents or other evidence and by such other fees for service or execution of processes as may be prescribed.

(5) On receipt of the reference under sub-section (1), if the Tribunal is satisfied that the reference is a fit case for adjudication, it may admit the reference but where the Tribunal is not so satisfied it may summarily reject the reference after recording reasons therefor."

9. From a perusal of Section 7, it is clear that the nature of the dispute between the parties in the instant case is covered by the definition under Section 2(d) read with Section 2(1). As such under Section 7 such a dispute has to be statutorily referred to Tribunal set up under the M.P. Act.

10. The case of the appellant is that in view of several breaches in Works Contract by the respondent, the appellant terminated the Works Contract and encashed the bank guarantee furnished by the respondent on 25.6.2008.

11. Thereafter, on 29.8.2008, the respondent submitted a representation to the appellant against the encashment of bank guarantee. Prior to that on 5.8.2008, respondent filed a Writ Petition No. 4491/2008 challenging the encashment of bank

guarantee and the writ petition was disposed of with a direction that the bank guarantee may not be encashed till the disposal of the representation. Thereafter, on 4.6.2009 the representation of the respondent was rejected after giving the appellant a personal hearing.

12. In the pending dispute, the respondent submitted additional claim on 24.2.2010 and requested the appellant to appoint an Arbitrator for adjudicating the dispute between the parties. On 24.4.2010, the appellant replied that Clause 25 of the Works Contract specifically provides for adjudication of disputes by the Arbitral Tribunal under the M.P. Act.

13. Then on 24.6.2010 respondent filed an application under Section 11 of A.C. Act 1996 for appointment of an Arbitrator before the High Court. On 8.9.2010, High Court allowed the application of the respondent and appointed an Arbitrator by placing reliance on a decision of this Court in *Va Tech Escher Wyass Flovel Ltd. Vs. MPSE Board & another* - Civil Appeal No. 3746 and 3747 of 2005.

14. In the case of *Va Tech* (supra), this Court after referring to both the M.P. Act and the A.C. Act 1996, held that the M.P. Act applies only where there is no arbitration clause and this Court further held that the M.P. Act stands impliedly repealed by the A.C. Act 1996 where there is an arbitration clause.

15. Facts in connection with the *Va Tech* (supra) were that Va Tech was awarded a works contract by the M.P. State Electricity Board and there was an arbitration clause in the agreement.

16. Va Tech filed an application under Section 9 of the A.C. Act 1996 which was rejected by the learned Additional District Judge and that order was also upheld by the High Court.

17. Then Va Tech filed a special leave petition before this Court. This Court noting the provision of Section 7 of the M.P. Act came to the aforesaid finding and ultimately held that the

judgment of the High Court in Va Tech cannot be sustained and opined that application under Section 9 of A.C. Act 1996 is maintainable. The exact reasoning recorded by this Court in Va Tech is as follows:

> "In our opinion, the 1983 Act and the 1996 Act can be harmonised by holding that the 1983 Act only applies where there is no arbitration clause but it stands impliedly repealed by the 1996 Act where there is an arbitration clause. We hold accordingly.
>
> Hence, the impugned judgment cannot be sustained and we hold that the application under Section 9 of the 1996 Act was maintainable."

18. Mr. K.K. Venugopal, learned senior counsel appearing for the appellant submitted that the Division Bench of this Court, while coming to the aforesaid finding, has not noticed the relevant provision of the M.P. Act as well as the relevant provisions of A.C. Act 1996 and as such the same judgment was rendered 'per incuriam'.

19. Learned senior counsel further submitted that another Division Bench of this Court in a case in which the Presiding Judge was common with the Bench which rendered the *Va Tech* (supra) ruling almost in a situation identical with Va Tech issued notice and stayed the arbitration proceedings.

20. In another case a Division Bench of this Court presided over by the same learned Judge who gave the Va Tech ruling passed the following order:

> "This petition has been filed against the judgment and order dated 11th March, 2011 passed by the High Court of Madhya Pradesh at Gwalior Bench in Arbitration Case No.4 of 2010.
>
> Learned counsel for the petitioner has relied on a decision of this Court in Civil Appeal No. 3746 of 2005

decided on 14th January, 2010.

We are of the opinion that the aforesaid decision is distinguishable because in the present case the arbitration clause itself mentions that the arbitration will be by the Madhya Pradesh Arbitration Tribunal. Hence, in this case arbitration has to be done by the Tribunal.

The Special leave petition is dismissed."

21. Relying on these two subsequent orders in the instant case and in *Ravikant Bansal vs. M.P. Rural Road Development Authority and Anr.* - SLP(C) No.18867 of 2011, Mr. Venugopal, the learned senior counsel submitted that subsequent Division Bench presided over by the same learned Judge who gave the Va Tech ruling has not followed the ratio in the case of Va Tech.

22. The learned counsel said so to justify his contention that the decision in Va Tech (supra) was rendered per incuriam.

23. If this Court looks at Section 2(4) of A.C. Act 1996, it will appear that Part-I of A.C. Act 1996, which is from Section 2 to Section 43, shall, except sub-section 1 of Sections 40, 41 and 43, apply to every arbitration under any other enactment for the time being in force where the arbitration was pursuant to an arbitration agreement except insofar as the provisions of this Part i.e. Part-I are inconsistent with the other enactment or with any other rule made thereunder.

24. Similar provision relating to statutory arbitration was also there in Section 46 of Arbitration Act, 1940. Section 46 is set out below:

"46. Application of Act to statutory arbitration - The provisions of this Act, except sub-section (1) of Sec. 6 and Secs. 7, 12, 36 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement

and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder.

25. If this Court compares the provisions of the M.P. Act with A.C. Act 1996 then the Court finds that the provisions of M.P. Act are inconsistent with the provisions of A.C. Act 1996. The M.P. Act is a special law providing for statutory arbitration in the State of Madhya Pradesh even in the absence of arbitration agreement. Under the provisions of A.C. Act 1996 in the absence of an arbitration agreement, arbitration is not possible. There is also difference in the formation of arbitration tribunal as is clear from Section 2(1)(d) of A.C. Act 1996. Again under A.C. Act 1996, arbitral tribunal is defined under Section 2(1)(d) as a sole arbitrator or a panel of arbitrators. But under M.P. Act such a tribunal is created under Sections 3 and 4 of the Act. And under the M.P. Act dispute has a special meaning as defined under Section 2(1)(d) of the Act whereas dispute has not been defined under the A.C. Act 1996.

26. It is clear from its long title that the M.P. Act provides for the establishment of a tribunal to arbitrate in disputes to which the State Government or a public undertaking [wholly or substantially owned or controlled by the State Government], is a party, and for matters incidental thereto or connected therewith. The structure of the tribunal under the M.P. Act is also different from the structure of a tribunal under the A.C. Act 1996. It is clear from Section 4 of the M.P. Act that the composition of tribunal and their qualification is statutorily provided which is set out below:

"4. Chairman and Members of Tribunal and their qualifications.-(1) Subject to sub-section (2) and (3), the State Government may appoint a chairman and as many members to the Tribunal as it may consider necessary.

(1-a) The State Government may, in consultation with the Chairman, designate one of the Judicial Members as

the Vice-Chairman who in the event of occurrence of any vacancy in the office of the Chairman by reason of his death, resignation, leave or otherwise, shall during such vacancy, discharge the functions of the Chairman.

(2) No person shall be appointed as Chairman of the Tribunal, unless he is or has been a Judge of a High Court.

(3) No person shall be qualified for appointment as a member of the Tribunal, unless-

(i) he is or has been a District Judge of not less than seven years standing: or

(ii) he is or has been a Revenue Commissioner or has held a post equivalent to the rank of Revenue Commissioner for a total period of not less than five years, or

(iii)he is or has been:-

(a) Chief Engineer in the service of the State Government in Public Works, Irrigation or Public Health Engineering Department; or

(b) a Chief Engineer in the service of the Madhya Pradesh Electricity Board; or

(c) a Senior Deputy Accountant General of the Office of the Accountant General, Madhya Pradesh,

for a period of not less than five years.

Provided that in the case of clause (iii), in exceptional circumstances, the State Government may, relax the prescribed minimum period of five years to three years."

27. The term of office and salaries and allowances are also statutorily provided under Sections 5 and 6 of the M.P. Act.

Section 8 provides for the procedure to be followed by the tribunal on receipt of reference and Section 9 provides for the Constitution of Benches and Chairman's power of distribution of business. Under Section 16(2) of the M.P. Act there is a time limit for giving the Award which is absent in A.C. Act 1996. Section 17-A of the M.P. Act confers inherent power on the Arbitral tribunal to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the tribunal. Section 17-B also provides for power conferred on the tribunal for correction of clerical or arithmetical mistakes. No such power is given to an arbitral tribunal under A.C. Act 1996. Section 19 of the M.P. Act gives High Court the suo motu power of revision. The High Court has also been given the power of revision to be exercised on an application made by an aggrieved party within three months of the award. While doing so, the High Court is to act like a revisional court under Section 115 of the CPC.

28. It is clear from the aforesaid enumeration of the statutory provision that under the M.P. Act the parties' autonomy in the choice of arbitral tribunal is not there.

29. In *State of Madhya Pradesh and another vs. Anshuman Shukla* - (2008) 7 SCC 487, this Court while referring to the M.P. Act and dealing with the nature of the arbitral tribunal constituted under the said Act held that the said Act is a special Act and provides for compulsory arbitration. It provides for a reference and the tribunal has been given the power of rejecting the reference at the threshold. It also held that the M.P. Act provides for a special limitation and fixes a time limit for passing an award. It has also been held that Section 14 of the M.P. Act provides that the award can be challenged under special circumstances and Section 17 provides for finality of the award, notwithstanding anything to the contrary contained in any other law relating to arbitration. All these features of the Act were pointed by this Court in *Anshuman Shukla* (supra) to show that there is inconsistency

between the provisions of A.C. Act 1996 and those of the M.P. Act. In para 28 of the judgment, this Court while referring to the provisions of M.P. Act held:

> "The provisions of the Act referred to hereinbefore clearly postulate that the State of Madhya Pradesh has created a separate forum for the purpose of determination of disputes arising inter alia out of the works contract. The Tribunal is not one which can be said to be a domestic tribunal. The Members of the Tribunal are not nominated by the parties. The disputants do not have any control over their appointment. The Tribunal may reject a reference at the threshold. It has the power to summon records. It has the power to record evidence. Its functions are not limited to one Bench. The Chairman of the Tribunal can refer the disputes to another Bench. Its decision is final. It can award costs. It can award interests. The finality of the decision is fortified by a legal fiction created by making an award a decree of a civil court. It is executable as a decree of a civil court. The award of the Arbitral Tribunal is not subject to the provisions of the Arbitration Act, 1940 and the Arbitration and Conciliation Act, 1996. The provisions of the said Acts have no application."
>
> (para 28, page 497 of the report)

30. It is clear, therefore, that in view of the aforesaid finding of a co-ordinate Bench of this Court on the distinct feature of an arbitral tribunal under the said M.P. Act the provisions of M.P. Act are saved under Section 2(4) of A.C. Act 1996. This Court while rendering the decision in *Va Tech* (supra) has not either noticed the previous decision of a co-ordinate Bench of this Court in *Anshuman Shukla* (supra) or the provisions of Section 2(4) of A.C. Act 1996. Therefore, we are constrained to hold that the decision of this Court in *Va Tech* (supra) was rendered per incuriam.

31. This was the only point argued before us by the learned

counsel for the appellant.

32. The principle of per incuriam has been very succinctly formulated by the Court of Appeal in *Young vs. Bristol Aeroplane Company,* Limited reported in 1944 (1) K.B. 718.

33. Lord Greene, Master of Rolls formulated the principles on the basis of which a decision can be said to have been rendered 'per incuriam'. The principles are:

> "Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam."
>
> (Page 729)

34. The decision in *Young* (supra) was subsequently approved by the House of Lords in Young vs. Bristol Aeroplane Company, Limited reported in 1946 Appeal Cases 163 at page 169 of the report.

35. Lord Viscount Simon in the House of Lords expressed His Lordship's agreement with the views expressed by the Lord Greene, the Master of Rolls in the Court of Appeal on the principle of per incuriam (see the speech of Lord Viscount Simon at page 169 of the report).

36. Those principles have been followed by the Constitution Bench of this Court in *The Bengal Immunity Company Limited vs. The State of Bihar and others* reported in 1955 (2) SCR 603 [See the discussion in pages 622 and

623 of the report].

37. The same principle has been reiterated by Lord Evershed, Master of Rolls, in *Morelle Ld. vs. Wakeling & another* [(1955) 2 QB 379 at page 406]. The principle has been stated as followed:

> "…As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned; so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong……."
>
> (page 406)

38. In the case of *State of U.P. and another vs. Synthetics and Chemicals Ltd. and another* reported in (1991) 4 SCC 139, this Court held the doctrine of 'per incuriam' in practice means 'per ignoratium' and noted that English Courts have developed this principle in relaxation of the rule of stare decisis and referred to the decision in the case of *Bristol Aeroplane Co. Ltd.* (supra). The learned Judges also made it clear that the same principle has been approved and adopted by this Court while interpreting Article 141 of the Constitution (see para 41).

39. In the case of *Municipal Corporation of Delhi vs. Gurnam Kaur* reported in (1989) 1 SCC 101, a three-Judge Bench of this Court explained this principle of per incuriam very elaborately in paragraph 11 at page 110 of the report and in explaining the principle of per incuriam the learned Judges held:

> "……A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of

> a rule having the force of a statute……."

40. In paragraph 12 the learned Judges observed as follows:

> "……One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority."

41. Following the aforesaid principles, this Court is constrained to hold that the decision in *Va Tech* (supra), having been rendered in per incuriam, cannot be accepted as a precedent to decide the controversy in this case.

42. In reply the learned counsel for the respondent only submitted that the M.P. Act is repugnant to A.C. Act 1996 since the same is a later Act made by Parliament. The learned counsel referred to the provisions of Article 254 of the Constitution. The learned counsel also urged that in view of the provision of Section 85 of A.C. Act 1996, the M.P. Act stands impliedly repealed.

43. The said argument cannot be accepted. The provision for repeal under Section 85 of A.C. Act 1996 does not show that there is any express repeal of the M.P. Act. Apart from that the provision of Section 2(4) of A.C. Act clearly militates against the aforesaid submissions.

44. The argument of repugnancy is also not tenable. Entry 13 of the Concurrent List in the VIIth Schedule of the Constitution runs as follows:

> "13. Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this

Constitution, limitation and arbitration."

45. In view of the aforesaid Entry, the State Government is competent to enact laws in relation to arbitration. The M.P. Act of 1983 was made when the previous Arbitration Act of 1940 was in the field. That Act of 1940 was a Central Law. Both the Acts operated in view of Section 46 of 1940 Act.

46. The M.P. Act 1983 was reserved for the assent of the President and admittedly received the same on 17.10.1983 which was published in the Madhya Pradesh Gazette Extraordinary dated 12.10.1983. Therefore, the requirement of Article 254(2) of the Constitution was satisfied. Thus, M.P. Act of 1983 prevails in the State of Madhya Pradesh. Thereafter, A.C. Act 1996 was enacted by Parliament repealing the earlier laws of arbitration of 1940. It has also been noted that A.C. Act 1996 saves the provisions of M.P. Act 1983 under sub-sections 2(4) and 2(5) thereof. Therefore, there cannot be any repugnancy. (See the judgment of this Court in *T. Barai vs. Henry Ah Hoe and another* reported in AIR 1983 SC 150). In this connection the observations made by the Constitution Bench of this Court in the case of *M. Karunanidhi vs. Union of India and another* reported in (1979) 3 SCC 431 are very pertinent and the following observations are excerpted:

> "……It is, therefore, clear that in view of this clear intention of the legislature there can be no room for any argument that the State Act was in any way repugnant to the Central Acts. We have already pointed out from the decisions of the Federal Court and this Court that one of the important tests to find out as to whether or not there is repugnancy is to ascertain the intention of the legislature regarding the fact that the dominant legislature allowed the subordinate legislature to operate in the same field pari passu the State Act."
>
> (para 37, page 450)

47. It is clear from the aforesaid observation that in instant case the latter Act made by the Parliament i.e. A.C. Act 1996 clearly showed an intention to the effect that the State Law of Arbitration i.e. the M.P. Act should operate in the State of Madhya Pradesh in respect of certain specified types of arbitrations which are under the M.P. Act 1983. This is clear from Sections 2(4) and 2(5) of A.C. Act 1996. Therefore, there is no substance in the argument of repugnancy and is accordingly rejected.

48. Therefore, appeal is allowed and the judgment of the High Court which is based on the reasoning of *Va Tech* (supra) is set aside. This Court holds the decision in *Va Tech* (supra) has been rendered in per incuriam. In that view of the matter the arbitration proceeding may proceed under M.P. Act of 1983 and not under A.C. Act 1996.

49. There will be no order as to costs.

GYAN SUDHA MISRA, J. 1. Leave granted.

2. While concurring and endorsing the reasonings assigned in the judgement of learned Justice Ganguly, I propose to add and thus partly dissent on certain aspects involved in the instant appeal which would have a bearing on the relief granted to the respondent by the High Court which appointed an arbitrator under the Arbitration and Conciliation Act, 1996 for adjudication of the dispute in regard to cancellation of the works contract between the contesting parties therein.

3. In this context, Section 7 of the Madhya Pradesh Madhyasthan Adhikaran Adhiniyam, 1983 (hereinafter referred to as the 'M.P. Arbitration Tribunal Act, 1983') needs to be reiterated which itself lays down as follows:

> "Reference to Tribunal" - (1) either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Tribunal."

4. On perusal of the aforesaid provision enumerated under Section 7, it is explicitly clear that the matter in the event of existence of a dispute between the parties in certain categories of cases where the State of Madhya Pradesh is a contracting party, the dispute shall be referred in writing to the tribunal irrespective of the fact whether the agreement contains an arbitration clause or not. From this provision it is clearly apparent that reference of any dispute to the tribunal postulates an existence of a works contract and the definition of 'works contract' under Section 2 (i) of the M.P. Arbitration Tribunal Act, 1983, it has clearly and unequivocally been specified as to what is a 'works contract' in relation to which the dispute is required to be referred in writing to the tribunal. We may therefore meticulously recollect the definition of 'works contract' which lays down as follows:-

> "works contract" means an agreement in writing for the execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory workshop, powerhouse, transformers or such other works of the State Government or Public Undertaking as the State Government may, by notification, specify in this behalf at any of its stages, entered into by the State Government or by an official of the State Government or Public Undertaking or its official for and on behalf of such Public Undertaking and includes an agreement for the supply of goods or material and all other matters relating to the execution of any of the said works."

5. Thus on a perusal of the definition of 'works contract', it is manifestly clear that while the 'works contract' means an agreement pertaining to matters relating to the execution of any of the work enumerated in the definition of 'works contract', the same does not include the dispute pertaining to termination, cancellation or repudiation of works contract and the entire nature of transaction laid down therein relates to disputes which arise out of execution of the nature of work specified in

the 'works contract'. However, the question whether the 'works contract' has been legally repudiated and rightly cancelled or not is the question or dispute pertaining to termination of works contract has not been incorporated even remotely within the definition of 'works contract'. In view of this, the legal and logical consequence which can be reasonably drawn from the definition of 'works contract' would be, that if there is a dispute between the contracting parties for any reason relating to works contract which include execution of any work, relating to construction, repair or maintenance of any building or super-structure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, workshop, power house, transformers or such other works of the State Government or Public Undertaking including an agreement for the supply of goods or material and all other matters relating to the execution of any of the said works, the same would fall within the ambit of the definition of 'works contract' and hence all disputes pertaining or arising out of execution of the works contract will have to be referred to the M.P. State Arbitration Tribunal as envisaged under Section 7 of the Act of 1983. Hence, in addition to the reasons assigned in the judgment and order of learned Brother Justice Ganguly, disputes arising out of execution of works contract has to be referred to the M.P. State Arbitration Tribunal and not under the Arbitration and Conciliation Act, 1996.

6. But in so far as the instant matter is concerned, the facts disclose that the appellant M.P. Rural Road Development Authority cancelled the works contract itself which was executed in favour of the respondent. In that event, the works contract between the parties was not in existence at all which would operate as a statutory mandate for reference of the dispute to the M.P. State Arbitration Tribunal.

7. It is no doubt true that if the matter were before an Arbitrator appointed under the Arbitration and Conciliation Act, 1996 for adjudication of any dispute including the question regarding the justification and legality as to whether the

cancellation of works contract was legal or illegal, then the said Arbitrator in view of the ratio of the judgment of the Supreme Court in *Maharshi Dayanand University & Anr. Vs. Anand Co-op L(C) Society,* 2007 (5) SCC 295, as also in view of the persuasive reasoning assigned in the judgment and order reported in *Heyman & Anr. Vs. Darwins, Limited,* 1942 (1) All E.R. 337 would have had the jurisdiction to adjudicate the dispute regarding the justification and legality of cancellation of works contract also. But the same cannot be allowed to be raised under the M.P. Act of 1983 since the definition of 'works contract' unambiguously lays down in explicit terms as to what is the nature and scope of 'works contract' and further enumerates the specific nature of disputes arising out of the execution of works contract which would come within the definition of a 'works contract'.

8. However, the same does not even vaguely include the issue or dispute arising out of cancellation and termination of contract due to which this question, in my considered opinion, would not fall within the jurisdiction of M.P. State Arbitration Tribunal so as to be referred for adjudication arising out of its termination. As already stated, fall out certainly would be otherwise if the matter were to be adjudicated by an Arbitrator appointed under the Arbitration and Conciliation Act, 1996 and that would be in view of the ratio of the decisions of the Supreme Court referred to hereinbefore which has held it permissible for the Arbitrator to adjudicate even the dispute arising out of cancellation or termination of an agreement or contract. This however, cannot be allowed to broaden or expand the ambit and scope of the M.P. Act of 1983 where the State Legislature has passed a specific legislation in respect of certain specified types of arbitration determining as to what are the nature of disputes to be referred to the M.P. State Arbitration Tribunal and that specifically permits the reference of dispute arising out of execution of contract but clearly leaves out any dispute arising out of termination, cancellation or repudiation of 'works contract'. In order to clarify the point

further, what needs to be emphasized is that if the nature of dispute referred to the Arbitrator like the instant matter, related to a dispute pertaining to construction, repair, maintenance of any building super-structure, dam or for the reasons stated within the definition of 'works contract', the matter may be referred to the M.P. Tribunal in view of the fact that if there is a dispute in relation to execution of a works contract, then irrespective of the fact whether the agreement contains an arbitration clause or not, the dispute is required to be referred to the M.P. State Arbitration Tribunal for adjudication. But when the contract itself has been terminated, cancelled or repudiated as it has happened in the instant case, then the nature of dispute does not fall within the definition of 'works contract' for the sole reason that it does not include any dispute pertaining to cancellation of a works contract implying that when the works contract itself is not in existence by virtue of its cancellation, the dispute cannot be referred to the M.P. State Arbitration Tribunal but may have to be decided by an Arbitrator appointed under the Arbitration and Conciliation Act, 1996.

9. Hence, the nature of the dispute which falls within the definition of 'works contract' under Section 2(i) of the M.P. Act, 1983 and one of the contracting parties to the agreement is the State of M.P., then irrespective of an arbitration agreement the dispute will have to be referred to the Tribunal in terms of Section 7 of the Act of 1983. But if the works contract itself has been repudiated and hence not in existence at all by virtue of its cancellation/termination, then in my considered view, the dispute will have to be referred to an independent arbitrator to be appointed under the Arbitration and Conciliation Act, 1996 since the M.P. Act 1983 envisages reference of a dispute to the State Tribunal only in respect of certain specified types of arbitration enumerated under Section 2 (i) of the M.P. Act, 1983.

10. As a consequence and fall out of the aforesaid discussion, the impugned order of the High Court by which the

dispute relating to termination of works contract by the M.P. Rural Road Development Authority itself was referred to an independent arbitrator appointed by the High Court under the Arbitration and Conciliation Act, 1996 needs to be sustained and there is no need for a de novo reference of the dispute to the M.P. State Arbitration Tribunal. In the alternative, the consequence would have been otherwise and the matter could have been referred to the State Arbitration Tribunal if the dispute between the parties related to any dispute emerging out of execution of works contract which could fall within the definition of 'works contract' given out within the definition of 'works contract' under Section 2(i) of the M.P. Act of 1983. In order to avoid any ambiguity, it is reiterated that in view of cancellation of the works contract itself which is the position in the instant case, the proceedings before the Arbitrator appointed by the High Court cannot be treated as non-est so as to refer the same once again to the tribunal for adjudication as the dispute does not emerge or pertain to execution of works contract but relates to non-existence of works contract by virtue of its cancellation.

11. Thus the sum and substance of what I wish to emphasize is that the question as to whether the dispute would be referred to the M.P. Tribunal in terms of Section 7 of the M.P. Act of 1983 or to an independent arbitrator under the Arbitration and Conciliation Act, 1996 will depend upon the factum whether the works contract is existing between the parties or not out of which the dispute has arisen. In case, the works contract itself has been repudiated/cancelled, then, in view of its non-existence, Section 7 of the M.P. Act pertaining to reference of dispute to tribunal would not come into play at all by virtue of the fact that the dispute relating to execution of works contract alone can be referred to the tribunal in view of the specific nature of works contract enumerated within the definition of works contract under the Act of 1983. However, when the works contract itself becomes non-existent as a consequence of its cancellation, the matter will have to be referred to an independent arbitrator under the Arbitration and Conciliation

Act, 1996 and not to M.P. State Arbitration Tribunal.

12. Thus, while holding that the M.P. Act 1983 should operate in the State of M.P. in respect of certain specified types of arbitration, the appointment of an independent arbitrator by the High Court under the Arbitration and Conciliation Act, 1996 needs to be sustained since the works contract itself is not in existence by virtue of its cancellation and hence this part of the dispute could not have been referred to the M.P. State Tribunal.

13. Consequently, the instant appeal stands partly allowed. There will be no order as to costs.

D.G. Appeal partly allowed.

ORDER

In view of some divergence of views expressed in the two judgments delivered today by us, the matter may be placed before Hon'ble the Chief Justice of India for constituting a larger Bench to resolve the divergence.

D.G. Referred to larger Bench

BIMAL KUMAR & ANOTHER
v.
SHAKUNTALA DEBI & OTHERS
(Civil Appeal No. 2524 of 2012)

FEBRUARY 27, 2012

[DALVEER BHANDARI AND DIPAK MISRA, JJ.]

DECREE:

Final decree and Preliminary decree - Distinction between -Discussed.

Preliminary decree - Compromise application - Tenor of application showed that the parties to the compromise settled the entire controversy and they were in separate and exclusive possession of the properties allotted to their respective shares - The compromise application did not contain any clause regarding the future course of action - Whether the decree passed by the court of first instance on the basis of compromise had become enforceable or it had the status of a preliminary decree requiring completion of a final decree proceeding to make it executable - Held: The parties were absolutely conscious and rightly so, that their rights had been fructified and their possession had been exclusively determined - They were well aware that the decree was final in nature as their shares were allotted and nothing remained to be done by metes and bounds - Their rights had attained finality and no further enquiry from any spectrum was required to be carried out - The whole thing had been embodied in the decree passed on the foundation of compromise - Thus the compromise decree was the final decree.

LIMITATION ACT, 1963: Article 136 - Execution application - Whether hit by bar of limitation - Partition suit - Predecessor of appellant one of the defendant proceeded ex

parte - Compromise decree - Subsequent suit for partition filed by appellants on the ground that earlier decree was obtained by fraud - Dismissed - Execution application filed after limitation period - Objections by appellants that execution proceeding was barred by limitation - Held: There was no stay of the earlier judgment or any proceedings emanating therefrom - There was no impediment or disability in the way of the decree holder to execute the decree but the same was not done - Therefore, initiation of execution proceedings was indubitably barred by limitation.

Words and phrases: Compromise/Settlement - Meaning of.

A partition suit was compromised between the parties. 'K', the predecessor of the appellants although had appeared in the suit and filed written statement, however, thereafter chose not to contest. The compromise petition stated that the parties were in separate and exclusive possession of the properties respectively belonging to them and had obtained separate and exclusive possession of the properties allotted to their respective shares. The trial court accepted the petition of compromise and passed a compromise decree on 3.4.1964 treating 'K' ex parte. 'K' initiated a fresh partition suit on the ground that the earlier decree was obtained by fraud. The said suit was dismissed on 27th August, 1994. The appeal thereagainst was dismissed for want of prosecution on 6.1.2004. At this juncture, the respondents filed execution case seeking execution of the compromise decree. In the meantime, 'K' died and the execution was levied against his legal heirs, the appellants. An objection was raised by the appellants that the execution proceeding was barred by limitation. The Sub-Judge dismissed the execution proceedings on the ground that it was absolutely barred by limitation. The single judge of the High Court allowed the revision on the

ground that the execution case was not barred by limitation.

The questions which arose for consideration in the instant appeal were whether the decree passed by the court of first instance on the basis of compromise had become enforceable or it had the status of a preliminary decree requiring completion of a final decree proceeding to make it executable and; whether the execution proceeding was untenable being hit by the law of limitation.

Allowing the appeal, the Court

HELD: 1. Perusal of the tenor of the entire compromise application showed that the parties to the compromise settled the entire controversy. The defendant No. 3 who was the predecessor-in-interest of the appellants was not allotted any share. As is perceptible from the terms of the compromise which formed a part of the decree, the parties had conceded that they were in separate and exclusive possession of the properties respectively belonging to them and further had obtained separate and exclusive possession of the properties allotted to their respective shares. Thus, their respective shares and exclusive possession were admitted on the basis of the said compromise petition and a decree had been drawn up. The Court had taken note of the contents of the compromise wherein it had been prayed that the decree be passed in accordance with the terms of the compromise. It was clearly evincible that the Court had proceeded on the basis that it was finally disposing of the suit in accordance with the terms set out in the compromise petition. The factum of exclusive possession had also been recorded in the application of compromise. It had been clearly stated that parties have been put in separate possession of the various

immovable properties. Even in the counter affidavit filed by the respondents, it was admitted that possession had remained with the parties as per the allotment. [Paras 16, 17]

2. A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are finally determined and a decree is passed in accordance with such determination, which is the final decree. It is clear that in the case at hand, the parties entered into a compromise and clearly admitted that they were in separate and exclusive possession of the properties and the same had already been allotted to them. It was also admitted that they were in possession of their respective shares and, therefore, no final decree or execution was required to be filed. It is demonstrable that the compromise application did not contain any clause regarding the future course of action. The parties were absolutely conscious and rightly so, that their rights had been fructified and their possession had been exclusively determined. They were well aware that the decree was final in nature as their shares were allotted and nothing remained to be done by metes and bounds. Their rights had attained finality and no further enquiry from any spectrum was required to be carried out. The whole thing had been embodied in the decree passed on the foundation of compromise. [para 22, 23]

3. The term 'compromise' essentially means settlement of differences by mutual consent. In such process, the adversarial claims come to rest. The cavil between the parties is given a decent burial. A compromise which is arrived at by the parties puts an

end to the litigative battle. Sometimes the parties feel that it is an unfortunate bitter struggle and allow good sense to prevail to resolve the dispute. In certain cases, by intervention of well-wishers, the conciliatory process commences and eventually, by consensus and concurrence, rights get concretised. A reciprocal settlement with a clear mind is regarded as noble. It signifies magnificent and majestic facets of the human mind. The exalted state of affairs brings in quintessence of sublime solemnity and social stability. In the instant case, as the factual matrix would reveal, a decree came to be passed on the bedrock of a compromise in entirety from all angles leaving nothing to be done in the future. The curtains were really drawn and the Court gave the stamp of approval to the same. Thus, the inescapable conclusion is that the compromise decree dated 03.04.1964 was a final decree. [Para 24]

4. It is well settled in law that a preliminary decree declares the rights and liabilities, but in a given case, a decree may be both preliminary and final and that apart, a decree may be partly preliminary and partly final. What is executable is a final decree and not a preliminary decree unless and until the final decree is a part of the preliminary decree. That apart, a final decree proceeding may be initiated at any point of time. [Para 27]

Rachakonda Venkat Rao And Others v. R. Satya Bai (D) by L.R. And Another **AIR (2003) SC 3322 : 2003 (3) Suppl. SCR 629;** *Renu Devi v. Mahendra Singh and others* **AIR 2003 SC 1608: 2003 (1) SCR 820 - relied on.**

Muzaffar Husain v. Sharafat Hussain **AIR 1933 Oudh 562;** *Raghubir Sahu v. Ajodhya Sahu* **AIR 1945 Pat 482 - approved.**

5. Perusal of the Article 136 of Limitation Act showed

that an application for execution of a decree (other than a decree granting a mandatory injunction) or order of any civil court is to be filed within a period of twelve years. In the case at hand, the compromise decree had the status of a final decree and was immediately executable. The period during which the suit and appeal preferred by the appellants remained pendency was not to be excluded for the purpose of execution. There was no stay of the said judgment or any proceedings emanating therefrom. In the absence of any interdiction from any court, the decree-holder was entitled to execute the decree. There was no impediment or disability in the way of the respondents to execute the decree but the same was not done. Therefore, the irresistible conclusion is that the initiation of execution proceedings was indubitably barred by limitation. Thus analyzed, the reasons ascribed by the single Judge are absolutely unsustainable. The period of limitation stipulated under Article 136 of the Act could not have been condoned. The reliance placed on the decision in Bharti Devi is totally misconceived inasmuch as in the said case, the execution proceeding was initiated for permanent injunction. [Paras 30, 32, 35]

Hasham Abbas Sayyad v. Usman Abbas Sayyad and others **(2007) 2 SCC 355 : 2006 (10) Suppl.SCR 740;** *Bikoba Deora Gaikwad and others v. Hirabai Marutirao Ghorgare and others* **(2008) 8 SCC 198 : 2008 (9) SCR 1038;** *Dr. Chiranji Lal (D) by LRs. v. Hari Das (D) By LRs.,* **(2005) 10 SCC 746 : 2005 (1) Suppl. SCR 359;** *Ram Bachan Rai and others v. Ram Udar Rai and others* **(2006) 9 SCC 446:2006 (1) Suppl. SCR 896;** *Ratan Singh v. Vijay Singh and Ors.* **2000 (8) SCALE 214;** *Manohar v. Jaipalsing* **AIR 2008 SC 429: 2007 (12) SCR 364 - relied on.**

Bharti Devi v. Fagu Mahto **2009 (3) JLJR 90 : AIR 2010 Jhar 10 - held inapplicable.**

Case Law Reference:

AIR 2010 Jhar 10	**held inapplicable**	**Paras 13, 26, 35**
2003 (3) Suppl. SCR 629	**relied on**	**Para 18**
AIR 1933 Oudh 562	**approved**	**Para 19**
AIR 1945 Pat 482	**approved**	**Para 20**
2003 (1) SCR 820	**relied on**	**Para 21**
2006 (10) Suppl. SCR 740	**relied on**	**Para 27**
2008 (9) SCR 1038	**relied on**	**Para 28**
2005 (1) Suppl. SCR 359	**relied on**	**Paras 30, 31**
2006 (1) Suppl. SCR 896	**relied on**	**Para 31**
2000 (8) SCALE 214	**relied on**	**Para 32**
2007 (12) SCR 364	**relied on**	**Para 34**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2524 of 2012.

From the Judgment & Order dated 19.08.2009 of the High Court of Jharkhand at Ranchiin Civil Revision No. 53 of 2007.

Ajit Kumar Sinha, Ambhoj umar Sinha for the Appellants.

S.S. Shamshery, Bhupendar Yadav, Babita Yadav, Bhakti Vardhan Singh, R.C. Kohli for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. In this appeal, the assail is to the order dated 19.9.2009 passed by the learned single Judge of Jharkhand High Court at Ranchi in C.R. No. 53 of 2007 by which he has dislodged

the order dated 10.7.2006 passed by the learned Sub-Judge (I), Ranchi, whereby he had dismissed the Execution Case No. 8 of 2004 filed by the respondents as being barred by limitation.

3. Filtering the unnecessary details, the facts which are requisite to be frescoed for the purpose of disposal of the present appeal are that one Kanilal Kasera filed a Partition Suit No. 131 of 1962 against his father, Nanak Kasera, and other brothers. The suit was compromised leaving aside Kishori Lal Kasera, the father of the present appellants, and a joint petition of compromise between the plaintiff and the defendant Nos. 1, 2, 4 to 9 and 11 to 18 was filed. It is worth noting that Kishori Lal Kasera had appeared in the suit and filed the written statement but thereafter chose not to contest.

4. The petition of compromise contained that the defendant Nos. 1, 9, 11 and 12 had relinquished and given up all their interests in item Nos. 3 and 8 of the suit schedule of property, being Holding No. 285 of new holding No. 509A of Ward No. II situated on portion of Municipal Survey Plot No. 621 and Holding No. 431 of Ward No. 1 situated on Municipal Survey Plot No. 902, and further declared that they had no claim or concern with any other properties involved in the suit; that the business, namely, “SEVEN BROTHERS STEEL FURNITURE WORKS”, item 5 of the schedule, belonged exclusively to the defendant No. 2, Moti Lal Kasera, and neither the plaintiff nor any of the other defendants either ever had or shall ever have any claim or interest; and that one half of the house and premises comprised in Municipal Holding No. 431, Ward No. 1, item 3 of the schedule, and half of Holding No. 509 A of Ward II, situated on portion of M.S. Plot No. 631, item 2 of the schedule, shall belong to the defendant No. 2 with all the liabilities and outstanding dues and the plaintiff and the other defendants shall have no liabilities or interest in the said prop rties; and that the business carried on under the name of ‘C otanagpur Tin Works’, item 6A of the schedule, was the sole separate business of the defendant No. 5, Prakash Kumar Kaser

, and the plaintiff or the other defendants had no claim on the said property.

5. The application further contained that the partition of the house and premises comprised in Holding No. 431 of Ward I, item 3 of the schedule, marked in green colour in the exhibit, shall belong exclusively to the defendant no. 4, Mohan Lal Kasera, and neither the plaintiff nor the other defendants shall have any claim or interest; that the business of iron shop at Bazaar Tan Ranchi, item 6 (c) of the schedule, was the separate and exclusive business of the defendant No. 6, Surendra Lal Kasera, and none others had any claim or interest and the portion of the building and premises comprised in Municipal Holding No. 431 of Ward No. I, item 3 of the schedule, marked in yellow colour, shall also belong to the defendant No. 6 and no one else had any claim or interest; that the portion of the building and premises comprised in Municipal Holding No. 431 of Ward No. I, item 3 of the schedule, marked in blue colour, and one-half of the shop premises comprised in Holding No. 509 A over portion of M.S. Plot No. 621 being item No. 2 of the schedule to the plaint shall exclusively belong to the plaintiff and he shall have absolute right over the same.

6. That apart, the plaintiff had agreed to pay up all outstanding dues of Bindrilal Agarwalla against the defendant No. 1 and none of the defendants shall be liable for the same.

7. It was also agreed upon that the House situated on Holding 6 Ward II of the Ranchi Municipality being comprised of Khata No. 71 plot No. 72 area 61 decimal and plot No. 79 area 7½ decimal total area measuring 14 decimal, being item No. 4 of the schedule and the house and premises comprised of Holding No. 180 Ward III being survey plot No. 92 area 0.30 Karies and Municipal Survey Plot No. 92 area 0.063 Karies total area 0.093 Karies of Hajamtolio, Ranchi being item No. 5 were separate and exclusive properties of Smt. Rama Devi and shall belong exclusively to the defendant No. 7, Srimati Rama Devi, the widow of Hira Lal Kasera, and no one else shall

have any claim or concern in the said property; that the shop premises being holding No. 509 B of Ward II of Ranchi Municipality situated on portion of M.S. Plot No. 621 being item No. 1 of the schedule and the house premises comprised of Holding No. 133(g) of Ward II being item No. 8 and the properties comprised Holding No. 145 A of Ward No. I measuring 6½ decimals being plot No. 268 of Khata No. 34 of Village Konka, being item No. 9 of the schedule belonged to the defendant No. 8, Sreemati Munitri Debi, wife of Prakash Lal Kasera, the defendant No. 5, and none had any claim or interest; that the house and the premises situated at Madhukam, Ranchi comprised in Holding No. 318 of Ward I being item No. 10 of the schedule was the property of the defendant No. 13, Shreemati Deojani Debi, wife of Moti Lal Kasera, the defendant No. 2.

8. It was stipulated that the business and properties mentioned in item Nos. 6(b) and 7 were erroneously included in the suit.

9. Be it noted, in Clause (K) of the petition of compromise, it was clearly stated as follows: -

> "k) That the parties are in separate and exclusive possession of the properties respectively belonging to them and have obtained separate and exclusive possession of the properties allotted to their respective shares."

10. The learned trial Judge being satisfied accepted the petition of compromise and passed a compromise decree on 3.4.1964 treating Kishori Lal Kasera ex parte.

11. When the matter stood thus, the legal representatives of Kishori Lal Kasera, the present appellants, initiated a fresh partition suit No. 49 of 1973 on the ground that the earlier decree was obtained by fraud. In the said suit, they claimed 1/11th share of the property for themselves which was involved

in the earlier suit being P.S. No. 131 of 1962. The said suit was dismissed on 27th August, 1994. Being dissatisfied with the said decision, Kishori Lal Kasera preferred Title Appeal No. 109 of 1994 which was dismissed for want of prosecution on 6.1.2004. At this juncture, the respondents herein filed execution case No. 8 of 2004 seeking execution of the decree passed in P.S. No. 131 of 1962. Be it noted, in the meantime, Kishori Lal Kasera had breathed his last and, therefore, the execution was levied against the legal heirs, the appellants herein.

12. An objection was raised by the appellants that the execution proceeding was barred by limitation and hence, deserved to be dismissed. The learned Sub-Judge dismissed the execution proceedings on the ground that it was absolutely barred by limitation.

13. Aggrieved by the said order, the respondents preferred C.R. No. 53 of 2007 under Section 115 of the Code of Civil Procedure (for short 'the CPC') and the learned single Judge allowed the said Revision on the ground that the execution case preferred by the revisionists was not barred by limitation. For the said purpose, the learned single Judge placed reliance on the decision in *Bharti Devi v. Fagu Mahto*[1]. The legal substantiality of the said order is the subject-matter of challenge in this appeal.

14. We have heard Mr. Amboj Kumar Sinha, learned counsel for the appellants, and Mr. S.S. Shamshery, learned counsel for the respondents.

15. The two seminal and spinal issues that had emanated before the executing court and the High Court and have also spiralled to this Court are whether the decree passed by the court of first instance on the basis of compromise had become enforceable or it had the status of a preliminary decree requiring completion of a final decree proceeding to make it

1. 2009 (3) JLJR 90 : AIR 2010 Jhar 10.

executable and whether the execution proceeding was untenable being hit by the law of limitation.

16. We shall advert to the first issue first. On a perusal of the tenor of the entire compromise application, we are of the considered view that the parties to the compromise settled the entire controversy. The defendant No. 3 who was the predecessor-in-interest of the present appellants was not allotted any share. As is perceptible from the terms of the compromise which formed a part of the decree, the parties had conceded that they were in separate and exclusive possession of the properties respectively belonging to them and further had obtained separate and exclusive possession of the properties allotted to their respective shares. Thus, their respective shares and exclusive possession were admitted on the basis of the said compromise petition and a decree had been drawn up. The Court had taken note of the contents of the compromise wherein it had been prayed that the decree be passed in accordance with the terms of the compromise. It is clearly evincible that the Court had proceeded on the basis that it was finally disposing of the suit in accordance with the terms set out in the compromise petition. The factum of exclusive possession had also been recorded in the application of compromise. It had been clearly stated that parties have been put in separate possession of the various immovable properties.

17. Quite apart from the above, in the counter affidavit filed by the respondents, it is admitted that possession had remained with the parties as per the allotment. It is profitable to reproduce the said portion of the counter affidavit:-

> "It is pertinent to mention here that the parties who were allotted the share as per the decree were stated to be in possession of their share and it was written in the judgment that no preliminary, final decree or execution was required to be filed. Though Kishori Lal Kasera had full knowledge of the compromise decree but he did not challenge the decree within the period of limitation therefore the

compromise decree became final and absolute against all the parties, including Kishori Lal Kasera."

18. Despite the aforesaid, a contention has been advanced by the learned counsel for the respondents that in a suit for partition, drawing up of a final decree is imperative. In this context, we may usefully refer to the decision in *Rachakonda Venkat Rao And Others v. R. Satya Bai (D) by L.R. And Another*[2] wherein it has been stated as follows:-

> "The compromise application does not contain any clause regarding future course of action which gives a clear indication that nothing was left for future on the question of partition of the joint family properties. The curtain had been finally drawn."

After so stating, the Bench proceeded to observe as follows:-

> "The decree as a matter of fact le aves nothing for future. As noticed earlier in a preliminary decree normally the court declares the shares of the parties and specifies the properties to be partitioned in the event of there being a dispute about the properties to be partitioned. After declaring the shares of the parties and the properties to be partitioned, the Court appoints a Commissioner to suggest mode of partition in terms of O. XXVI, R. 13, C.P.C. A perusal of Order XXVI, R. 13 C.P.C. shows that it comes into operation after a preliminary decree for partition has been passed. In the present case, there was no preliminary decree for partition and, therefore, R. 13 of O. XXVI does not come into operation. If the plaintiffs considered the decree dated 13th July, 1978 as a preliminary decree, why did they wait to move the application for final decree proceedings for 13 years? The only answer is that the plaintiffs knew and they always believed that the 1978 decree was a final decree for partition and it was only passage of time and change in

2. AIR 2003 SC 3322 : 2003 7 SCC 452.

> value of the properties which was not up to their expectations that drove plaintiffs to move such an application."

19. In *Muzaffar Husain v. Sharafat Hussain*[3], it has been held as follows:-

> "We think the decree passed by the civil Court should be treated as a final order for effecting a partition. It is true that the decree was passed on the basis of a compromise filed by the parties, but the fact remains that it was passed in a partition suit, and had the effect of allotting a specific portion of the property to the plaintiff as his share in the property. The conclusion at which we have arrived is supported by a decision of the Madras High Court in *Thiruvengadathamiah v. Mungiah*[4]"

20. In *Raghubir Sahu v. Ajodhya Sahu*[5], the Division Bench of Patna High Court had ruled thus: -

> "In the present case, the decree was passed on compromise. It was admitted that by the compromise, the properties allotted to the share of each party were clearly specified and schedules of properties allotted to each were appended to the compromise petition. Therefore, no further inquiry was at all necessary. In such circumstances, the decree did not merely declare the rights of the several parties interested in the properties but also allotted the properties according to the respective shares of each party. Therefore, it was not a preliminary decree but it was the final decree in the suit."

21. In *Renu Devi v. Mahendra Singh and others*[6], the effect of a compromise decree and allotment of shares in

3. AIR 1933 Oudh 562.
4. (1912) ILR 35 Mad 26.
5. AIR 1945 Pat 482.
6. AIR 2003 SC 1608.

pursuance of the said decree was dealt with. The two- Judge Bench referred to the decisions in *Raghubir Sahu v. Ajodhya Sahu* (supra) and *Muzaffar Husain* (supra) and opined that the law had been correctly stated in the said authorities.

22. In the said case, after referring to CPC by Mulla, this Court, while drawing a distinction between the preliminary and the final decree, has stated that a preliminary decree declares the rights or shares of the parties to the partition. Once the shares have been declared and a further inquiry still remains to be done for actually partitioning the property and placing the parties in separate possession of the divided property, then such inquiry shall be held and pursuant to the result of further inquiry, a final decree shall be passed. A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are finally determined and a decree is passed in accordance with such determination, which is the final decree. Thus, fundamentally, the distinction between preliminary and final decree is that: a preliminary decree merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and conducted pursuant to the directions made in the preliminary decree which inquiry having been conducted and the rights of the parties finally determined a decree incorporating such determination needs to be drawn up which is the final decree.

23. Applying the principles laid down in the aforesaid authorities, it is graphically clear that in the case at hand, the parties entered into a compromise and clearly admitted that they were in separate and exclusive possession of the properties and the same had already been allotted to them. It was also admitted that they were in possession of their respective shares and, therefore, no final decree or execution was required to be filed. It is demonstrable that the compromise application does not contain any clause regarding the future

course of action. The parties were absolutely conscious and rightly so, that their rights had been fructified and their possession had been exclusively determined. They were well aware that the decree was final in nature as their shares were allotted and nothing remained to be done by metes and bounds. Their rights had attained finality and no further enquiry from any spectrum was required to be carried out. The whole thing had been embodied in the decree passed on the foundation of compromise.

24. It is to be borne in mind that the term 'compromise' essentially means settlement of differences by mutual consent. In such process, the adversarial claims come to rest. The cavil between the parties is given a decent burial. A compromise which is arrived at by the parties puts an end to the litigative battle. Sometimes the parties feel that it is an unfortunate bitter struggle and allow good sense to prevail to resolve the dispute. In certain cases, by intervention of well-wishers, the conciliatory process commences and eventually, by consensus and concurrence, rights get concretised. A reciprocal settlement with a clear mind is regarded as noble. It signifies magnificent and majestic facets of the human mind. The exalted state of affairs brings in quintessence of sublime solemnity and social stability. In the present case, as the factual matrix would reveal, a decree came to be passed on the bedrock of a compromise in entirety from all angles leaving nothing to be done in the future. The curtains were really drawn and the Court gave the stamp of approval to the same. Thus, the inescapable conclusion is that the compromise decree dated 03.04.1964 was a final decree.

25. Presently, we shall dwell upon the issue whether the execution levied by the respondents was barred by limitation or not. The executing Court, by its order dated 10.07.2006, accepted the plea of the present appellants and came to hold that the execution petition filed by the decree holder was hopelessly barred by limitation. In the Civil Revision, the learned Single Judge overturned the decision on several counts; (i) that

no steps were taken and no objection was raised by the father of the opposite parties for setting aside the ex parte decree passed in the first suit, if he was aggrieved by it, for about 9 years, though he had appeared and had full knowledge about the first suit; (ii) that as per the compromise decree, the parties were in possession of the respective shares allotted to them and, accordingly, neither preliminary nor final decree was drawn up and there was no occasion for the petitioners for filing execution case for enforcement of the compromise decree; (iii) that the second suit challenging the compromise decree passed in the first suit remained pending for about 21 years; (iv) that the appeal filed against the dismissal of the second suit also remained pending for about 10 years; (v) that after the appeal was dismissed and the judgment and decree passed in the second suit became final, the execution case was filed by the petitioner alleging dispossession from the family business being run in the ground floor of the building; and (vi) that on the basis of such allegation, the compromise decree passed in the first suit became enforceable.

26. Apart from the aforesaid reasons, the learned Single Judge has opined that after the execution case was admitted by the predecessor of the learned Sub-Judge presumably after condoning the delay, the successor should not have dismissed it on the ground of limitation. He placed reliance on the decision rendered in *Bharti Devi* (supra) and buttressed the reasoning that there was no delay in levying of the execution proceeding. The learned single Judge further took note of the pending Misc. Appeal No. 369 of 2008 preferred by the present appellants to reinforce the conclusion.

27. It is well settled in law that a preliminary decree declares the rights and liabilities, but in a given case, a decree may be both preliminary and final and that apart, a decree may be partly preliminary and partly final. It has been so held in *Rachakonda Venkat Rao v. R. Satya Bai*[7]. It is worth noting

7. (2003) 7 SCC 452.

that what is executable is a final decree and not a preliminary decree unless and until the final decree is a part of the preliminary decree. That apart, a final decree proceeding may be initiated at any point of time. It has been so enunciated in *Hasham Abbas Sayyad v. Usman Abbas Sayyad and others*[8].

28. In *Bikoba Deora Gaikwad and others v. Hirabai Marutirao Ghorgare and others*[9], a two-Judge Bench of this Court has held that only when a suit is completely disposed of, thereby a final decree would come into being. In the said case, it has also been laid down that an application for taking steps towards passing a final decree is not an execution application and further, for the purposes of construing the nature of the decree, one has to look to the terms thereof rather than speculate upon the court's intention.

29. Regard being had to the aforesaid principles and having opined that the decree passed on the basis of a compromise in the case at hand is the final decree, it is to be addressed whether the execution is barred by limitation. Article 136 of the Limitation Act (for brevity 'the Act') reads as follows:-

"Description of application	Period of Limitation	Time from which period begins to run
136. For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.	Twelve years	When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which

8. (2007) 2 SCC 355.

9. (2008) 8 SCC 198.

execution is sought, takes place;

Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation."

30. On a perusal of the said Article, it is quite vivid that an application for execution of a decree (other than a decree granting a mandatory injunction) or order of any civil court is to be filed within a period of twelve years. In *Dr. Chiranji Lal (D) by LRs. v. Hari Das (D) By LRs.*[10], the question arose whether a final decree becomes enforceable only when it is engrossed on the stamp paper. The three-Judge Bench dealing with the controversy has opined that Article 136 of the Limitation Act presupposes two conditions for the execution of the decree; firstly, the judgment has to be converted into a decree and secondly, the decree should be enforceable. The submission that the period of limitation begins to run from the date when the decree becomes enforceable, i.e., when the decree is engrossed on the stamp paper, is unacceptable. The Bench, while elaborating the said facet, proceeded to lay down as under: -

"24. A decree in a suit for partition declares the rights of the parties in the immovable properties and divides the shares by metes and bounds. Since a decree in a suit for partition creates rights and liabilities of the parties with respect to the immovable properties, it is considered as an instrument liable for the payment of stamp duty under the Indian Stamp Act. The object of the Stamp Act being securing the revenue for the State, the scheme of the Stamp Act provides that a decree of partition not duly stamped can be impounded and once the requisite stamp

10. (2005) 10 SCC 746.

duty along with penalty, if any, is paid the decree can be acted upon.

25. The engrossment of the final decree in a suit for partition would relate back to the date of the decree. The beginning of the period of limitation for executing such a decree cannot be made to depend upon date of the engrossment of such a decree on the stamp paper. The date of furnishing of stamp paper is an uncertain act, within the domain, purview and control of a party. No date or period is fixed for furnishing stamp papers. No rule has been shown to us requiring the court to call upon or give any time for furnishing of stamp paper. A party by his own act of not furnishing stamp paper cannot stop the running of period of limitation. None can take advantage of his own wrong. The proposition that period of limitation would remain suspended till stamp paper is furnished and decree engrossed thereupon and only thereafter the period of twelve years will begin to run would lead to absurdity. In *Yeshwant Deorao Deshmukh v. Walchand Ramchand Kothari* [1950 SCR 852 : AIR 1951 SC 16] it was said that the payment of court fee on the amount found due was entirely in the power of the decree holder and there was nothing to prevent him from paying it then and there; it was a decree capable of execution from the very date it was passed.

26. Rules of limitation are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. As abovenoted, there is no statutory provision prescribing a time limit for furnishing of the stamp paper for engrossing the decree or time limit for engrossment of the decree on stamp paper and there is no statutory obligation on the Court passing the decree to direct the parties to furnish the stamp paper for engrossing the decree. In the present case the Court has not passed an order directing the parties to furnish the stamp papers for the purpose of

engrossing the decree. Merely because there is no direction by the Court to furnish the stamp papers for engrossing of the decree or there is no time limit fixed by law, does not mean that the party can furnish stamp papers at its sweet will and claim that the period of limitation provided under Article 136 of the Act would start only thereafter as and when the decree is engrossed thereupon. The starting of period of limitation for execution of a partition decree cannot be made contingent upon the engrossment of the decree on the stamp paper."

31. In *Ram Bachan Rai and others v. Ram Udar Rai and others*[11], a contention was advanced to the effect that as the cost for enforcement of decree was not quantified, the period of limitation could not have commenced from the date of judgment and decree. The Court referred to the decision in *Dr. Chiranji Lal* (supra) and, after referring to paragraphs 24 and 25 of the said decision, expressed the view in unequivocal terms that the inevitable conclusion was that the suit was barred by limitation.

32. In the present case, the learned counsel for the respondents, in support of the order passed in Civil Revision, has canvassed that when a suit was filed for declaring the earlier compromise decree to have been obtained by fraud and the same remained pending for more than 21 years, the period of limitation commenced only after the suit and the appeal arising therefrom were dismissed since only on the conclusion of the said proceeding, the decree became enforceable and further, the time consumed in the said proceeding is to be excluded for computation of the period of limitation under Article 136 of the Limitation Act. We have already held that the decree was a final decree. Therefore, it was immediately executable. The question, thus, would be 'was the time arrested?' On a query being made, it was fairly conceded at the Bar that at no point of time, there was any order by any court directing stay of

11. (2006) 9 SCC 446.

operation of the judgment and decree passed in P.S. No. 131 of 1962. The question that emanates for consideration is whether the period during which the suit and appeal preferred by the appellants remained pending is to be excluded for the purpose of limitation. In this context, we may usefully refer to the dictum in *Ratan Singh v. Vijay Singh and Ors.*[12] wherein, while dwelling upon the concept of enforceability of a decree and the effect of an order of stay passed by the appellate court, the Bench stated thus:

"8. When is a decree becoming enforceable? Normally a decree or order becomes enforceable from its date. But cases are not unknown when the decree becomes enforceable on some future date or on the happening of certain specified events. The expression "enforceable" has been used to cover such decrees or orders also which become enforceable subsequently.

9. Filing of an appeal would not affect the enforceability of the decree, unless the appellate court stays its operation. But if the appeal results in a decree that would supersede the decree passed by the lower court, it is the appellate court decree which becomes enforceable. When the appellate order does not amount to a decree there would be no supersession and hence the lower court decree continues to be enforceable."

33. In *Ram Bachan Rai* (supra), the two-Judge Bench took note of the fact that an application under Order IX Rule 13 for setting aside the ex parte decree was dismissed which was assailed in a miscellaneous appeal and ultimately in a civil evision. At no stage, stay was granted by any court. The decree olders therein filed an application for execution after 12 y ars. Regard being had to the same, it was held that the execution roceeding was barred by

imitation. 34. In this context, it is fruitful to refer

12. 2000 (8) SCALE 214.

o the pronouncement in *Manohar v. Jaipalsing*[13]. In the said case, it has been held as follows:

> "15. The order of purported stay passed by this Court in terms of its Order dated 21.3.1988 is also of no assistance to the plaintiff decree-holder. The Special Leave Petition was filed only against the Order dated 1.7.1985 refusing to review its judgment and decree dated 2.9.1983. The stay of operation of the Order dated 1.7.1985 for all intent and purport was meaningless as the review petition already stood dismissed.
>
> 16. Further direction of this Court that computation of mesne profit would go on and the same would be deposited by the appellant is of no consequence inasmuch as by reason thereof neither proceeding was stayed nor had the operation of the judgment and decree been stayed. In fact, it was an order passed in favour of the decree holder. The said direction did not come in his way to execute the decree for possession."

35. In the case at hand, the compromise decree had the status of a final decree. The latter suit filed by the appellants was for partition and declaring the ex parte compromise decree as null and void. As has already been stated, there was no stay of the earlier judgment or any proceedings emanating therefrom. In the absence of any interdiction from any court, the decree-holder was entitled to execute the decree. It needs no special emphasis to state that there was no impediment or disability in the way of the respondents to execute the decree but the same was not done. Therefore, the irresistible conclusion is that the initiation of execution proceedings was indubitably barred by limitation. Thus analyzed, the reasons ascribed by the learned single Judge are absolutely unsustainable. The period of limitation stipulated under Article 136 of the Act could not have been condoned as has been so

13. AIR 2008 SC 429.

presumed by the learned single Judge. The reliance placed on the decision in *Bharti Devi* (supra) is totally misconceived inasmuch as in the said case, the execution proceeding was initiated for permanent injunction. No exception can be taken to the same and, therefore, reliance placed on the said decision is misconceived.

36. *Ex consequenti,* the appeal is allowed, the order passed by the High Court in Civil Revision is set aside and that of the executing court is restored. The parties shall bear their respective costs.

D.G. Appeal allowed.

VINAYAK KASHINATH SHILKAR

v.

DY. COLLECTOR & COMPETENT AUTHORITY AND OTHERS

(Civil Appeal No. 2615 of 2012)

FEBRUARY 29, 2012.

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

URBAN LAND (CEILING AND REGULATION) REPEAL ACT, 1999:

s.3 (2) read with ss. 3(1)(a) and 10(3) - Abatment of proceedings initiated under the 1976 Act - Held: Mere vesting of vacant land with State Government by operation of law without actual possession is not sufficient for operation of s.3(1)(a) - In the instant case, the possession of the subject land has not been taken by State Government and, therefore, appellant was entitled to the relief and High Court ought to have declared that the proceedings under the Act in relation to the subject property stood abated - It is declared accordingly.

The appellant filed a writ petition before the High Court stating that the proceedings under the Urban Land (Ceiling and Regulation) Act, 1976 (the Act), in respect of the subject land be declared as abated in view of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (Repeal Act), which came to be adopted and became operative in the State of Maharashtra w.e.f. 29.11.2007. It was stated in the writ petition that the possession of the subject land was with the petitioner and at no point of time his possession was disturbed or attempted to be taken by the respondents. The Division Bench of the High Court dismissed the writ petition holding that the possession of the property had already been taken by the

State Government under the Act. Aggrieved, the writ petitioner filed the appeal.

Allowing the appeal, the Court

HELD: 1.1. It is clear from the provisions of s. 3 of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 that where the possession of the vacant land has not been taken over by the State Government or by any person duly authorised by the State Government in this behalf or by the Competent Authority, the proceedings under the Act would not survive. Mere vesting of the vacant land with the State Government by operation of law without actual possession is not sufficient for operation of s.3(1)(a) of the Repeal Act. [para 10]

Ritesh Tiwari & Anr. .vs. State of U.O. & Ors. **2010 (11) SCR 589 = 2010 (10) SCC 677 - relied on.**

1.2 In view of the legal position enunciated by this Court in Ritesh Tewari1 and the factual situation that the possession of the subject land has not been taken by the State Government, the appellant was entitled to the relief in terms of para 9(b) in the writ petition and the High Court ought to have declared that the proceedings under the Act in relation to the subject property stood abated. It is declared accordingly. [para 12]

Case Law Reference:

2010 (11) SCR 589 relied on para 11

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2615 of 2012.

From the Judgment & Order dated 05.01.2009 of the High Court of Judictaure at Bombay in Civil Writ Petition No. 4867 of 2008.

U.U. Lalit, Amol Chitale,Jessal Wahi, Nirnimesh Dube for

the Appellant.

Uday B. Dube, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. The appellant herein was the writ petitioner before the High Court. In the Writ Petition, he prayed that the proceedings in respect of the land bearing survey No. 195, Hissa No. 2 (New 195/1) of Village Parsik, District Thane under the Urban Land (Ceiling & Regulation) Act, 1976 (for short "the Act") on the basis of the return filed by Nabibai Tukaram Patil may be declared as abated in view of the repeal of the Act. The appellant asserted that the possession of the subject land was with him and at no point of time, his possession was ever disturbed or attempted to be taken by the respondents.

3. In response to the Writ Petition, a reply affidavit was filed by the Additional Collector and Competent Authority, Thane Urban Agglomeration, Thane before the High Court. In paragraph 3 of that affidavit, it is stated that notice under Section 10 (5) of the Act was issued to the appellant on February 25, 2005 calling upon the appellant to hand over the possession of the subject land within 30 days from the receipt of the said notice and, thus, the subject land had vested with the State Government. In paragraph 10 of the said affidavit, it is stated that the Competent Authority had already taken action under Sections 10(3) and 10(5) of the Act and, therefore, the subject land is deemed to have vested in the State Government.

4. The Division Bench of the Bombay High Court dismissed the Writ Petition by observing that the possession of the subject property had already been taken by the Government of Maharashtra under the Act.

5. Mr. U.U. Lalit, learned senior counsel for the appellant submitted that the finding of the High Court that the possession

of the property had been taken by the Government of Maharashtra was factually incorrect. He submitted that, as a matter of fact, even in the reply affidavit before the High Court filed on behalf of respondent No. 1, no such statement about possession was made. The subject land although had vested in the Government of Maharashtra on action having been taken under Sections 10(3) and 10(5) of the Act, learned senior counsel submitted but actual possession continued with the appellant.

6. Mr. Uday B. Dube, learned counsel for the respondents submitted and, in our view fairly that there was nothing on record to indicate that actual possession of the subject land had been taken over by the respondents from the appellant. He further submitted that the observation of the High Court that the possession of the subject land had already been taken by the Government of Maharashtra was based on the assertion made in the reply affidavit filed on behalf of respondent No. 1 that land had vested in the State Government on action having been taken under Sections 10(3) and 10(5) of the Act and for no other reason.

7. The Act came to be repealed by the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (for short " the Repeal Act") on March 22, 1999. However, the State of Maharashtra did not adopt the Repeal Act immediately. On resolution having been passed by the Maharashtra Legislative Assembly as well as Maharashtra Legislative Council that w.e.f. November 29, 2007, the Repeal Act came to be adopted and became operative in the State of Maharashtra.

8. Section 2 of the Repeal Act reads as follows:

"2. The Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as the principal Act) is hereby repealed."

9. Section 3A of the Repeal Act reads as follows:

" 3 : Savings

(1) The repeal of the principal Act shall not affect-

(a) the vesting of any vacant land under sub-section (3) of section 10, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under sub-section (1) of section 20 or any action taken thereunder, notwithstanding any judgment of any court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of section 20.

(2) Where-

(a) any land is deemed to have vested in the State Government under sub-section (3) of section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land,

then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government."

10. It is clear from the above provisions that where the possession of the vacant land has not been taken over by the State Government by any person duly authorised by the State Government in this behalf or by the Competent Authority, the proceedings under the Act would not survive. Mere vesting of the vacant land with the State Government by operation of law without actual possession is not sufficient for operation of Section 3(1)(a) of the Repeal Act.

11. We are fortified in our view by a recent decision of this Court in *Ritesh Tewari and another vs. State of Uttar Pradesh*

and others[1]. This Court in Retiesh Tewari1 considered the matter thus:

"Shri Jayant Bhushan, learned Senior Counsel appearing for the appellants has submitted that as the State Government had not taken possession of th eland in exercise of its powers under Section 10(6) of the 1976 Act, on coming of the 1999 Act into force, the proceedings stood abated and the respondents have no business to interfere with the peaceful possession and enjoyment of the property.

We find full force in the submissions so made by Shri Jayant Bhushan to a certain extent, and hold that all proceedings pending before any court/authority under the 1976 Act, stood abated automatically on coming of 1999 Act into force, provided the possession of the land involved in a particular case had not been taken by the State. Such a view is in consonance with the law laid down by this Court in *Pt. Madan Swaroop Shrotiya Public Charitable Trust vs. State of U.P.* (2000)6SCC 325, *Ghasitey Lal Sahu vs. Competent Authority* (2004)13 SCC 452, *Mukarram Ali Khan vs. State of U.P.* (2007)11 SCC 90 and *Sulochana Chandrakant Galande vs. Pune Municipal Transport* (2010)8 SCC 467."

12. In view of the legal position enunciated by this Court in *Ritesh Tewari*[1] and the factual situation that the possession of the subject land has not been taken by the Government of Maharashtra, we are satisfied that the appellant was entitled to the relief in terms of para 9 (b) in the Writ Petition and the High Court ought to have declared that the proceedings under the Act in relation to the subject property stood abated. Now it is declared accordingly.

13. Appeal is allowed as above with no order as to costs.

R.P. Appeal allowed.

1. (2010) 10 SCC 677.

RAJENDRA PRALHADRAO WASNIK
v.
THE STATE OF MAHARASHTRA
(Criminal Appeal Nos.145-146 of 2011)

FEBRUARY 29, 2012

[A.K. PATNAIK AND SWATANTER KUMAR, JJ.]

PENAL CODE, 1860:

ss. 302, 376(2)(f), and 377 - Rape and murder of a 3 year old girl - Circumstantial evidence - Conviction and sentence of death awarded by trial court, upheld by High Court - Held: The prosecution has been able to bring home the guilt of the accused for the offences charged - The chain of events proved by the prosecution is fully established and the circumstances which were required to be proven by the prosecution, have been proved by them successfully - The cumulative effect of the entire prosecution evidence is that it points unmistakably towards the guilt of the accused - It is not only a case of circumstantial evidence simpliciter but also the 'last seen together' principle - There is no justifiable reason to interfere with impugned judgment - Circumstantial evidence - 'Last seen together' principle - Sentence/ Sentencing.

SENTENCE/SENTENCING.:

Sentence of death - Mitigating and aggravating circumstances - Rape and murder of a 3 year old girl - Accused found guilty of offences punishable u/ss 302, 376(2)(f) and 377 IPC - Held: In fact, it is not heinous simpliciter, but is a brutal and inhuman crime where a married person, aged 31 years, chooses to lure a three year old minor girl child and then commits rape on her - Further, obviously intending to destroy the entire evidence and the possibility of

being identified, he kills the minor child - It can hardly be even imagined that what torture and brutality the minor child must have faced during the course of commission of the crime - The injuries show the extent of brutal sexual urge of the accused, which targeted a minor child - The pain and agony that he must have caused to the deceased minor girl is beyond imagination and is the limit of viciousness - Court has to examine the conduct of the accused prior to, at the time as well as after the commission of the crime - When a balance-sheet of the aggravating and mitigating circumstances is drawn, in the instant case, for the purposes of determining whether the extreme penalty of death should be imposed upon the accused or not, the scale of justice only tilts against him as there is nothing but aggravating circumstances evident from the record - Trial court was fully justified in law and on the facts of the case, in awarding the extreme penalty of death - Penal Code, 1860 - ss. 302, 376(2)(f) and 377 - Circumstantial evidence.

The appellant was prosecuted for committing offences punishable u/ss 376 (2) (f), 377 and 302 IPC. The prosecution case was that the appellant, at about 6.00 P.M. on 2.3.2007, took away the three year old daughter of PWs 2 and 12 from their house stating that he would purchase her biscuits. Thereafter, the child did not return home. The following day the dead body of the child was found in the fields. The post mortem report clearly showed the cause of death as rape and asphyxia. The trial court convicted the accused of the offences charged and sentenced him to various terms including sentence of death u/s 302 IPC. The High Court upheld the conviction and the sentence.

Dismissing the appeal, the Court

HELD: 1.1. There is no doubt that it is not a case of direct evidence and the conviction of the accused is founded on circumstantial evidence. The circumstances

forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone. In such circumstances, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. Furthermore, the rule which needs to be observed by the court while dealing with cases of circumstantial evidence is that the best evidence must be adduced which the nature of the case admits. The circumstances have to be examined cumulatively. The court has to examine the complete chain of events and then see whether all the material facts sought to be established by the prosecution to bring home the guilt of the accused, have been proved beyond reasonable doubt or not. It has to be kept in mind that all these principles are based upon one basic canon of our criminal jurisprudence that the accused is innocent until proven guilty and that the accused is entitled to a just and fair trial. [para 7]

Dhananajoy Chatterjee alias Dhana vs. State of W.B. **1994 (1) SCR 37 = JT 1994 (1) SC 33;** *Shivu & Anr. v. R.G. High Court of Karnataka & Anr.* **2007 (2) SCR 555 = (2007) 4 SCC 713; and** *Shivaji @ Dadya Shankar Alhat v. State of Maharashtra* **2008 (13) SCR 81 = (AIR 2009 SC 56 - referred to.**

1.2. The following circumstances which would show that for the undisputable rape and murder of the deceased minor girl, the accused is not only the suspect but is also the person who has committed the crime: (i) The accused had taken the victim from her home on the pretext of purchasing her biscuits; (ii) Neither the victim nor the accused returned to the house; (iii) Accused was seen with the deceased on 2.3.2007 at about 6.00 p.m. at the bus stand where, in the normal course of life, such

shops are situated; (iv) Thereafter, the nude body of the victim was found in the field of 'PVM' on 3.3.2007; and (v) Exts. 11 and 71, show beyond reasonable doubt that the three year old girl was subjected to rape, injuries and then murdered. These circumstances and the chain of events is complete with regard to the commission of crime and undoubtedly points towards the accused. [para 8-9]

1.3. PW2, the mother of the deceased, in her statement has stated that the accused had come to their house earlier and then on the date of the incident as well; that the accused at about 6.00 P.M., took the child with him saying that he would purchase biscuits for her. They went towards the bus-stand and thereafter, neither the child nor the accused returned home; that on the next day body of deceased was found in the fields. Her statement remained uncontroverted or nothing material came in her cross-examination. PW-12, the father of the deceased, provided the complete chain of events, right from the time he got the information that his daughter had been taken away till the time when her dead body was recovered from the fields. The accused was also seen in the house of PW12 by PW3, who is the niece of PW12. She also corroborated the statements of PW12 and PW2. PW4, is the other material witness, who stated that on the day of the incident, he was present at the bus stand and he saw the accused along with the victim child in a hotel; she was on the waist of the accused and they had purchased a packet of biscuits. PW-7, is another witness, who had seen the accused holding the victim child when he was going back to his house from the bus stand. [para 10-11]

1.4.The postmortem report, Ext.-17 clearly shows that the cause of death of the three-year old girl was rape and asphyxia. The accused admitted the documents i.e. the sketch map, Ext.64, spot panchnama, Ext.10, inquest panchnama, Ext.11, seizure panchnamas Exts. 12, 13 and

14 in respect of the seizure of clothes of the accused and in respect of blood sample, pubic hair sample, semen sample of the accused, arrest panchnama, Ext.16, postmortem report Ext.17 and letters Ext.19 to 27. [para 11]

1.5. Once the crucial pieces of documentary evidence have been admitted by the accused and other factual links in the story of the prosecution have been duly proved by the witnesses by circumstantial or direct evidence, there is no occasion for this Court to doubt that the prosecution has not been able to prove its case beyond reasonable doubt. [para 12]

1.6. From the report of the experts, it is clear that there is no direct evidence connecting the appellant to the commission of the crime but it is not the case of the defence that the FSL report was in the negative. Merely because the report regarding the samples of blood and semen of the accused was inconclusive, it is not necessary that the irresistible conclusion is only one that the accused is not guilty, particularly, where the prosecution has been able to establish its case on circumstantial evidence as also by direct oral evidence. It is a settled principle of law that the evidence has to be read in its entirety. If, upon reading the evidence as such, there are serious loopholes or lacking in the case of the prosecution and they do not prove that the accused is guilty, then the court would be justified in giving the benefit of doubt to the accused on the strength of a weak FSL report. The FSL report Ext. P77 had clearly established that the blood of group 'O' was found on the clothes of the deceased and that was her blood group. [para13]

1.7. As regards the identity of the accused, he has been identified by PW2, PW3 and PW4. Besides them,

even PW7 had also stated that he had seen the victim minor girl with the appellant in the house of PW2 and then again saw him with the victim going towards the bus stand. Statement of these four witnesses successfully stood the lengthy cross-examination conducted on behalf of the defence. There cannot be any doubt in these circumstances that the accused had taken away the victim from the house of PW2 and was seen at the bus stand. [para 14]

Baldev Singh v. State of Haryana **2008 (16) SCR 826 = AIR 2009 SC 963 - relied on.**

1.8. The circumstances and the chain of events proved by the prosecution is fully established and the circumstances which were required to be proven by the prosecution, have been proved by them successfully. The cumulative effect of the entire prosecution evidence is that it points unmistakably towards the guilt of the accused. It is not only a case of circumstantial evidence simpliciter but also the 'last seen together' principle. There are witnesses who had seen the accused at the house of PW2 with the deceased minor girl. Thereafter, he was again seen with the child at the bus stand and lastly while going away from the bus stand with the minor child. Thus, once the evidence had successfully shown that the accused was last seen with the minor girl, it was for the accused to explain the circumstances. The accused in his statement u/s 313 Cr.P.C., in response to all the 68 questions put to him, answered only one simple answer - 'it is false'. He also stated that the Police had registered a false case against him and that he did not want to lead any defence. There are no circumstances which can even remotely suggest that this plea taken by the accused even deserves consideration. Ex facie this is an incorrect stand. [para 15]

1.9 The prosecution has been able to bring home the guilt of the accused for the offences punishable u/ss 376(2)(f), 377 and 302 of the IPC. [para 16]

2.1. As regards the sentence, in fact, it is not heinous simpliciter, but is a brutal and inhuman crime where a married person, aged 31 years, chooses to lure a three year old minor girl child on the pretext of buying her biscuits and then commits rape on her. Further, obviously intending to destroy the entire evidence and the possibility of being identified, he kills the minor child. It can hardly be even imagined that what torture and brutality the minor child must have faced during the course of commission of the crime. The injuries, as described in Ext. P17 (the post mortem report) shows the extent of brutal sexual urge of the accused, which targeted a minor child. The pain and agony that he must have caused to the deceased minor girl is beyond imagination and is the limit of viciousness. [para 17]

Ramnaresh vs. State of Chattisgarh, **2012 (2) JT 588 - relied on.**

2.2. This Court has to examine the conduct of the accused prior to, at the time as well as after the commission of the crime. Prior thereto, the accused had been serving with PW5 and PW6 under a false name and took advantage of his familiarity with the family of the deceased. He committed the crime in the most brutal manner and, thereafter, he opted not to explain any circumstances and just took up the plea of false implication, which is unbelievable and unsustainable. When the Court draws a balance-sheet of the aggravating and mitigating circumstances, for the purposes of determining whether the extreme sentence of death should be imposed upon the accused or not, the scale of justice only tilts against the accused as there is nothing but aggravating circumstances evident from the record.

In fact, one has to really struggle to find out if there were any mitigating circumstances favouring the accused. Another aspect of the matter is that the minor child was helpless in the cruel hands of the accused. The accused was holding the child in a relationship of 'trust-belief' and 'confidence', in which capacity he took the child from the house of PW2. The accused, by his conduct, has belied the human relationship of trust and worthiness. The accused left the deceased in a badly injured condition in the open fields without even clothes. This reflects the most unfortunate and abusive facet of human conduct. [para 17-18]

2.3. The trial court was fully justified in law and on the facts of the case, in awarding the extreme penalty of death for an offence u/s 302 IPC along with other punishments for other offences. There is no justifiable reason to interfere with the judgment of conviction and order of sentence under the impugned judgment. [para 19]

Case Law Reference:

1994 (1) SCR 37	**referred to**	**para 7**
2007 (2) SCR 555	**referred to**	**para 7**
2008 (13) SCR 81	**referred to**	**para 7**
2008 (16) SCR 826	**relied on**	**para 15**
2012 (2) JT 588	**relied on**	**para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 145-146 of 2011.

From the Judgment & Order dated 26.03.2009 of the High Court of Judicature at Bombay Nagpur Bench, at Nagpur dismissing Criminal Confirmation Case No. 3 of 2008 in Criminal Appeal No. 700 of 2008.

Subhro Sanyal, Kawaljeet Singh for the Appellant.

Sushil Karanjkar, Sanjay Kharde, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeals are directed against the judgment dated 26th March, 2009 passed by the High Court of Bombay, Nagpur Bench affirming the conviction of the accused under Sections 376(2)(f), 377 and 302 of the Indian Penal Code, 1860 (hereafter 'IPC') and the sentence of death awarded to the accused-appellant herein vide judgment of the First Additional Sessions Judge, Amrawati, dated 10th September, 2008.

2. The facts giving rise to the present appeal fall within a narrow compass and are as follows :

Mahendra Namdeorao Wasnik, PW12, was living with his wife, three children and parents in Village Asra. He used to go to Village Tarkheda for earning his livelihood at the thresher of one Zafarbhai. Normally, he used to return to his village at about 10.00 p.m. after doing his day's work. On 2nd March, 2007, he left his house at 7.00 a.m. and returned from his work at about 9.00 p.m. Upon his arrival, he was informed by his wife Kantabai Wasnik that at about 4.00 p.m. one person, whose name she did not know, had come to the house and after taking tea, he left. The said person had again come at about 6.30 p.m. On his second visit, he told that he would take out their daughter, namely Vandana, to get her biscuits. After talking to the mother of Vandana, the accused had taken Vandana for purchasing biscuits but never brought her back to her house. Having learnt this, PW12 started searching for his daughter Vandana along with others, but they were unable to find her. On 3rd March, 2007 at about 8.00 a.m. when he was going to the Police Station for lodging the report, he saw

that some persons had gathered in the fields of Pramod Vitthalrao Mohod. He went there and saw the dead body of his daughter in that field. The dead body of Vandana was lying in a nude condition and there were injuries on her person. It has come in evidence that the accused had visited the house of PW12, Mahendra Namdeorao Wasnik to see his ailing father. He left after a cup of tea. It was on this information received from his wife that PW12 suspected that the accused was the person who was a resident of Village Parlam and had taken away his daughter. Consequently, PW12 lodged the report with the Police, Exhibit 71 in respect of the incident. As the body of the deceased minor girl, Vandana, had been recovered, an FIR was registered being Crime Case No.23/2007 under Sections 376(2)(f), 377 and 302 IPC. The Investigating Officer started the investigation, prepared the inquest *panchnama* in respect of the dead body of the deceased Vandana vide Exhibit 11. Sample of soil, soil mixed with urine and clothes of the deceased Vandana were seized from the spot under *Panchanama* Exhibit 12. The Investigating Officer had also drawn a sketch map of the spot of the incident on 16th June, -2007 vide Exhibit 64. At the request of the Police, the Judicial Magistrate recorded statement of the witnesses, namely, Bhimrao Gulhane, Nilesh Gedam, Ravindra Borkar and Sumit Ramteke under Section 164 of the Code of Criminal Procedure, 1973 (hereafter 'Cr.P.C.') The accused was arrested on 10th April, 2007 his clothes were seized vide Exhibit 14. He was subjected to medical examination. The doctor had taken blood and semen sample of the accused. These samples and the viscera were sent for medical examination vide Exhibits 21 and 22. The reports thereof are Exhibits 76 to 79.

3. The accused was produced before the Court and was committed to the Court of Sessions where he was charged with the offences punishable under Sections 376(2)(f), 377 and 320

IPC. He was tried for these offences. Learned Trial Court found him guilty of all the offences and awarded him punishments as follows :

Offences	**Punishment/Sentence**
302 IPC	Sentenced to death and he shall be hanged by neck till he is dead subject to confirmation by the Hon'ble High Court, Bombay, Bench at Nagpur as per the provisions of Section 366 of Cr.P.C.
376(2)(f) IPC	Sentenced to imprisonment for life and to pay fine of Rs.1,000 (one thousand), in default to suffer rigorous imprisonment for six months.
377 IPC	Sentenced to rigorous imprisonment for 10 (ten) years and to pay fine of Rs.1,000 (one thousand) in default to suffer further rigorous imprisonment for six months.

4. Aggrieved by the said judgment, the accused preferred an appeal before the High Court which, as already noticed, came to be dismissed. The High Court upheld the conviction and sentence of the accused giving rise to the filing of the present appeals.

5. Learned counsel appearing for the appellant-accused contended that the complete chain of events leading to the involvement of the appellant in the crime, in question, have not been established by the prosecution. According to him, the prosecution has failed to prove its case beyond reasonable doubt. The case is one of circumstantial evidence and the onus to prove the case by leading cogent, appropriate and linking evidence is on the prosecution. The prosecution has failed to establish the charge against the appellant. All witnesses are interested witnesses as they are the relatives of the informant or the deceased and as such cannot be safely relied upon by

the Court to hold the appellant guilty of the alleged offences. Lastly, it is also contended that it was not a case which fell in the category of 'rarest of rare' cases where the Court would find that any other sentence except death penalty would be inadequate and unjustifiable. Thus, the imposition of penalty of death imposed by the High Court calls for interference by this Court. Though the accused, in his statement under Section 313 Cr.P.C., while replying to question No.9 about the death of Vandana and injuries on her body, had stated that it was false but from the evidence led by the prosecution, it is clear that the death of the deceased Vandana was homicidal. One can get the idea of the torture and brutality that the minor girl suffered at the hands of the accused from the injuries found on her person in the post-mortem report. They have been described by the doctor as follows:

> "External Vaginal Swelling present Vaginal wall lacerated, wound extending from labia mejora to inside vaginal canal in lower 1/3rd on both side 1½" x ¼" x muscle deep
>
> Stains of semen present on inner side of thigh.
>
> Hymen absent, one finger easily pass.
>
> Swelling present on anal region.
>
> Multiple abrasions with Contusions present on body on face, chest back & both shoulders and knees Interiorly.
>
> Bite mark on chest (L) side around Nipple elliptical with diameters 1½" x 1¼".
>
> Right Lung collapsed, 150 gm, Congested on section collapsed.
>
> Left Lung Collapsed, 100 gm, Congested on section collapsed.
>
> Large vessels – contained blood."

6. Exhibit 11, the inquest *panchnama* is admitted while the post mortem report Exhibit 71 has been proved in accordance with law. Both these documents demonstrate, beyond reasonable doubt, that it was a case of homicidal death and as per the post mortem report, the cause of death was rape and asphyxia.

7. There is no doubt that it is not a case of direct e idence but the conviction of the accused is founded on circum tantial evidence. It is a settled principle of law that the p osecution has to satisfy certain conditions before a conviction b sed on circumstantial evidence can be sustained. The c rcumstances from which the conclusion of guilt is to be drawn sh uld be fully established and should also be consistent w th only one hypothesis, i.e. the guilt of the accused. Th circumstances should be conclusive and proved by the prosecution. here must be a chain of events so complete as not to leave any subs antial doubt in the mind of the Court. Irresistibly, the ev dence should lead to the conclusion which is inconsistent wit the innocence of the accused and the only possibility is that t e accused has committed the crime. To put it simply, the cir umstances forming the chain of events should be proved an they should cumulatively point towards the guilt of the accused alone. In such circumstances, the inference of guilt can be ustified only when all the incriminating facts and circumstan es are found to be incompatible with the innocence of the ccused or the guilt of any other person. Furthermore the rule which needs to be observed by the Court while dealing with cases of circumstantial evidence is that the best evidence must be adduced which the nature of the case admits. The circumstances have to be examined cumulatively. The Court has to examine the complete chain of events and then see whether all the material facts sought to be established by the prosecution to bring home the guilt of the accused, have been proved beyond reasonable doubt or not. It has to be kept in mind that all these principles are based upon one basic cannon of our criminal jurisprudence that the accused is innocent until

proven guilty and that the accused is entitled to a just and fair trial. [Ref. *Dhananajoy Chatterjee alias Dhana vs. State of W.B.* [JT 1994 (1) SC 33]; *Shivu & Anr. v. R.G. High Court of Karnataka & Anr.* [(2007) 4 SCC 713]; and *Shivaji @ Dadya Shankar Alhat v. State of Maharashtra* [(AIR 2009 SC 56].

8. Now, we will revert to the facts of the present case in light of the above-stated principles. We must spell out the circumstances which would show that for the undisputable rape and murder of the deceased minor girl, the accused is not only the suspect but is also the person who has committed the crime. These circumstances are:

1. The accused had taken Vandana from her home on the pretext of purchasing her biscuits.

2. Neither Vandana nor the accused returned to the house.

3. Accused was seen with the deceased Vandana on 2nd March, 2007 at about 6.00 p.m. at the bus stand where, in the normal course of life, such shops are situated.

4. Thereafter, the nude body of Vandana was found in the field of Pramod Vitthalrao Mohod on 3rd March, 2007.

5. Exhibit 11 and 71, show beyond reasonable doubt that the three year old girl was subjected to rape, injuries and then murdered.

9. The above circumstances and the chain of events is complete with regard to the commission of crime and undoubtedly points towards the accused. Now, we have to examine whether the prosecution has provided these facts as required in law.

10. PW2, Kanta, is the mother of the deceased Vandana.

In her statement she has stated that she was living along with her husband, one daughter and two sons. According to her, her in-laws were residing in the same house, though separately. Vandana was three years old at the time of her death. According to her, the occurrence took place on the day of *Holi* festival. She identified the accused, who was present in the court and stated that he had come to their house earlier and then on the date of the incident as well. Supporting the case of the prosecution, she stated that he had come to the house at about 3.00 p.m. and then left after having tea by saying that he wanted to meet his friends and thereafter, he again came back at 6.00 p.m. Vandana was playing in front of the house at that time. The accused told her that he would purchase biscuits for the child and took Vandana with him. They had gone towards the bus-stand and thereafter, neither Vandana nor the accused returned home. She had told her husband, PW1, about the incident on his return from work. PW2 also stated that on the next day body of deceased was found in the fields. There was blood in her nostrils and mouth. Marks of bites were found on her breast. There was swelling in the private parts of her body. She came to know the name of the accused subsequently. Her statement remained uncontroverted or nothing material came in her cross-examination. The accused was also seen in the house of PW12 by PW3, Preeti, who is the niece of PW12. She also corroborated the statements of PW12 and PW2. PW4, is the other material witness, Ravindra, who stated that on the day of the incident, i.e. 2nd March, 2007, he was present at the S.T. Bus stand of Asra and he had seen the accused along with Vandana in hotel *Rajendra Bhojane*. She was on the waist of the accused and they had purchased a packet of biscuits. Thereafter, he saw the accused going on the road which goes to Amrawati. Thereafter, he even searched for Vandana along with Vikram Meshram. PW5, Bhimrao Pundlik Gulhane is a witness who owns 13 acres of agricultural land at Village Khargodi in Village Nagthana. For the purposes of cultivating his land, he used to engage labourers, and the accused was engaged by him for doing the work on his agricultural field and

he disclosed the name of accused as Sanjay Manohar Wankhede. According to this witness, he maintained a regular register for marking 'presence' and 'payment of wages' to the labourers he engaged. The said witness deposed that on the date of occurrence, i.e. 2nd March, 2007, the accused did not come for duty. However, on that day in the morning, the accused came to him and demanded Rs. 500/- saying that he wanted to go to Asra and thereafter, he did not come back. He produced the register which had been seized by the police earlier and had the signatures and it was exhibited as Ex.36. PW7, is another witness, who had seen the accused holding Vandana when he was going back to his house from the S.T. bus stand Asra.

11. The accused was subjected to medical examination and was examined by Dr. Ravindra Ruprao Sirsat, PW9 and he noticed no injuries on his person. Father of the deceased minor girl was examined as PW12 and he provided the complete chain of events, right from the time he got the information that his daughter had been taken away till the time when her dead body was recovered from the fields. Dr. K.V. Wathodkar, Dr. (Mrs.) V.K. Wathodkar and Dr. Varsha S. Bhade had prepared the postmortem report, Ex.-17, which clearly shows that the cause of death of the three-year old girl was rape and asphyxia. All these factors have been proved by the prosecution both by documentary as well as oral evidence. The accused admitted the documents i.e. the sketch map, Ex.64, spot *panchnama*, Ex.10, inquest *panchnama*, Ex.11, seizure *panchnamas* Exihibits 12, 13 and 14 in respect of the seizure of clothes of the accused and in respect of blood sample, public hair sample, semen sample of the accused, arrest *panchnama,* Ex.16, postmortem report Ex.17 and letters Ex.19 to 27.

12. Once these crucial pieces of documentary evidence have been admitted by the accused and other factual links in the story of the prosecution have been duly proved by the

witnesses by circumstantial or direct evidence, there is no occasion for this Court to doubt that the prosecution has not been able to prove its case beyond reasonable doubt.

13. It has been vehemently argued on behalf of the appellant that the report of the FSL does not connect the accused to the commission of the crime. This, being a very material piece of evidence which the prosecution has failed to establish, the accused would be entitled to the benefit of doubt. There were two kinds of Exhibits which were sent by the Police to the Forensic Science Laboratory for examination – one, the blood-stained clothes of the deceased and second, the sample of blood, semen and pubic hair sample of the accused which were sent vide Exhibit 57. The reports of the laboratory are Exhibits 76, 77, 78 and 79. As far as the reports in respect of the appellant's sample of semen and blood are concerned, they were inconclusive as was stated by the FSL in Exhibit 76. His clothes which were seized by the Police did not bear any blood or semen stains and that was duly recorded in Exhibit 78. Exhibit 77 were the clothes of the deceased which were blood stained. The clothes contained blood group 'O' which was the blood group of the deceased girl. From the report of the experts, it is clear that there is no direct evidence connecting the appellant to the commission of the crime but it is not the case of the defence that the FSL report was in the negative. Merely because the report was inconclusive, it is not necessary that the irresistible conclusion is only one that the accused is not guilty, particularly where the prosecution has been able to establish its case on circumstantial evidence as also by direct oral evidence. It is a settled principle of law that the evidence has to be read in its entirety. If, upon reading the evidence as such, there are serious loopholes or lacking in the case of the prosecution and they do not prove that the accused is guilty, then the Court would be justified in giving the benefit of doubt to the accused on the strength of a weak FSL report. The FSL report Exhibit P77 had clearly established that the blood of group 'O' was found on the clothes of the deceased and that

was her blood group. The prosecution has been able to establish not only by substantial evidence but clearly by medical evidence as well, that the minor girl had suffered serious injuries on her private parts and there were bite marks on her chest.

14. An attempt was also made to cast certain doubts as to the very identity of the accused but we find this submission without any substance. The accused has been identified by PW2, PW3 and PW4. Besides them, even PW7 Sumeet Ramteke had also stated that he had seen the victim minor girl with the appellant in the house of PW2, Kantabai and then again seen him with the victim going towards the ST bus stand. Statement of these four witnesses successfully stood the lengthy cross-examination conducted on behalf of the defence. There cannot be any doubt in these circumstances that the accused had taken away the victim from the house of PW2 and was seen at the ST stand.

15. In our considered opinion, the tests laid down by this Court in *Baldev Singh v. State of Haryana,* AIR 2009 SC 963 in relation to cases of circumstantial evidence are completely satisfied in the present case. The circumstances and the chain of events proved by the prosecution is fully established and the circumstances which were required to be proven by the prosecu ion, have been proved by them successfully. The cumulative effect of the entire prosecution evidence is that it points unmistakably towards the guilt of the accused. It is not only a case of circumstantial evidence simpliciter but also the 'last seen together' principle. There are witnesses who had seen the accused at the house of PW2 with the deceased minor girl. Thereafter, he was again seen with the child at the ST bus stand, Asra and lastly while going away from the ST bus stand with the minor child. Thus, once the evidence had successfully shown that the accused was last seen with the minor girl, it was for the accused to explain the circumstances. The accused in his statement under Section 313 Cr.P.C., in response to all the 68 questions put to him, answered only one simple answer - 'it

is false'. He also stated that the Police had registered a false case against him and that he did not want to lead any defence. It is very difficult to assume that as many as 13 witnesses from the same village, the Police and doctors would falsely implicate the accused. There are no circumstances which can even remotely suggest that this plea taken by the accused even deserves consideration. *Ex facie* this is an incorrect stand.

16. Having dealt with the contentions of the learned counsel appearing for the appellant on the merits of the case, now we would proceed to discuss the last contention raised on behalf of the appellant that this is not one of the rarest of rare cases where awarding death sentence is justified. We have already held that the prosecution has been able to bring home the guilt of the accused for the offences under Sections 376(2)(f), 377 and 302 of the IPC. In order to deal with this contention raised on behalf of the appellant, we may, at the very outset, refer to the basic principles that are to be kept in mind by the Court while considering the award of death sentence to an accused. This very Bench in a recent judgment, considered various judgments of this Court by different Benches right from *Bachan Singh's* case, in relation to the canons governing the imposition of death penalty and illustratively stated the aggravating circumstances, mitigating circumstances and the principles that would be applied by the Courts in determining such a question. It will be useful to refer to the judgment of this Bench in the case of *Ramnaresh vs. State of Chattisgarh*, Crl. Appeal No. 166-167/2010 decided on February 28, 2012 wherein it was held as under: -

> "The above judgments provide us with the dicta of the Court relating to imposition of death penalty. Merely because a crime is heinous *per se* may not be a sufficient reason for the imposition of death penalty without reference to the other factors and attendant circumstances.
>
> Most of the heinous crimes under the IPC are punishable by death penalty or life imprisonment. That by

> itself does not suggest that in all such offences, penalty of death should be awarded. We must notice, even at the cost of repetition, that in such cases awarding of life imprisonment would be a rule, while 'death' would be the exception. The term 'rarest of rare case' which is the consistent determinative rule declared by this Court, itself suggests that it has to be an exceptional case. The life of a particular individual cannot be taken away except according to the procedure established by law and that is the constitutional mandate. The law contemplates recording of special reasons and, therefore, the expression 'special' has to be given a definite meaning and connotation. 'Special reasons' in contra-distinction to 'reasons' *simplicitor* conveys the legislative mandate of putting a restriction on exercise of judicial discretion by placing the requirement of special reasons.
>
> Since, the later judgments of this Court have added to the principles stated by this Court in the case of *Bachan Singh* (supra) and *Machhi Singh* (supra), it will be useful to re-state the stated principles while also bringing them in consonance, with the recent judgments.
>
> The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in the case of *Bachan Singh* (supra) and thereafter, in the case of *Machhi Singh* (supra). The aforesaid judgments, primarily dissect these principles into two different compartments – one being the 'aggravating circumstances' while the other being the 'mitigating circumstance'. The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be

appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354(3) Cr.P.C.

Aggravating Circumstances :

1. The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

2. The offence was committed while the offender was engaged in the commission of another serious offence.

3. The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

4. The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

5. Hired killings.

6. The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

7. The offence was committed by a person while in lawful custody.

8. The murder or the offence was committed, to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Cr.P.C.

9. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

10. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

11. When murder is committed for a motive which evidences total depravity and meanness.

12. When there is a cold blooded murder without provocation.

13. The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances :

1. The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

2. The age of the accused is a relevant consideration but not a determinative factor by itself.

3. The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

4. The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

5. The circumstances which, in normal course of life, would render such a behavior possible and could have the effect

of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

6. Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

7. Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused.

While determining the questions relateable to sentencing policy, the Court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles :

1. The Court has to apply the test to determine, if it was the 'rarest of rare' case for imposition of a death sentence.

2. In the opinion of the Court, imposition of any other punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.

3. Life imprisonment is the rule and death sentence is an exception.

4. The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant circumstances.

5. The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the Court, while exercising its jurisdiction. It is difficult to state, it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the Court may consider in its endeavour to do complete justice between the parties.

The Court then would draw a balance-sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The Court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and the punishment is the principle of *'just deserts'* that serves as the foundation of every criminal sentence that is justifiable. In other words, the 'doctrine of proportionality' has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large.

Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole. Thus, the Courts should consider retributive

and deterrent aspect of punishment while imposing the extreme punishment of death.

Wherever, the offence which is committed, manner in which it is committed, its attendant circumstances and the motive and status of the victim, undoubtedly brings the case within the ambit of 'rarest of rare' cases and the Court finds that the imposition of life imprisonment would be inflicting of inadequate punishment, the Court may award death penalty. Wherever, the case falls in any of the exceptions to the 'rarest of rare' cases, the Court may exercise its judicial discretion while imposing life imprisonment in place of death sentence."

17. We shall tentatively examine the facts of the present case in light of the above principles. First and foremost is that the crime committed by the accused is heinous. In fact, it is not heinous simplicitor, but is a brutal and inhuman crime where a married person, aged 31 years, chooses to lure a three year old minor girl child on the pretext of buying her biscuits and then commits rape on her. Further, obviously intending to destroy the entire evidence and the possibility of being identified, he kills the minor child. On the basis of the 'last seen together' theory and other direct and circumstantial evidence, the prosecution has been able to establish its case beyond any reasonable doubt. It can hardly be even imagined that what torture and brutality the minor child must have faced during the course of commission of this crime. All her private parts were swollen and bleeding. She was bleeding through her nose and mouth. The injuries, as described in EX.P17 (the post mortem report) shows the extent of brutal sexual urge of the accused, which targeted a minor child, who still had to see the world. He went to the extent of giving bites on her chest. The pain and agony that he must have caused to the deceased minor girl is beyond imagination and is the limit of viciousness. This Court has to examine the conduct of the accused prior to, at the time as well as after the commission of the crime. Prior thereto, the accused

had been serving with PW5 and PW6 under a false name and took advantage of his familiarity with the family of the deceased. He committed the crime in the most brutal manner and, thereafter, he opted not to explain any circumstances and just took up the plea of false implication, which is unbelievable and unsustainable. When the Court draws a balance-sheet of the aggravating and mitigating circumstances, for the purposes of determining whether the extreme sentence of death should be imposed upon the accused or not, the scale of justice only tilts against the accused as there is nothing but aggravating circumstances evident from the record of the Court. In fact, one has to really struggle to find out if there were any mitigating circumstances favouring the accused. Another aspect of the matter is that the minor child was helpless in the cruel hands of the accused. The accused was holding the child in a relationship of 'trust-belief' and 'confidence', in which capacity he took the child from the house of PW2. In other words, the accused, by his conduct, has belied the human relationship of trust and worthiness.

18. The accused left the deceased in a badly injured condition in the open fields without even clothes. This reflects the most unfortunate and abusive facet of human conduct, for which the accused has to blame no one else than his own self.

19. Thus, for the reasons afore-recorded, we find that the learned trial court was fully justified in law and on the facts of the present case, in awarding the extreme penalty of death for an offence under Section 302 IPC along with other punishments for other offences. We find no justifiable reason to interfere with the judgment of conviction and order of sentence under the impugned judgment. The appeals are dismissed.

R.P. Appeals dismissed.

KISHOR KUMAR & ORS.
v.
PRADEEP SHUKLA & ORS.
(S.L.P.(C) Nos. 22590 of 2011 etc.)

FEBRUARY 29, 2012

[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]

U.P. PROCEDURE FOR DIRECT RECRUITMENT OF GROUP 'C' POSTS (OUTSIDE THE PURVIEW OF PUBLIC SERVICE COMMISSION) RULES, 2000:

r.15(2) - Appointment to 766 posts of Pharmacists advertised on 12.11.2007 - Held: As has been held in Santosh Kumar Mishra's case, the decision taken by State Government to accommodate the diploma-holders in batches against their respective years could be discontinued at a later stage, but not to the disadvantage to those who had been denied the opportunity of being appointed by virtue of the same Rules - The subsequent policy could be introduced after the private respondents and those similarly situated persons were accommodated - All candidates who were similarly situated as the original petitioners would be entitled to the benefit of the judgment in Santosh Kumar Mishra's case.

The instant special leave petitions arose out of the writ petitions questioning the select list prepared on 14.2.2011 after the decision of the Supreme Court in *Santosh Kumar Mishra's* **case the subject matter whereof was the advertisement dated 12.11.2007 for filling up 766 vacancies of pharmacists in the State of Uttar Pradesh. The case of the petitioners was that despsite having better merit, they were not selected for filling up the 766 vacancies. The case of the respondents was that as per r.15(2) of the U.P. Procedure for Direct Recruitment of**

Group 'C' Posts (Outside the Purview of Public Service Commission) Rules, 2000, diploma-holders were to be appointed against the vacancies which became available in each recruitment year, by first appointing batchwise those pharmacists who had obtained their diplomas earlier, irrespective of their merit.

Dismissing the petitions, the Court

HELD:

The matter has already been decided in the case of *Santosh Kumar Mishra**** wherein it has been directed by this Court that the candidates could be appointed against the vacancies in order of their inter-se seniority as per the vacancies available in each year. It was directed that the decision taken by the State Government to accommodate the diploma holders in batches against their respective years, could be discontinued at a later stage, but not to the disadvantage to those who had been denied the opportunity of being appointed by virtue of the same Rules. This Court observed that the same decision which was taken to deprive the private respondents from being appointed, could not be discarded once again to their disadvantage to prevent them from being appointed, introducing the concept of merit selection at a later stage. It was further directed that the subsequent policy could be introduced after the private respondents and those similarly situated persons have been accommodated. Therefore, there is no reason to interfere with the order of the Division Bench of the High Court. All the pending applications shall stand disposed of by virtue of this judgment. All candidates, who were similarly situated as the original petitioners, would be entitled to the benefit of the judgment delivered in Santosh Kumar Mishra's case. [para 8, 12 and 14]**

State of U.P. & Anr. Vs. Santosh Kumar Mishra & Ors.* **2010 (9) SCR 942 = (2010) 9 SCC 52 - relied on.

Case Law Reference:

2010 (9) SCR 942 relied on para 8

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 22590 of 2011 etc.

From the Judgment & Order dated 12.07.2011 of t he High Court of Judicature at Allahabad Lucknow Bench, Lucknow in Contempt Petition No. 2209 of 2009.

WITH

SLP (C) Nos. 27086 of 2011 & 2011 & 4130 of 2012.

Mahalakshmi Pavani, Mukesh Verma, Pawan Shukla, Yash Pal Dhingra, T. Mahipal, Dr. S. Bhardwaj, Archana P. Dave, Mridule Ray Bhardwaj, Veera Kaul Singh, C.J. Sahu, Jasbir Singh Malik, S.K. Sabharwal, Shree Pal Singh, Niranjana Singh, K.L. Janjani, Satpal Singh, Vidhi International, Anjani Kumar Mishra, Sunita Sharma for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. These three Special Leave Petitions are directed against the judgment and order dated 12.7.2011, passed by the Lucknow Bench of the Allahabad High Court in C.P. No.2209 of 2009, affirming the order of the learned Single Judge which had been upheld by the Division Bench of the High Court regarding the appointment of Pharmacists in the State of Uttar Pradesh. So as to understand how the matter reached the High Court, it is necessary to set out a few facts which led to the filing of the Writ Petitions.

2. By way of an advertisement dated 12.11.2007, 766 vacancies were advertised for being filled up by diploma holders in Pharmacy. The advertisement provided that the recruitment could be done as per the U.P. Procedure for Direct Recruitment of Group 'C' Posts (Outside the Purview of Public Service Commission) Rules, 2000. The said advertisement led

to controversies as to how the appointments were to be filled up.

3. According to the Respondents, the interpretation of Rule 15(2) of the U.P. Pharmacists Service Rules, 1980, hereinafter referred to as the "1980 Rules", required the diploma holders to be appointed against the vacancies which became available in each recruitment year, by first appointing those Pharmacists who had obtained their diplomas earlier. It was their claim that appointment to the post of Pharmacist could be made batch-wise from each year and that the vacancies which had accrued were required to be filled up by giving appointment to those Pharmacists according to the dates on which they obtained their diplomas, irrespective of their merit. According to the Respondents, on an interpretation of Rule 15(2) of the 1980 Rules by the State Government, they were entitled to be selected and appointed first in respect of the vacancies advertised, as they belonged to previous batches and had been denied appointment by the State Government earlier on the plea that notwithstanding their merit being superior to some of the diploma holders, those who had obtained diplomas prior to the Respondents, had to be adjusted against the vacancies first, irrespective of their merit. It was submitted that those diploma holders who had obtained their diplomas before the Respondents, should be adjusted first against the vacancies available, irrespective of their merit, vis-à-vis the diploma holders of subsequent batches and the said practice was continued till 2002.

4. Questioning the interpretation of Rule 15(2) of the 1980 Rules, several Writ Petitions were filed before the Lucknow Bench of the Allahabad High Court for quashing the advertisement dated 12.11.2007 and for a writ in the nature of Mandamus to command the concerned authorities to effect recruitment to the post of Pharmacist strictly in accordance with Rules 14 and 15 of the 1980 Rules, by specifying the vacancies year-wise, and, thereafter, appointing the Writ Petitioners to the post of Pharmacist after providing for age relaxation.

5. According to the Respondents, it was not open to the State Government to interpret the Rules differently to the prejudice of the Respondents' right to appointment, though similarly situated persons had been given the benefit of the said Rules under which the Respondents were denied appointment when their turn came to be appointed. The order passed by the learned Single Judge, while disposing of various Writ Petitions, was challenged by the Respondents in several Writ Appeals before the Division Bench of the Lucknow Bench of the Allahabad High Court, which after recognizing the anomalous position which had arisen, disposed of the various Appeals with a direction that the case of the Appellants would be considered in accordance with the pre-existing practice by considering their appointment on the basis of their merit, but that the said process would be available only for the Appellants. It was directed that they would be accommodated if they were otherwise found eligible and the remaining vacancies would be filled up by following Rule 15(2) of the 1980 Rules strictly.

6. The said decision of the Division Bench came to be challenged before this Court by the State of U.P. by way of Special Leave Petition (Civil) Nos.20558 of 2009, which was heard along with several other Special Leave Petitions, where the issue was the same. During the course of hearing of the Special Leave Petitions, the main question which fell for decision was whether the Rules could be applied differently at different points of time, in order to deny the benefit of appointment to the same group of people at such different points of time. It was also indicated by the Division Bench that the State Government had acted arbitrarily and unfairly in not applying the same set of Rules when the turn of the Respondents came to be appointed on the basis thereof on the ground that they have become over-age. It had been submitted that such arbitrariness could not be allowed to continue and the decision of the State and its authorities not to give batch-wise promotion to those Pharmacists, who had obtained their diplomas prior to 1988, was liable to be quashed.

7. Some of the Petitioners moved the High Court for implementing the order dated 4.5.2009 passed by the Division Bench of the said Court. Inasmuch as, the applications were not being disposed of, one Sunil Kumar Rai and others moved Contempt Petition No.2209 of 2009 before the High Court alleging willful contempt on the part of the State and its authorities in not implementing the directions given by the Division Bench on 4.5.2009. During the hearing of the Contempt Petition, it was also pointed out that the said order of the Division Bench of the High Court had been challenged in Special Leave Petition (Civil) No.22665 of 2009, and that while issuing notice, this Court did not stay the operation of the judgment and order passed by the Division Bench on 4.5.2009.

8. Upholding the decision of the Division Bench of the High Court, this Court did not interfere with the same and dismissed the Special Leave Petitions vide judgment dated 3.8.2010 titled *State of U.P. & Anr. Vs. Santosh Kumar Mishra & Ors.* reported in (2010) 9 SCC 52, and directed that the decision taken by the State Government to accommodate the diploma holders in batches against their respective years, could be discontinued at a later stage, but not to the disadvantage to those who had been denied the opportunity of being appointed by virtue of the same Rules. This Court observed that the same decision which was taken to deprive the private Respondents from being appointed, could not be discarded once again to their disadvantage to prevent them from being appointed, introducing the concept of merit selection at a later stage. It was further directed that the subsequent policy could be introduced after the private Respondents and those similarly situated persons have been accommodated.

9**.** After the aforesaid judgment of this Court, a select list was prepared on 14.2.2011, which was again challenged by way of several Writ Petitions, of which the lead matter was Writ Petition No.1186 of 2011 filed by Pawan Kumar and others, against the State of U.P. and others. On 4.3.2011, the High Court stayed the select list prepared on 14.2.2011 and directed

not to make any appointments therefrom. At the same, time, the contempt proceedings were also take up for consideration and on 12.7.2011, in the said proceedings the High Court directed the official respondents to prepare a fresh select list.

10. It is in such background that these Special Leave Petitions came to be filed by candidates who had not been selected for appointment on the ground that despite having better merit, they had not been selected for filling up the 766 vacancies.

11. The submissions which had been previously urged when the earlier batch of Special Leave Petitions were disposed of, were reiterated during the hearing of these Special Leave Petitions. An attempt was made to re-open the issue by urging that the Petitioners have been over-looked, despite their better merit.

12. We are unable to accept the said submissions on account of the fact that the matter has already been decided and it has been directed by this Court, following the decision of the Division Bench of the High Court, that the candidates could be appointed against the vacancies in order of their inter-se seniority as per the vacancies available in each year. That being so and having regard to the earlier decision of this Court referred to hereinabove, we see no reason to interfere with the order of the Division Bench of the High Court.

13. The Special Leave Petitions are, accordingly, dismissed, but without any order as to costs.

14. All the pending applications shall stand disposed of by virtue of this judgment. As we have observed hereinabove, all candidates, who were similarly situated as the original petitioners, would be entitled to the benefit of the judgment delivered in *State of U.P. & Anr. Vs. Santosh Kumar Mishra & Ors.* (supra).

R.P. Special Leave Petition dismissed.

JITU PATNAIK

v.

SANATAN MOHAKUD & ORS.

(Civil Appeal No. 2689 of 2012)

MARCH 2, 2012

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

REPRESENTATION OF THE PEOPLE ACT, 1951:

s.52(as inserted by Amendment Act 21 of 1996) read with ss.38, 83 and 100(1)(d) - State Legislative Assembly Elections - Death of an independent contesting candidate after the date of withdrawal of nomination and publication of list of contesting candidates, but before the date of polling - Election petition challenging the election of returned candidate - Held: s.52 enjoins that if a candidate set up by recognized political party dies before the poll, the poll must be adjourned; it does not provide any such obligation on the returning officer if a candidate of a registered political party other than recognized political party or an independent candidate dies after the list of the contesting candidates as defined in s. 38 is published - The expression "contesting candidates" in paragraph 8.1, Chapter XII of the Handbook has to be given the same meaning as the contesting candidates defined in s. 38 of the Act - In this view of the matter, there was no duty imposed on the returning officer to mask the name of the independent candidate who died after publication of list of validly nominated candidates being a contesting candidate as defined in s. 38 - Moreover, the instructions in the Handbook are only guidelines - These instructions have no statutory force - There being no non-compliance with the provisions of the Constitution or the 1951 Act or any rules framed or orders made under 1951 Act by the returning officer insofar as death of an independent candidate was concerned, the averments made in paragraph 7(A) of the election petition do not furnish

any cause of action for declaring the election of the returned candidate to be void u/s 100(1)(d)(iv) - High Court seriously erred in holding otherwise and ordering trial of the election petition on the pleadings set out in paragraph 7(A).

s.83(1)(a) - Election petition to contain concise statement of 'material facts' - Averment in para 7(D) of the election petition alleging suppression of votes - Held: It is imperative for an election petition to contain a concise statement of the material facts on which the election petitioner relies - All basic and primary facts which must be proved at the trial by a party to establish the existence of cause of action or defence are material facts - The bare allegations are never treated as material facts - The material facts are such facts which afford a basis for the allegations made in the election petition - Omission of even a single material fact leads to an incomplete cause of action and statement of claim becomes bad - The averments made in paragraph 7(D) do not set out all the material facts and do not afford an adequate basis for the allegations made therein - The allegations in paragraph 7(D) do not constitute cause of action for declaring election of the returned candidate to be void -High Court has already struck out paragraphs 7(B), 7(C), 7(E), 7(F) and 7(G) of the election petition - The remaining two paragraphs 7(A) and 7(D) do not disclose any cause of action and are liable to be struck out - After striking out paragraphs 7(A) and 7(D), nothing remains in the election petition for trial and, therefore, the election petition is liable to be rejected in its entirety - Code of Civil Procedure, 1908 - O. 6, r. 2 - Conduct of Election Rules, 1961 - r.93.

An independent candidate whose candidature had survived the scrutiny of nominations for the 14th Assembly Election to Orissa State Legislative Assembly, died on 13.4.2009, i.e. after the date of withdrawal of nominations i.e. 8.4.2009, but before the date of polling i.e. 23.4.2009. His name continued to appear in the list of

contesting candidates and was included in Electronic Voting Machine (EVM). The polling was held on 23.4.2009 and the deceased got 550 votes. Respondent no. 1 lost the election to the appellant. He filed an election petition challenging the election of the appellant. The appellant filed an application with a prayer to strike out the pleadings made in paragraphs 7(A) to 7(G) of the election petition. The High Court struck out paragraphs 7(B), 7(C) and 7(E) to 7(G) and permitted trial of the election petition on the pleadings set out in paragraphs 7(A) and 7(D). The returned candidate filed the appeal contending that paragraphs 7(A) and 7(D) of the election petition did not set out the material facts to constitute cause of action u/ ss 100(1)(d)(iii) and (iv) of the Representation of the People Act, 1951.

The questions for consideration before the Court were: (i) "if an independent contesting candidate dies after the publication of list of contesting candidates, does the electoral law as contained in 1951 Act or the Rules framed thereunder cast any obligation upon the returning officer not to display the name of such deceased candidate in the EVM"; and (ii) "whether the pleadings in paragraph 7(D) set out the material facts to constitute cause of action u/s 100(1)(d)(iii) and/or (iv) of the 1951 Act.

Allowing the appeal, the Court

HELD: 1.1 This Court has stated time and again that right to contest election or to question the election by means of the election petition is neither common law nor fundamental right. Instead, it is a statutory right regulated by the statutory provisions contained in the Representation of the People Act. 1951. The Act is complete and self-contained code within which the rights claimed in relation to an election or election dispute must be found. [para 19]

N.P. Ponnuswami v. The Returning Officer, Namakkal Constituency, Namakka, Salem Dist. and Others **1952 SCR 218 = 1952 AIR 64 ; ,** *Jagan Nath v. Jaswant Singh and Others* **1954 SCR 892 =1954 AIR 210;** *Jyoti Basu & others v. Debi Ghosal and Others* **1982 (3) SCR 318 = 1982 (1) SCC 691,** *Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi* **1987 SCR 369 = 1987 Suppl. SCC 93; and** *Chandra Kishore Jha v. Mahavir Prasad and Others* **1999 (2) Suppl. SCR 754 = 1999 (8) SCC 266 - referred to.**

1.2 Once nomination has been filed by a candidate and on scrutiny his candidature is found proper and before the expiry of the period of the withdrawal, he has not withdrawn his candidature and his name is included in the list of validly nominated candidates prepared u/s 38 of the 1951 Act and r. 11 of the Conduct of Election Rules, 1961, if death of a contesting candidate as defined in s.38 takes place, the consequences following the death of such contesting candidate have to be found from electoral law contained in 1951 Act or the rules framed thereunder. [para 20]

1.3 Section 52, after its substitution by Act 21 of 1996, takes cognizance of a death of a candidate of the recognized political party before poll and not the other two categories of the candidates classified in s. 38, namely, (one) candidates of registered political parties other than the candidates of recognized political parties and (two) other candidates (which include independent candidates). Section 52 enjoins that if a candidate set up by recognized political party dies before the poll, the poll must be adjourned; it does not provide any obligation on the returning officer if a candidate of a registered political party other than recognized political party or an independent candidate dies after the list of the contesting candidates as defined in s. 38 is published. [para 20 and 23]

1.4 Chapter XII of the Handbook deals with preparation for the poll, particularly commissioning of EVMs. A careful reading of paragraph 8.1 of the Handbook relied upon on behalf of respondent no. 1 would show that the number of candidates' buttons which should be visible should be equal to the number of contesting candidates and the remaining buttons must be masked. The expression "contesting candidates" in paragraph 8.1 has to be given the same meaning as the contesting candidates defined in s. 38 of 1951 Act. No other meaning to the expression "contesting candidates" can be given. The candidates who survive the date of the withdrawal of candidatures are described in s.38 as 'contesting candidates'. Thus, the number of candidates' buttons which should be visible on EVM should be equal to the number of candidates as published in the list of validly nominated candidates who have not withdrawn the candidature within the period prescribed and whose nominations are included in the list published u/s 38. In this view of the matter, there was no duty imposed on the returning officer to mask the name of the candidate at Sl. no. 9, who was an independent candidate and who died on 13.4.2009 after publication of list of validly nominated candidates being a contesting candidate as defined in s. 38. Moreover, the instructions in the Handbook are only guidelines. These instructions have no statutory force. [para 16 and 25]

Ramesh Rout vs. Rabindra Nath Rout **2012 (1) SCC 762 - relied on**

1.5 There being no non-compliance with the provisions of the Constitution or the 1951 Act or any rules framed or orders made under 1951 Act by the returning officer insofar as death of an independent candidate was concerned, the averments made in paragraph 7(A) of the election petition do not furnish any cause of action for

declaring the election of the returned candidate to be void u/s 100(1)(d)(iv). The High Court seriously erred in holding otherwise and ordering trial of the election petition on the pleadings set out in paragraph 7(A). [para 26]

2.1 As regards the pleadings in paragraph 7(D) of the election petition, it is significant to note that the first part of O. 6, r. 2 CPC is similar to clause 1(a) of s. 83 of the 1951 Act. It is imperative for an election petition to contain a concise statement of the material facts on which the election petitioner relies. All basic and primary facts which must be proved at the trial by a party to establish the existence of cause of action or defence are material facts. The bare allegations are never treated as material facts. The material facts are such facts which afford a basis for the allegations made in the election petition. [para 32]

Virender Nath Gautam v. Satpal Singh and others **2006 (10) Suppl. SCR 413 = 2007 (3) SCC 617 - relied on**

Philipps v. Philipps and Others **(1878) 4 Q.B.D. 127 and the subsequent decision in** *Bruce v. Odhams Press Limited* **(1936) 1 K.B. 697 - referred to**

2.2 As regards the discrepancy in the number of voters in the register of voters maintained in Form-17A and the voters shown in Form 17C, it is significant to note that the register of voters in Form-17A is not available for inspection. Rule 93 of the 1961 Rules provides for the production and inspection of election papers. Clause (dd) of r. 93(1) makes a provision that the packets containing register of voters in Form 17A, while in the custody of the district election officer or the returning officer, as the case may be, shall not be opened and their contents shall not be inspected by, or produced before, any person or authority except under the order of a competent court. [para 36]

2.3 There is no averment that the election petitioner or any of his polling agents had perused the register of voters maintained in Form 17A. The basis of the knowledge that the register of voters maintained in Form 17A records that 1091 voters came to vote is not disclosed at all. Moreover, there is no pleading that 1091 voters who came to vote at Booth No. 179 in fact voted. [para 37]

2.4 The averment that in Form-17C, certified copy, "it has been deliberately shown as 772 making a deliberate suppression of 319 votes" hardly improves the pleading in the election petition. There is no averment that the election petitioner or his agents challenged part II of Form-17C before the authorities. At least, there are no facts pleaded concerning that. There is no pleading that there was any challenge by the election petitioner or his agents in respect of the counting figure in Form-20. The only pleading is that the illegality has been deliberately committed by the counting personnel while recording the counting figure in Form-20 with respect to Booth No. 179. There is, thus, no disclosure of material facts in respect of the challenge to the correctness of Form-20 and Form-17C. [para 38]

2.5 The pleading of material facts with regard to suppression of 319 votes in paragraph 7(D) is also incomplete as it has not been disclosed who suppressed 319 votes; who was the counting agent present on behalf of the election petitioner at the time of counting; how 319 votes were suppressed and why recounting was not demanded. Moreover, there is no express pleading as to how the result of the election has been materially affected by less counting of 319 votes. Omission of even a single material fact leads to an incomplete cause of action and statement of claim becomes bad. [para 39-40]

Samant N. Balkrishna and Another v. George Fernandez

and Others **1969 (3) SCR 603 =1969 (3) SCC 238 - relied on.**

2.6 The other part of paragraph 7(D) relating to 462 votes is based on the preceding paragraph 7(C) which has been already struck out by the High Court. Therefore, the pleadings in paragraph 7(D) in respect of 462 votes do not survive as it is. Thus, the averments made in paragraph 7(D) do not set out all the material facts and do not afford an adequate basis for the allegations made therein. The allegations in paragraph 7(D) do not constitute cause of action for declaring election of the returned candidate to be void. [para 41-42]

3. The High Court has already struck out paragraphs 7(B), 7(C), 7(E), 7(F) and 7(G). The remaining two paragraphs 7(A) and 7(D) do not disclose any cause of action and are liable to be struck out. After striking out paragraphs 7(A) and 7(D), nothing remains in the election petition for trial and, therefore, the election petition is liable to be rejected in its entirety. [para 43]

Madan Gopal vs. Nek Ram Sharma **25 ELR 61 - cited.**

Case Law Reference:

25 ELR 61	**cited**	**para 18**
1952 SCR 218	**referred to**	**Para 19**
1954 SCR 892	**referred to**	**Para 19**
1982 (3) SCR 318	**referred to**	**Para 19**
1987 SCR 369	**referred to**	**Para 19**
1999 (2) Suppl. SCR 754	**referred to**	**Para 19**
2012 (1) SCC 762	**relied on**	**para 25**
2006 (10) Suppl. SCR 413	**relied on**	**para 32**

(1878) 4 Q.B.D. 127	**referred to**	**para 33**
(1936) 1 K.B. 697	**referred to**	**para 33**
1969 (3) SCR 603	**relied on**	**para 40**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2689 of 2012.

From the Judgment & Order dated 21.06.2011 of the High Court of Orissa at Cuttack in Misc. Case No. 50 of 2009 in Election Petition No. 2 of 2009.

C.A. Sundram, Rohini Musa, Zafar Inayat, Yogesh Kotemath, Mahesh Agarwal, Rishi Agrawala, E.C. Agrawala, Shakti Prasad Panda, Satyajit Mohanti, Gaurav Goel for the Appellant.

Mukul Rohatgi, Bidhyadhar Mishra, S.N. Bhat, Sanjeeb Panigrahi, Pusparaj Bharadwaj, Subhash Acharya, Shyam Mohan, Ninad Laud for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. The two paragraphs – 7(A) and 7(D) – of the election petition occupied significant time of this Court on 3 days – February 7, 2012, February 9, 2012 and February 14, 2012 – to determine the correctness of the order dated June 21, 2011 passed by the Orissa High Court whereby the High Court directed that the election petition shall proceed in respect of the pleadings contained in these two paragraphs.

3. On the announcement of the 14th Assembly Election to the Orissa State Legislative Assembly, insofar as it related to 25—Champua Assembly Constituency, the following schedule of election was notified:

SCHEDULE OF ELECTION	
28.3.2009	PERIOD PRESCRIBED FOR FILLING
To 4.4.2009	NOMINATION.
6.4.2009	DATE FIXED FOR SCRUTINY OF NOMINATION
8.4.2009	DATE OF WITHDRAWAL
23.4.2009	DATE OF POLLING
16.5.2009	DATE OF COUNTING/ DECLARATION OF RESULT.
28.5.2009	DATE BEFORE WHICH THE ELECTION SHALL BE COMPLETED.

4. As per the above schedule, on expiry of the time of withdrawal on April 8, 2009, the returning officer prepared and published the following list of contesting candidates.

Sl. No.	Name of the contesting candidate	Name of the political party	Election symbol
1.	Chitaranjan Nayek	B.S.P.	Elephant
2.	Bidyadhar Mohanta	C.P.I.	Ears of Corn and Sickle
3.	Muralimanohar Sharma	B.J.P.	Lotus
4.	Laxman Kumar Sethi	J.M.M.	Bow & Arrow
5.	Sanatan Mahakud	I.N.C.	Hand
6.	Keshab Mohanta	Samrudha Orissa	Nagara
7.	Khitish Chandra Mohanta	Orissa Mukti Morcha	Violin
8.	Jadumani Patra	Samajbadi Party	Saw
9.	Akhila Kumar Mohanta	Independent	Television
10.	Akhileswar Giri	Independent	Battery & Torch

11.	Abhimanyu Mohanta	Independent	Coconut
12.	Arabinda Behera	Independent	Ripe Plantation
13.	Ashok Mohanta	Independent	Road Roller
14.	Kusha Apot	Independent	Scissors
15.	Jitu Patnaik	Independent	Saucer & Plate
16.	Deepak Moharana	Independent	Camera
17.	Puma Chandra Mohanta	Independent	Baloon
18.	Prabhupada Mishra	Independent	Almirah
19.	Buta Singh	Independent	Ceiling Fan
20.	Bhabani Mohanta	Independent	Candle
21.	Manoj Kumar Mohanta	Independent	Rail Engine
22.	Sanjita Nayek	Independent	Batsman

5. It so happened that one of the contesting candidates at Sl. No. 9, namely, Akhila Kumar Mohanta, who was an independent candidate, died on April 13, 2009. His death was allegedly informed to the returning officer. However, his name continued to appear in the list of contesting candidates and was included in Electronic Voting Machine (EVM). The polling was held on April 23, 2009 in all 218 booths of the 25-Champua Assembly Constituency through EVM. The total votes recorded in the EVMs of 218 booths were 1,25,342 and postal ballots were 10. The appellant, Jitu Patnaik who contested as an in dependent candidate secured 27700 votes. The first respondent, Sanatan Mohakud, a candidate of Indian National Congress, secured 27555 votes. The deceased Akhila Kumar Mohanta got 550 votes. Since the appellant secured the highest number of votes, he was declared elected from 25-Champua Assembly Constituency.

6. The first respondent (hereinafter referred to as 'election petitioner') challenged the election of the appellant (hereinafter referred to as 'returned candidate') by filing an election petition before the Orissa High Court. In paragraphs 7(A) to 7(G), the election petitioner set out the case for declaring the election of

the returned candidate to be void and declare the election petitioner duly elected to the Orissa State Legislative Assembly from 25-Champua Assembly Constituency.

7. On service of the notice of the election petition, the returned candidate appeared and filed his written statement/ reply traversing the pleadings set out in the election petition. The returned candidate also made an application under Order VI Rule 16 read with Section 151 and Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short, 'CPC') read with Section 86(1) of the Representation of the People Act, 1951 (for short, '1951 Act') with prayer to strike out/reject the pleadings made in paragraphs 7(A), 7(B), 7(C), 7(D), 7(E), 7(F) and 7(G) of the election petition and reject the election petition.

8. The High Court considered the above application made by the returned candidate and, after hearing the learned counsel for the election petitioner and the returned candidate, struck out paragraphs 7(B), 7(C), 7(E), 7(F) and 7(G) of the election petition by invoking its jurisdiction under Order VI, Rule 16(c) of CPC. However, the High Court ordered that the election petition shall proceed in respect of the remaining pleadings. In other words, the High Court permitted trial of the election petition on the pleadings set out in paragraphs 7(A) and 7(D).

9. The returned candidate is aggrieved by the above order to the extent trial of the election petition on the pleadings set out in paragraphs 7(A) and 7(D) has been ordered to be continued. According to the returned candidate, these two paragraphs do not set out the material facts to constitute cause of action under Section 100 (1)(d)(iii) and/or (iv) of the 1951 Act.

10. It may be stated immediately that the election petitioner has not challenged the order of the High Court striking out pleadings in paragraphs 7(B), 7(C), 7(E), 7(F) and 7(G).

11. We have heard Mr. C.A. Sundaram, learned senior counsel for the appellant – returned candidate and Mr. Mukul Rohatgi, learned senior counsel for respondent – 1 – the election petitioner.

12. We shall first take up the pleadings set out in paragraph 7(A) of the election petition which reads as follows :

> "7(A) That Akhila Kumar Mohanta, who had filed nomination as an independent candidate and was assigned symbol Television died on 13.04.2009. His death was duly notified by the Returning Officer. In view of his death his name/symbol should not have been displayed in the E.V.M. on the date of polling.
>
> Both AKhila Kumar Mohanta as well as the Election petitioner were sharing a common ideology. Both were members of Indian National Congress. But since the Election petitioner was having more support base amongst the rank and file of the party he was nominated by the I.N.C. as a party nominee to contest the Election and Akhila Kumar Mohanta filed his nomination as an independent candidate. The Voters who recorded their vote in the EVM on the date of Polling, i.e., 23.04.09, in favour of Akhila Kumar Mohanta were basically supporter of Indian National Congress. In the event Akhila Kumar Mohanta would have withdrawn from contest or otherwise his name and symbol would not have displayed on the E.V.M. on account of his death, then the voters who have recorded their votes in his favour would have recorded the same in favour of the election Petitioner in view of their party affiliation. As appears from the recording in Form-20, 550 (five hundred fifty) votes have been recorded in favour of the deceased contesting candidate Akhila Kumar Mohanta. Had his name been not shown/displayed on the EVM, all these 550 (Five hundred fifty) votes would have been recorded in favour of the Election petitioner. On account of the above wrong committed by the Returning Officer the prospect of wining of the Election petitioner has been adversely affected and the result of Election has been materially

affected."

13. The crux of the above averments is that one of the independent candidates Akhila Kumar Mohanta had died on April 13, 2009 after the expiry of withdrawal date; his death was duly notified to the returning officer but despite that his name was displayed on the EVM on the date of the polling (although he was already dead) and had his name not been shown/ displayed on the EVM, all the 550 votes polled in his favour would have been voted in favour of the election petitioner as the deceased candidate and the election petitioner shared the common ideology and both were members of the Indian National Congress and on account of wrong committed by the returning officer, the prospect of the election petitioner has been adversely affected. In light of the above pleadings, the question that falls for determination is: if an independent contesting candidate dies after the publication of list of contesting candidates, does the electoral law as contained in 1951 Act or the Rules framed thereunder cast any obligation upon the returning officer not to display the name of such deceased candidate in the EVM.

14. In order to answer the above question, it is appropriate to survey the scheme of the 1951 Act in regard to the conduct of elections. Part V, Chapter I of the 1951 Act is relevant in this regard. Section 30 requires the Election Commission, as soon as the notification calling upon a constituency to elect a member or members is issued, to appoint (a) the last date for making nominations, (b) the date for the scrutiny of nominations, (c) the last date for the withdrawal of candidatures, (d) the date or dates on which a poll shall, if necessary, be taken and (e) the date before which the election is to be completed. Section 31 requires the returning officer, on issue of the notification under Section 30, to give public notice of the intended election inviting nominations of candidates for such election. Sections 32 and 33, inter alia, provide for nomination of candidates for election, presentation of nomination paper

and requirements for a valid nomination. Under the scheme of these two sections, a candidate for election has to be validly nominated. As per Section 36, after the nomination papers are received, on the date fixed for the scrutiny, returning officer is to hold scrutiny of nominations. Immediately after all the nomination papers have been scrutinized and decisions accepting or rejecting the same have been recorded, the returning officer is to prepare a list of validly nominated candidates and affix it on his notice board. Section 37 enables any of the validly nominated candidates to withdraw his candidature on or before the last date for the withdrawal of candidature.

15. Section 38 makes the provision for publication of list of contesting candidates. It reads as follows :

> *"S. 38. - Publication of list of contesting candidates*.—(1) Immediately after the expiry of the period within which candidatures may be withdrawn under sub- section (1) of section 37, the returning officer shall prepare and publish in such form and manner as may be prescribed a list of contesting candidates, that is to say, candidates who were included in the list of validly nominated candidates and who have not withdrawn their candidature within the said period.
>
> (2) For the purpose of listing the names under sub- section (1), the candidates shall be classified as follows, namely:-
>
> (i) candidates of recognised political parties;
>
> (ii) candidates of registered political parties other than those mentioned in clause (i);
>
> (iii) other candidates.
>
> (3) The categories mentioned in sub- section (2) shall be arranged in the order specified therein and the names of candidates in each category shall be arranged in alphabetical order and the addresses of the contesting

candidates as given in the nomination papers together with such other particulars as may be prescribed."

16. Section 38, thus, provides that immediately after the expiry of the period within which candidatures may be withdrawn, the returning officer is to prepare and publish a list of contesting candidates, that is to say, candidates who were included in the list of validly nominated candidates and who have not withdrawn their candidature within the said period. The candidates who survive the date of the withdrawal of candidatures are described in Section 38 as 'contesting candidates'. The list of contesting candidates prepared and published by the returning officer contains the names of the contesting candidates in alphabetical order and the addresses of the contesting candidates as given in the nomination papers together with such other particulars as may be prescribed.

17. Part V, Chapter III of the 1951 Act deals with the general procedure at elections. Section 52, after amendment in 1996, deals with the situation of a death of a candidate of a recognized political party before poll. It reads as follows :

"S.-52. - Death of a candidate of a recognized political party before the poll.— (1) If a candidate set up by a recognised political party,-

(a) dies at any time after 11 A. M. on the last date for making nominations and his nomination is found valid on scrutiny under section 36; or

(b) whose nomination has been found valid on scrutiny under section 36 and who has not withdrawn his candidature under section 37, dies, and in either case, a report of his death is received at any time before the publication of the list of contesting candidates under section 38; or

(c) dies as a contesting candidate and a report of his death is received before the commencement of the

poll, the returning officer shall, upon being satisfied about the fact of the death of the candidate, by order, announce an adjournment of the poll to a date to be notified later and report the fact to the Election Commission and also to the appropriate authority:

Provided that no order for adjourning a poll should be made in a case referred to in clause (a) except after the scrutiny of all the nominations including the nomination of the deceased candidate.

(2) The Election Commission shall, on receipt of a report from the returning officer under sub- section (1), call upon the recognised political party, whose candidate has died; to nominate another candidate for the said poll within seven days of issue of such notice to such recognised political party and the provisions of sections 30 to 37 shall, so far as may be, apply in relation to such nomination as they would apply to other nominations: Provided that n person who has given a notice of withdrawal of h s candidature under sub- section (1) of section 37

efore the adjournment of the poll shall be ineligible for being nominated as a candidate for the election after such adjournment.

(3) Where a list of contesting candidates had been published under section 38 before the adjournment of the poll under sub- section (1), the returning officer shall again prepare and publish a fresh list of contesting candidates under that section so as to include the name of the candidate who has been validly nominated under sub-section (2).

Explanation.- For the purposes of this section, sections 33 and 38," recognised political party", means a political party recognised by the Election Commission under the

Election Symbols (Reservation and Allotment) Order, 1968."

18. There is no provision other than Section 52 in the 1951 Act which provides for the consequences following the death of a candidate after the publication of list of contesting candidates under Section 38 and before poll. The Conduct of Elections Rules, 1961 (for short, '1961 Rules') also do not provide for such contingency. Mr. Mukul Rohatgi, learned senior counsel for the election petitioner, however, heavily relied upon certain instructions contained in the Handbook for Returning Officers (at elections where electronic voting machines are used) issued by the Election Commission of India in 2009 (for short, 'the Handbook'). He referred to paragraphs 4.14 and 4.15 which deal with commissioning of machines, paragraph 6.1 that deals with preparation of ballot unit and paragraphs 8.1 and 8.2 which provide for masking of candidates' buttons which are not to be used. Mr. Mukul Rohatgi also referred to a decision of Allahabad High Court in *Madan Gopal* v. *Nek Ram Sharma*[1] underlying philosophy of law in the case of death of a contesting candidate before poll. Learned senior counsel submitted that the law contemplates living person, and not a dead person, to be a contesting candidate and, therefore, it was obligatory on the part of the returning officer to erase or mask the name of Akhila Kumar Mohanta—an independent candidate—who died after the publication of the list of the contesting candidates but before poll and whose death was notified to the returning officer well in advance. He submitted that the margin of difference of votes between the returned candidate and the election petitioner was only 145 votes and had 550 votes not been cast in favour of the deceased candidate, the result of the election would have been otherwise.

19. We are unable to accept the submission of Mr. Mukul Rohatgi. In long line of cases beginning from 1952 this Court has stated time and again that right to contest election or to

1. 25 ELR .

question the election by means of the election petition is neither common law nor fundamental right. Instead, it is a statutory right regulated by the statutory provisions contained in the 1951 Act. The 1951 Act is complete and self-contained code within which the rights claimed in relation to an election or election dispute must be found. It is not necessary to refer to all such decisions in this regard but reference to few of them, namely, *N.P. Ponnuswami v. The Returning Officer, Namakkal Constituency, Namakkal, Salem Dist. and Others*[2], *Jagan Nath v. Jaswant Singh and Others*[3], *Jyoti Basu & others v. Debi Ghosal and Others*[4], *Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi*[5] and *Chandra Kishore Jha v. Mahavir Prasad and Others*[6] shall suffice.

20. There is no doubt that only living persons can offer themselves or be offered as candidates for membership of Parliament or State Legislatures. However, once nomination has been filed by a candidate and on scrutiny his candidature is found proper and before the expiry of the period of the withdrawal, he has not withdrawn his candidature and his name is included in the list of validly nominated candidates prepared under Section 38 of the 1951 Act and Rule 11 of the 1961 Rules, if death of a contesting candidate as defined in Section 38 takes place, the consequences following the death of such contesting candidate have to be found from electoral law contained in 1951 Act or the rules framed thereunder. Section 52, after its substitution by Act 21 of 1996, takes cognizance of a death of a candidate of the recognized political party before poll and not the other two categories of the candidates classified in Section 38, namely (one) candidates of registered political parties other than the candidates of recognized political parties and (two) other candidates (which includes independent

2. AIR 1952 SC 64.
3. AIR 1954 SC 210.
4. (1982) 1 SCC 691.
5. 1987 (supp) SCC 93.
6. (1999) 8 SCC 266.

candidates). Section 52 in its original form in 1951 Act was as follows:-

> *"S.-52. Death of Candidate before poll.* – If a candidate who has been duly nominated under this Act dies after the date fixed for the scrutiny of nominations and a report of his death is received by the Returning Officer before the commencement of the poll, the Returning Officer shall, upon being satisfied of the fact of the death of the candidate, countermand the poll and report the fact to the Election Commission and also to the appropriate authority and all proceedings with reference to the election shall be commenced anew in all respects as if for a new election:
>
> Provided that no further nomination shall be necessary in the case of a candidate whose nomination was valid at the time of the countermanding of the poll :
>
> Provided further that no person who has under sub-section (1) of Section 37 given a notice of withdrawal of his candidature before the countermanding of the poll shall be ineligible for being nominated as a candidate for the election after such countermanding".

21. According to the original provision contained in Section 52, the consequence of the death of a candidate duly nominated after the scrutiny of nomination form was countermand of the poll. However, this provision was substituted by Act 2 of 1992. On substitution by Act 2 of 1992, Section 52 read as follows:

> *"S. 52. Death of candidate before the poll.* - If a candidate, set up by a recognised political party,-
>
> (a) dies at any time after 11 A. M. on the last date for making nominations and his nomination is found valid on scrutiny under section 36; or
>
> (b)whose nomination has been found valid on scrutiny

> under section 36 and who has not withdrawn his candidature under section 37, dies, and in either case, a report of his death is received at any time before the publication of the list of contesting candidates under section 38; or
>
> (c) dies as a contesting candidate and a report of his death is received before the commencement of the poll, the returning officer shall, upon being satisfied about the fact of the death of the candidate, by order, countermand the poll and report the fact to the Election Commission and also to the appropriate authority and all proceedings with reference to the election shall be commenced anew in all respects as if for a new election:
>
> Provided that no order for countermanding a poll should be made in a case referred to in clause (a) except after the scrutiny of all the nominations including the nomination of the deceased candidate.
>
> Provided further that no further nomination shall be necessary in the case of a person who was a contesting candidate at the time of the countermanding of the poll:
>
> Provided also that no person who has given a notice of withdrawal of his candidature under sub-section (1) of Section 37 before the countermanding of the poll shall be ineligible for being nominated as a candidate for the election after such countermanding.
>
> Explanation. – For the purposes of this section, 'recognised political party' means a political party recognized by the Election Commission under the Election Symbols (Reservation and Allotment) Order, 1968".

22. A significant departure was thus made from the original Section 52 concerning the death of a candidate before the poll. On death of a candidate set up by recognized political party, the consequence of countermand of the poll was provided in

three situations set out therein namely; (a) a candidate dies at any time after 11 a.m. on the last date for making nominations and his nomination is found valid on scrutiny under Section 36; or (b) a candidate whose nomination has been found valid on scrutiny under Section 36 and who has not withdrawn his candidature under Section 37, dies and (c) a candidate dies as contesting candidate before the commencement of the poll. Section 52 substituted by Act 2 of 1992 provided that in any of the above situations, the returning officer upon being satisfied about the death of the candidate shall countermand the poll.

23. Section 52 which was brought in the 1951 Act by Act 2 of 1992 was further substituted by Act 21 of 1996. The substituted Section 52 by Act 21 of 1996 has already been quoted above. The provision in 1951 Act now existing takes cognizance of the death of a candidate of recognized political party before poll only in three situations as were brought by Act 2 of 1992. The significant change brought in law by 1996 amendment is that the death of a candidate of a recognized political party before poll in three situations set out in clauses (a), (b) and (c) results in adjournment of the poll to a date to be notified later and not countermand of the poll. Proviso that follows sub-section (1) of Section 52 provides that no order for adjourning poll shall be made in a case if a candidate set up by a recognized political party dies at any time after 11.00 a.m. on the last date for making nomination and his nomination is found valid on scrutiny under Section 36 except after the scrutiny of all the nominations including the nomination of the deceased candidate. Sub-section (2) of Section 52 provides that the Election Commission shall on receipt of the report of the returning officer call upon the recognized political party to nominate another candidate in place of the deceased candidate for the said poll within seven days of issue of such notice. Sections 30 to 37 shall apply in relation to such nomination as far as applicable. According to sub-section (3) in a situation where list of contesting candidates had been published under Section 38 before the adjournment of the poll under sub-section (1), the returning officer shall again prepare

and publish a fresh list of contesting candidates under that section so as to include the name of the candidate who has been validly nominated under sub-section (2). Section 52 takes care of the situation in case of death of a candidate of recognized political party before poll. However, the electoral law as enacted in 1951 Act does not contemplate cognizance of the death of an independent candidate after publication of list of contesting candidates in Section 38. Section 52 enjoins that if a candidate set up by recognized political party dies before the poll, the poll must be adjourned; it does not provide any obligation on the returning officer if a candidate of a registered political party other than recognized political party or an independent candidate dies after the list of the contesting candidates as defined in Section 38 is published.

24. We shall now consider the instructions provided in the Handbook, particularly paragraphs 4.14, 4.15, 6.1. 8.1 and 8.2 of Chapter XII relied upon by Mr. Mukul Rohatgi, learned senior counsel for the election petitioner. Chapter XII of the Handbook deals with preparation for the poll, particularly commissioning of EVMs. Paragraphs 4.14, 4.15, 6.1, 8.1 and 8.2 read as follows:-

> "4.14. Before a voting machine is supplied to a Presiding Officer for use at a polling station, some preparations, as detailed below, are to be made in it at your level. These preparations have to be made in the presence of the candidates and/or their agents.
>
> 4.15 You should decide well in advance as to when the voting machines shall be prepared as aforesaid. This will depend on the number of machines to be prepared, the time required for the movement of polling parties with the voting machines to the polling stations, the time likely to be taken in the printing of ballot papers for use on the ballot units and such other factors. In any case, all required EVMs must be duly prepared (i.e. commissioned) one week before the date of poll in the Constituencies.

6.1 Each ballot unit has to be prepared at the Returning Officer's level by: -

(A) Inserting and fixing ballot paper in the space meant for the purpose;

(B) Masking the candidate's buttons which are not required to be used, depending on the number of contesting candidates;

(C) Setting the slide switch at the appropriate position, i.e. , 1, 2, 3 or 4, as the case may be, according to the number of such units which are to be used depending upon the number of contesting candidates and the sequence in which each unit is to be used, and

(D) Sealing the unit (detailed step-by-step operations during sealing of EVM may be seen at Annexure XXX).

8.1 On the ballot unit, only those candidate's buttons should be visible which are to be used by voters. In other words, the number of candidate's buttons, which should be visible, will be equal to the number of contesting candidates. For example, if the number of candidates is nine, the first nine from the top (i.e., 1 to 9) candidates' buttons should be visible and the remaining seven buttons (i.e., 10 to 16) should be masked.

8.2 The masking of the unwanted buttons can be done by moving the white masking tabs on to the candidate's buttons, when the ballot unit is open like a book as explained in Para 7 above".

25. We do not think paragraphs 4.14, 4.15 and 6.1 have much relevance. Paragraphs 4.14 and 4.15 basically provide that requisite EVMs must be prepared one week before the poll in the Constituencies. Each EVM has to be prepared at the returning officer's level in the manner provided in paragraph 6.1. The emphasis of the learned counsel was on paragraph 8.1 which states that on ballot unit only those candidates' buttons should be visible which are to be used by voters and remaining

buttons should be masked. A careful reading of paragraph 8.1 would show that the number of candidates' buttons which should be visible should be equal to the number of contesting candidates and the remaining buttons must be masked. The expression "contesting candidates" in paragraph 8.1 has to be given the same meaning as the contesting candidates defined in Section 38 of 1951 Act. No other meaning to the expression "contesting candidates" can be given. In other words, the number of candidates' buttons which should be visible on EVM should be equal to the number of candidates as published in the list of validly nominated candidates who have not withdrawn the candidature within the period prescribed and whose nominations are included in the list published under Section 38. In this view of the matter, there was no duty imposed on the returning officer to mask the name of the candidate at Sl. no. 9, Akhila Kumar Mohanta, who was an independent candidate and who died on April 13, 2009 after publication of list of validly nominated candidates being a contesting candidate as defined in Section 38. Moreover, the instructions in the Handbook are only guidelines. These instructions have no statutory force. In a recent decision of this Court in *Ramesh Rout vs. Rabindra Nath Rout*[7] one of us (R.M. Lodha, J.) speaking for the Bench observed as follows:

> "14. . . . . The handbook, as it states, has been designed to give to the Returning Officers the information and guidance which they may need in performance of their functions; to acquaint them with up-to-date rules and procedures prescribed for the conduct of elections and to ensure that there is no scope for complaint of partiality on the part of any official involved in the election management. We shall refer to the relevant provisions of the handbook a little later. The handbook does not have statutory character and is in the nature of guidance to the Returning Officers".

26. In view of the above legal position that the Handbook

7. 2012 (1) SCC 762.

does not have statutory character and there being no non-compliance with the provisions of the Constitution or the 1951 Act or any rules framed or orders made under 1951 Act by the returning officer insofar as death of an independent candidate was concerned, the averments made in paragraph 7(A) of the election petition do not furnish any cause of action for declaring the election of the returned candidate to be void under Section 100(1)(d)(iv). The High Court seriously erred in holding otherwise and ordering trial of the election petition on the pleadings set out in paragraph 7(A).

27. The next question remains to be seen is whether the pleadings in paragraph 7(D) set out the material facts to constitute cause of action under Section 100 (1)(d)(iii) and/or (iv) of 1951 Act.

28. Paragraph 7(D) of the election petition read as under:

"7(D). The petitioner further gives a concise statement of material fact exposing a glaring instance of illegality deliberately committed by the counting personnels while recording the counting figure in Form-20 with respect to Booth No. 179, Urdu Madrasa Champua Alinagar Booth. The total number of voters as recorded in the Electoral Roll with respect to Booth No. 179 is 1109. Whereas in Form-17C, certified copy, deliberately this figure has been shown wrongly as 1091. On the date of polling on a plain perusal of Register of Voters maintained in Form-17A, it will be abundantly clear that the total number of voters came to vote and signed 17-A Register is 1091 whereas in Form-17C certified copy, it has been deliberately shown as 772 making a deliberate suppression of 319 votes. According to the information received by the Election petitioner from his counting agents in Booth Number 179, the Election petitioner has received 462 (Four hundred sixty two) votes. The said 462 votes are to be added to the total vote of the petitioner as stated in preceeding paragraph. Thus, the petitioner has received in total 27410+73+462+02 (postal Ballots) = 27,947 and the first respondent having received

= 27700, the Election petitioner has received 247 (Two hundred forty seven) more votes than the First respondent and is entitled to be declared elected as M.L.A. from "25-CHAMPUA" Assembly Constituency to Orissa State Legislative Assembly".

29. Mr. Mukul Rohatgi, learned senior counsel for the election petitioner submitted that the above pleadings are in two parts. The first part relates to suppression of 319 votes. This part begins with the start of paragraph 7(D) and ends with '…….suppression of 319 votes'. The second part relates to addition of 462 votes which is remaining part of paragraph 7(D). He would submit that all material facts concerning deliberate suppression of 319 votes have been pleaded in paragraph 7(D) and these facts constitute cause of action for declaring the election of the returned candidate to be void.

30. Order VI Rule 2 of CPC, to the extent it is relevant, reads as under :

"O. VI Rule 2. Pleading to state material facts and not evidence.— (1) Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved.

(2) xxx xxx xxx

(3) xxx xxx xxx"

31. Section 83(1)(a) of the 1951 Act is as follows :

"S. 83. Contents of petition.—(1) An election petition—

(a) shall contain a concise statement of the material facts on which the petitioner relies;"

32. A bare perusal of the above provisions would show that the first part of Order VI Rule 2, CPC is similar to clause 1(a) of Section 83 of the 1951 Act. It is imperative for an election petition to contain a concise statement of the material facts on which the election petitioner relies. What are material facts? All

basic and primary facts which must be proved at the trial by a party to establish the existence of cause of action or defence are material facts. The bare allegations are never treated as material facts. The material facts are such facts which afford a basis for the allegations made in the election petition. The meaning of 'material facts' has been explained by this Court on more than one occasion. Without multiplying the authorities, reference to one of the later decisions of this Court in *Virender Nath Gautam v. Satpal Singh and others*[8] shall suffice.

33. In *Virender Nath Gautam*[8], this Court referred to the leading case of *Philipps v. Philipps and Others*[9] and the subsequent decision in *Bruce v. Odhams Press Limited*[10] that referred to *Philipps*[9] and observed in paragraphs 34 and 35 (Pg. 629) of the Report as follows:

> "34. A distinction between "material facts" and "particulars", however, must not be overlooked. "Material facts" are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. "Particulars", on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. "Particulars" thus ensure conduct of fair trial and would not take the opposite party by surprise.

35. All "material facts" must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars,

8. 2007 (3) SCC 617.

9. (1878) 4 Q.B.D. 127.

10. (1936) 1 K.B. 697.

on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial."

34. Whether the averments in the election petition constitute material facts or not would depend upon facts of each case. As stated by this Court in *Virender Nath Gautam*[8], no rule of universal application can be applied in finding out whether the statements of fact made in the election petition amount to material facts or not. It is, therefore, necessary to consider the pleadings with regard to suppression of 319 votes in paragraph 7(D) of the election petition.

35. A close analysis of first part of paragraph 7(D) of the election petition would show that the statements comprise of the following facts :

- Illegality deliberately committed by the counting personnels while recording the counting figure in Form-20 with respect to Booth No. 179.
- The total number of voters as recorded in the electoral roll with respect to Booth No. 179 is 1109.
- Whereas in Form-17C, certified copy, deliberately this figure has been shown wrongly as 1091.
- On the date of polling, on a plain perusal of register of voters maintained in Form-17A, it will be abundantly clear that the total number of voters came to vote and signed 17-A register is 1091; whereas in Form-17C, it has been deliberately shown as 772 making a deliberate suppression of 319 votes.

36. Before we discuss the above pleadings further, it may be stated immediately that register of voters in Form-17A is not available for inspection. Rule 93 of the 1961 Rules provides for the production and inspection of election papers. Clause (dd) of Rule 93(1) makes a provision that the packets containing register of voters in Form 17A, while in the custody of the district election officer or the returning officer, as the case may be, shall not be opened and their contents shall not be

inspected by, or produced before, any person or authority except under the order of a competent court.

37. We now revert back to the pleadings set out in paragraph 7(D) as analysed above. There is no averment that the election petitioner or any of his polling agents had perused the register of voters maintained in Form 17A. The basis of the knowledge that the register of voters maintained in Form 17A records that 1091 voters came to vote is not disclosed at all. Moreover, there is no pleading that 1091 voters who came to vote at Booth No. 179 in fact voted. There is no merit in the contention of Mr. Mukul Rohatgi that the facts stated in paragraph 7(D) with regard to Form 17A shall be established at the trial after Form 17A is summoned by the Court. We are afraid such fanciful imagination of proof at the trial cannot be a substitute of the pleading of material facts about the total number of voters who came to vote and in fact voted at Booth No. 179.

38. The averment that in Form-17C, certified copy, it has been deliberately shown as 772 making a deliberate suppression of 319 votes hardly improves the pleading in the election petition. There is no averment that the election petitioner or his agents challenged part II of Form-17C before authorities. At least, there are no facts pleaded concerning that. There is no pleading that there was any challenge by the election petitioner or his agents in respect of the counting figure in Form-20. The only pleading is that the illegality has been deliberately committed by the counting personnels while recording the counting figure in Form-20 with respect to Booth No. 179. There is, thus, no disclosure of material facts in respect of the challenge to the correctness of Form-20 and Form-17C.

39. The pleading of material facts with regard to suppression of 319 votes in paragraph 7(D) is also incomplete as it has not been disclosed who suppressed 319 votes; who was the counting agent present on behalf of the election petitioner at the time of counting; how 319 votes were suppressed and why recounting was not demanded. Moreover,

there is no express pleading as to how the result of the election has been materially affected by less counting of 319 votes.

40. In *Samant N. Balkrishna and Another v. George Fernandez and Others*[11] while dealing with the requirement in an election petition as to the statement of material facts and the consequences of lack of such disclosure, this Court, inter alia, exposited the legal position that omission of even a single material fact leads to an incomplete cause of action and statement of claim becomes bad.

41. The other part of paragraph 7(D) relating to 462 votes is based on the preceding paragraph. The preceding paragraph i.e., 7(C) has been already struck out by the High Court. Therefore, the pleadings in paragraph 7(D) in respect of 462 votes do not survive as it is.

42. In view of the above, we have no hesitation in holding that the averments made in paragraph 7(D) do not set out all the material facts and do not afford an adequate basis for the allegations made therein. The allegations in paragraph 7(D) for the reasons noted above do not constitute cause of action for declaring election of the returned candidate to be void.

43. The High Court has already struck out paragraphs 7(B), 7(C), 7(E), 7(F) and 7(G). The remaining two paragraphs 7(A) and 7(D), as noted above, do not disclose any cause of action and are liable to be struck out. After striking out paragraphs 7(A) and 7(D), we find that nothing remains in the election petition for trial and, therefore, election petition is liable to be rejected in its entirety.

44. In the circumstances, the appeal has to be allowed and is allowed. We do so without any order as to costs.

R.P. Appeal allowed.

SAMPATH KUMAR

v.

INSPECTOR OF POLICE, KRISHNAGIRI

11. 1969 (3) SCC 238.

(Criminal Appeal No. 1950 of 2009 etc.)

MARCH 2, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 - s 302 r/w s. 34 - Murder - Prosecution for - No eye-witness - Conviction by courts below - Based on ocular testimony of a witness and motive - Held: Conviction not justified - Evidence of the witness being in contrast with his police statement and not having independent corroboration, not reliable - Motive by itself cannot be a ground for conviction - However, in the facts of the case, even motive did not survive.

Evidence - Circumstantial evidence - Motive - Evidentiary value - Held: Motive by itself cannot be basis for conviction.

Criminal Trial - Discrepancies and contradictions in evidence - Distinction between.

The appellants-accused were prosecuted for having caused death of one person. There was no eye-witness to the incident. The prosecution case was that the deceased had a love affair with the sister of one of the accused which was not approved by two of the accused. The trial court convicted all the three accused relying on the testimony of PW7 who stated that on the night of the occurrence, he was sleeping with the deceased, and on hearing a sound, when he woke up, he saw the accused persons there. Trial court also based the conviction on motive. High Court upheld the conviction. Hence the present appeals.

Allowing the appeals, the Court

HELD: 1. The prosecution has not proved its case against the appellants. They are entitled to acquittal

giving them the benefit of doubt. The prosecution relies entirely upon the deposition of PWs. 1, 2, 3 and 7. Of these depositions PWs. 1, 2 and 3 are not admittedly eye-witnesses to the occurrence, nor have they stated anything against the appellants except that the deceased was fond of sister of one of the accused and wanted to marry her, which was not to the liking of her brother. [Paras 16 and 8]

2. The statement made by PW7 is in complete contrast with the statement made by him before the Police where the witness stated nothing about having seen the appellants standing near the deceased around the time of the incident. This omission is of very vital character. What affects the credibility of the witness is that he did not in his version to the police come out with what according him was the truth, but withheld it for a period of five years till he was examined as a prosecution witness in the court. Reliance upon the deposition of a witness who has made such a material improvement in his version is wholly unsafe unless it is corroborated by some other independent evidence that may probabilize his version. PW 7 is not a chance witness who had no reason to be found near the deceased at the time of the occurrence. What makes it suspect is that the witness has, despite being a natural witness, made a substantial improvement in the version without there being any acceptable explanation for his silence in regard to the fact and matters which was in his knowledge and which would make all the difference in the case. The Court would, therefore, look for independent corroboration to his version, which corroboration is not forthcoming. All that is brought on record by the prosecution is the presence of a strong motive but that by itself is not enough to support a conviction especially in a case where the sentence can be capital punishment. [Paras 13, 8 and 14]

Sharad Birdhichand Sarda v. State of Maharashtra **(1984) 4 SCC 116: 1985 (1) SCR 88;** *Aftab Ahmad Ansari v. State of Uttaranchal* **(2010) 2 SCC 583: 2010 (1) SCR 1027;** *Narayan Chetanram Chaudhary and Anr. v. State of Maharashtra* **AIR 2000 SC 3352:2000 (3) Suppl. SCR 104;** *State of Himachal Pradesh v. Lekh Raj and Anr.* **AIR 1999 SC 3916 :1999 (4) Suppl. SCR 286;** *State of Haryana v. Gurdial Singh and Pargat Singh* **AIR 1974 SC 1871: 1974 (3) SCR 6;** *Kehar Singh and Ors. v. State Delhi Administration* **AIR 1988 SC 1883: 1988 (2) Suppl. SCR 24 - relied on.**

3. Although, according to the appellants the question of one the appellants having the motive to harm the deceased for falling in love with his sister, did not survive once the family had decided to offer her in matrimony to the deceased. Yet even assuming that the appellant had a motive for physically harming the deceased, that may be an important circumstance in a case based on circumstantial evidence but cannot take the place of conclusive proof that the person concerned was the author of the crime. One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the appellant but suspicion, howsoever strong, also cannot be a substitute for proof of the guilt of the accused beyond a reasonable doubt. [Para 15]

N.J. Suraj v. State represented by Inspector of Police **(2004) 11 SCC346;** *Santosh Kumar Singh v. State through CBI.* **(2010) 9 SCC 747: 2010 (13) SCR 901;** *Rukia Begum v. State of Karnataka* **AIR 2011 SC 1585: 2011 (4) SCR 711;** *Sunil Rai @ Paua and Ors. v. Union Territory, Chandigarh* **AIR 2011 SC 2545- relied on.**

Vadivelu Thevar v. The State of Madras **AIR 1957 SC 614: 1957 SCR981;** *Lallu Manjhi v. State of Jharkhand* **AIR 2003 SC 854: 2003 (1) SCR 1 - referred to.**

Case Law Reference:

1985 (1) SCR 88	**Relied on**	**Para 6**
2010 (1) SCR 1027	**Relied on**	**Para 7**
2000 (3) Suppl. SCR 104	**Relied on**	**Para 9**
1999 (4) Suppl. SCR 286	**Relied on**	**Para 10**
1974 (3) SCR 6	**Relied on**	**Para 10**
1988 (2) Suppl. SCR 24	**Relied on**	**Para 11**
1957 SCR 981	**Referred to**	**Para 12**
2003 (1) SCR 1	**Referred to**	**Para 13**
2004 (11) SCC 346	**Relied on**	**Para 14**
2010 (13) SCR 901	**Relied on**	**Para 14**
2011 (4) SCR 711	**Relied on**	**Para 14**
AIR 2011 SC 2545	**Relied on**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1950 of 2009 etc.

From the Judgment & Order dated 30.04.2009 of the High Court of Judicature at Madras in Criminal Appeal No. 1008 of 2007.

WITH

Crl. A. Nos. 1205 & 66 of 2010.

K. Kanagaraj, P. Ramesh, Y. Arunagiri, Rakesh K. Sharma, P. Vinay Kumar, V. Ramasubramaninan for the Appellant.

M. Anbalagan (for B. Balaji) for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. These appeals by special leave call in question the correctness of an order dated 30th April 2009 passed by the High Court of Madras, whereby Criminal Appeal No. 1008 of 2007 filed by the appellants against their conviction under Section 302 read with Section 34 IPC has been dismissed and the sentence of imprisonment for life awarded to them by the trial Court upheld.

2. Briefly stated, the prosecution case is as under: The appellants, namely, Shanmugam, Velu and Sampath Kumar were close friends of the deceased-Senthil Kumar and Palani (PW7). Appellant-Velu has a younger sister, named, Usha who, according to the prosecution story, had fallen in love with the deceased-Senthil Kumar and wanted to marry him. Appellant-Velu did not approve of the said relationship and had asked appellant-Shanmugan to convey to the deceased-Senthil Kumar to keep off Usha or else he would break his hands and legs. In July 2002, appellant-Velu appears to have come on leave from his army services and during this period he and his mother-Balammal are said to have informed Murugambal (PW2)- mother of the deceased, sister-Lakshmi (PW3) and her husband-Selvam (PW1) that they had decided to give Usha in marriage to the deceased-Senthil Kumar. Further discussion regarding the marriage was, however, deferred till the passing of the Tamil month Adi, considered inauspicious for finalisation of matrimonial alliance. On 27th July, 2002 i.e. two days after the marriage proposal was made, Ramesh (PW9) was employed to paint the house of Lakshmi (PW3) when he saw the deceased-Senthil Kumar and Usha embracing one another in one of the rooms of the house. According to Ramesh (PW9), even the appellant-Shanmugam saw Usha and Senthil Kumar in a romantic embrace. The appellant-Shanmugam was also, according to the prosecution, one of the suitors of Usha and had a one-sided affection for her. On the following day, i.e. 28th July, 2002 PWs. 1 to 3, their neighbour and the appellant-

Shanmugam went to a theatre to see a movie and retuned home around 9.30 p.m. While Selvam (PW1), Murugambal (PW2) and Lakshmi (PW3) retired to bed inside the house after dinner, the deceased-Senthil Kumar and Palani (PW7) slept as usual in the verandah of the house. The appellant-Shanmugam also used to sleep with them but for some reason he did not turn up to do so on that day. At about 2.45 a.m. on the night intervening 28th and 29th July, 2002, Palani (PW7) heard the sound of a stone being thrown. He woke up to see the appellant-Shanmugam standing near the head of the deceased and the remaining two appellants also standing close by. The prosecution case is that Palani (PW7) was threatened by the appellants not to disclose to anyone regarding anything for otherwise they would kill him also. At this, Palani (PW7) shouted and ran to hide himself on the rear side of the house. In the meantime, PWs 1 to 3 who were sleeping inside the house also awoke upon hearing the noise and started shouting for help. This woke up their neighbour (PW8) in the opposite house who went over to the house and opened the door to help them come out. PWs 1 and 8 then went to the rear side of the house to find the appellant-Shanmugam lying beside a plantain tree with his hands tied with a cloth. It was also noticed on removing the blanket covering the deceased that someone had smashed his head with a stone which was lying at his side. When the appellant-Shanmugam was asked as to who had beaten him and thrown him behind the house, he stated that it was some stranger who had done so. Senthil was rushed to the hospital but died en-route. Selvam (PW1) went to the police station and lodged an oral complaint. The police registered a case under Sections 302 and 324 IPC.

3. After completion of the investigation the police filed a charge-sheet against the appellants accusing them of committing the murder of Senthil Kumar. The appellants were then committed to the Sessions Judge, where they pleaded not guilty and claimed trial. At the trial the prosecution examined as many as 18 witnesses to prove its case. The Sessions

Judge eventually came to the conclusion that the prosecution had proved its case beyond a reasonable doubt and accordingly convicted the appellants for the murder of the deceased-Senthil Kumar and sentenced them to undergo imprisonment for life under Section 302 read with Section 34 IPC. They were also sentenced to pay a fine of Rs.2,000/- each and in default of payment of fine, to undergo further rigorous imprisonment for two years. The Sessions Judge based his conviction primarily on the strong motive which appellants Shanmugam and Velu had to do away with the deceased due to his love affair with Usha. The Sessions Judge relied heavily upon the deposition of Palani (PW7) and the letter Exh. P-22 allegedly written by appellant-Shanmugam to the mother of the deceased, Murugambal (PW2) accusing appellant-Velu to be the person responsible for the death of the deceased.

4. Aggrieved by their conviction and sentence imposed upon them, the accused person preferred Criminal Appeal No.1008/2007 before the High Court of Madras which appeal has been dismissed thereby confirming the conviction and sentence recorded by the trial Court. The High Court held that while the deposition of Palani (PW7) was reliable, letter Exh. P-22 allegedly written by the appellant-Shanmugam to the mother of the deceased, Murugambal (PW2) was not. The confessional statement was held to be inadmissible having been produced after the statement of the accused persons had been recorded under Section 313 Cr.P.C. Independent of the said document, the High Court felt that the evidence on record formed a complete chain of circumstances that unerringly pointed to the guilt of the appellants. The present appeals assail the correctness of the said judgment as noticed above.

5. Mr. K. Kanagaraj, learned senior counsel for the appellant strenuously argued that the trial Court as also the High Court had fallen in error in holding that the charge against the appellants had been proved beyond a reasonable doubt. He urged that the entire case was based on circumstantial

evidence and that the courts below had failed to keep in view the legal requirements attracted to cases that are based on circumstantial evidence. He further argued that the deposition of Palani (PW7) was not reliable for reasons more than one and the trial Court as also the High Court had committed an error in ignoring those reasons. The fact that there was a motive, assuming that any such motive had been established in the present case, was also not sufficient by itself to justify the conclusion that the appellants were responsible for the murder of the deceased.

6. The legal position regarding the standard of proof and the test which the circumstantial evidence must satisfy is well-settled by a long line of decisions of this Court. It is unnecessary to burden this judgment by making reference to all such decisions. We are content with reference to some of those decisions. In *Sharad Birdhichand Sarda v. State of Maharashtra* (1984) 4 SCC 116, this Court laid down the following five tests to be satisfied in a case based on circumstantial evidence:

> "(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> (2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
>
> (3) The circumstances should be of a conclusive nature and tendency.
>
> (4) They should exclude every possible hypothesis except the one to be proved, and
>
> (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must

show that in all human probability the act must have been done by the accused."

7. The decision of this Court in *Aftab Ahmad Ansari v. State of Uttaranchal* (2010) 2 SCC 583 is a timely reminder of the abovementioned requirements in the following words:

"In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the court hould consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts, by itself/themselves, is/are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be."

8. Coming to the facts of the present case, the prosecution relies entirely upon the deposition of PWs. 1, 2, 3 and 7. Of these depositions PWs. 1, 2 and 3 are not admittedly eye-witnesses to the occurrence, nor have they stated anything against the appellants except that the deceased was fond of Usha and wanted to marry her which was not to the liking of her brother-Velu, the appellant before us. It is only the deposition of Palani (PW7) that holds the key to whether the appellants are guilty or innocent. According to this witness who was sleeping with the deceased in the verandah of the house of PWs 1 to 3, at about 2.45 a.m. at night he heard a sound that woke him up. He also noticed the appellants standing near the deceased. According to the witness, the appellants threatened him not to disclose anything to anyone otherwise he would meet

the same fate. The witness, however, made no disclosure to PWs. 1, 2 and 3 who were inside the house, even when they had been woken up because of the sound and wanted to come out but could not because the door was bolted from outside. He made no disclosure of what he had seen even after the police had arrived at the scene after the registration of the case. In his statement before the police under Section 161 Cr.P.C., Palani (PW7) made no such accusations against the appellants nor did he disclose to anyone that he had seen the accused persons on the spot around the time of the commission of the offence. It was only five years after the occurrence that the witness for the first time disclosed in the Court the story about his having seen the appellants standing near the deceased when the former woke up on account of the noise of a stone falling hard on the ground. The witness did not offer any explanation, much less a cogent and acceptable one for his silence for such a long period. His assertion that he was scared by the appellants even after they had been taken into custody by the police and, therefore, did not reveal anything about the actual events till he had the courage to come to the Court to make a statement, is hard to believe. At any rate, reliance upon the deposition of a witness who has made such a material improvement in his version is wholly unsafe unless it is corroborated by some other independent evidence that may probabilize his version.

9. In *Narayan Chetanram Chaudhary & Anr. v. State of Maharashtra* (AIR 2000 SC 3352), this Court held that while discrepancies in the testimony of a witness which may be caused by memory lapses were acceptable, contradictions in the testimony were not. This Court observed:

"Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the

Court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution become doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person."

10. The difference between discrepancies and contradictions was explained by this Court in *State of Himachal Pradesh v. Lekh Raj and Anr.* (AIR 1999 SC 3916). Reference may also be made to the decision of this Court in *State of Haryana v. Gurdial Singh & Pargat Singh* (AIR 1974 SC 1871), where the prosecution witness had come out with two inconsistent versions of the occurrence. One of these versions was given in the Court while the other was contained in the statement made before the Police. This Court held that these are contradictory versions on which the conclusion of fact could not be safely based. This Court observed:

"The present is a case wherein the prosecution witnesses have come out with two inconsistent versions of the occurrence. One version of the occurrence is contained in the evidence of the witnesses in court, while the other version is contained in their statements made before the police...In view of these contradictory versions, the High Court, in our opinion, rightly came to the conclusion that the conviction of the accused could not be sustained."

11. Reference may also be made to the decision of this Court in *Kehar Singh and Ors. v. State (Delhi Administration)* AIR 1988 SC 1883. This Court held that if the discrepancies between the first version and the evidence in Court were material, it was safer to err in acquitting than in convicting the accused.

12. In the present case the statement made by Palani (PW7) is in complete contrast with the statement made by him before the Police where the witness stated nothing about

having seen the appellants standing near the deceased around the time of the incident. This omission is of very vital character. What affects the credibility of the witness is that he did not in his version to the police come out with what according him is the truth, but withheld it for a period of five years till he was examined as a prosecution witness in the Court. This Court in *Vadivelu Thevar v. The State of Madras* (AIR 1957 SC 614) classified witnesses into three categories, namely, (i) those that are wholly reliable, (ii) those that are wholly unreliable and (iii) who are neither wholly reliable nor wholly unreliable. In the case of the first category the Courts have no difficulty in coming to the conclusion either way. It can convict or acquit the accused on the deposition of a single witness if it is found to be fully reliable. In the second category also there is no difficulty in arriving at an appropriate conclusion for there is no question of placing any reliance upon the deposition of a wholly unreliable witness. It is only in the case of witnesses who are neither wholly reliable nor wholly unreliable that the Courts have to be circumspect and have to look for corroboration in material particulars by reliable testimony direct or circumstantial.

13. To the same effect is the decision of this Court in *Lallu Manjhi v. State of Jharkhand,* (AIR 2003 SC 854) where this Court felt that the testimony of the witness Mannu (PW9) could neither be totally discarded nor implicitly accepted. Mannu was a witness who could have been naturally present with his brother while ploughing the field. However, his testimony was found to have been improved substantially at the trial. He was considered neither wholly reliable nor wholly unreliable.

14. In the present case the testimony cannot be wholly reliable or wholly unreliable. He is not a chance witness who had no reason to be found near the deceased at the time of the occurrence. There is evidence to show that Palani (PW7) used to sleep with the deceased-Senthil in the verandah of the house. What makes it suspect is that the witness has, despite being a natural witness, made a substantial improvement in the

version without their being any acceptable explanation for his silence in regard to the fact and matters which was in his knowledge and which would make all the difference in the case. The Court would, therefore, look for independent corroboration to his version, which corroboration is not forthcoming. All that is brought on record by the prosecution is the presence of a strong motive but that by itself is not enough to support a conviction especially in a case where the sentence can be capital punishment. In *N.J. Suraj v. State represented by Inspector of Police* (2004) 11 SCC 346, the prosecution case was based entirely upon circumstantial evidence and a motive. Having discussed the circumstances relied upon by the prosecution, this Court rejected motive which was the only remaining circumstance relied upon by the prosecution stating that the presence of a motive was not enough for supporting a conviction, for it is well-settled that the chain of circumstances should be such as to lead to an irresistible conclusion, that is incompatible with the innocence of the accused. To the same effect is the decision of this Court in *Santosh Kumar Singh v. State through CBI.* (2010) 9 SCC 747 and *Rukia Begum v. State of Karnataka* AIR 2011 SC 1585 where this Court held that motive alone in the absence of any other circumstantial evidence would not be sufficient to convict the appellant. Reference may also be made to the decision of this Court in *Sunil Rai @ Paua and Ors. v. Union Territory, Chandigarh* (AIR 2011 SC 2545). This Court explained the legal position as follows :

> "In any event, motive alone can hardly be a ground for conviction. On the materials on record, there may be some suspicion against the accused but as is often said suspicion, howsoever, strong cannot take the place of proof."

15. Suffice it to say although, according to the appellants the question of the appellant-Velu having the motive to harm the deceased-Senthil for falling in love with his sister, Usha did

not survive once the family had decided to offer Usha in matrimony to the deceased-Senthil. Yet even assuming t at the appellant-Velu had not reconciled to the idea of Usha getting married to the deceased-Senthil, all that can be said was that the appellant-Velu had a motive for physically harming the deceased. That may be an important circumstance in a case based on circumstantial evidence but cannot take the place of conclusive proof that the person concerned was the author of the crime. One could even say that the presence of motive in the facts and circumstances of the case creates a strong suspicion against the appellant but suspicion, howsoever strong, also cannot be a substitute for proof of the guilt of the accused beyond a reasonable doubt.

16. In the totality of the circumstances, we are of the view that the prosecution has not proved its case against the appellants who are, in our opinion, entitled to acquittal giving them the benefit of doubt. In the result, these appeals succeed and are hereby allowed. The appellants shall stand acquitted of the charges framed against them giving them the benefit of doubt.

K.K.T. Appeals allowed.

###NEXT FILE
H.P.HOUSING & URBAN DEVT.AUTH.& ANR
v.
RANJIT SINGH RANA
(Civil Appeal No. 2751 of2012)

MARCH 12, 2012.

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

ARBITRATION AND CONCILIATION ACT, 1996:

s.31(7)(b) - Liability to pay interest for the post-award period - Held: The deposit of the award amount into the court is nothing but a payment to the credit of the decree-holder - Once the award amount was deposited into the court on a particular date, the liability of post-award interest would cease from that date.

During the pendency of the objections u/s 34(3) of the Arbitration and Conciliation Act, 1996, against the award dated 14.2.2001, the appellants on 24.5.2001, deposited before the High Court the entire amount due under the award. The objections were rejected and the appellant filed an intra-court appeal. While the appeal was still pending, the respondent, on 12.8.2008, filed an execution petition. The High Court held that the respondent was entitled to post award interest @18% p.a. from the date of the award till the date of the actual payment.

In the instant appeal, the question for consideration before the Court was: whether the deposit of the entire award amount by the appellants on 24.5.2001 into the High Court amounted to payment to the respondent and the appellants' liability to pay interest @ 18% p.a. from the date of the award ceased from that date.

Partly allowing the appeal, the Court

HELD: 1. The parties are ad idem that the arbitrator has not exercised any discretion in the matter pertaining to the interest for the post-award period. Obviously, in absence thereof, by virtue of s. 31(7)(b) of the Arbitration and Conciliation Act, 1996 the award would carry interest @ 18% p.a. from the date of the award till the date of payment. [para 9]

State of Haryana and others vs. S.L. Arora and Company **2010 (2) SCR 297 = (2010) 3 SCC 690 - relied on.**

2.1 The word 'payment' is not defined in the Act. It may have different meaning in different context but in the context of s. 31(7)(b) of the Act, it means extinguishment of liability arising under the award. It signifies satisfaction of the award. The deposit of the award amount into the court is nothing but a payment to the credit of the decree-holder. In this view, once the award amount was deposited by the appellants before the High Court on 24.5.2001, the liability of post-award interest from 24.5.2001 ceased. The High Court, thus, was not right in directing the appellants to pay interest @ 18% p.a. beyond 24.5. 2001. [para 10-11]

The Concise Oxford English Dictionary (Tenth Edition-revised); Webster Comprehensive Dictionary (International Edition) Volume two; The Law Laxicon, 2nd Edition reprint by P. Ramanatha Aiyar, inter alia - referred to.

Case Law Reference:

2010 (2) SCR 297 relied on para 8

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2751 of 2012.

From the Judgment & Order dated 05.03.2009 of the High Court of Himachal Pradesh at Shimla in CMP No. 678 of 2008 in Execution Petition No. 6 of 2008.

Y. Prabhakara Rao for the Appellants.

Binu Tamta, Dhrur Tamta for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA,J. 1. Leave granted.

2. Pursuant to the agreement between the parties being agreement No. 11 of 1989-90 concerning construction of residential complex at Shimla, certain disputes arose. As per the terms of the contract, the Arbitrator was appointed to adjudicate the claims of the respondent and counter-claims of the appellants. On August 12, 1998, the Arbitrator passed the award. Aggrieved thereby, the appellants filed objections under Section 34(3) of the Arbitrator and Conciliation Act, 1996 (for short "the Act"). The objections were accepted by the High Court to the extent that the reasons were not given by the Arbitrator and, accordingly, the matter was sent back to the Arbitrator for giving reasons in support of the award.

3. After remand, the Arbitrator considered the matter and passed the award on February 14, 2001. The appellants filed objections against the award dated February 14, 2001. They also deposited the entire amount due under the award before the High Court on May 24, 2001. The objections filed by the appellants were ultimately rejected by the single Judge of the High Court on February 26, 2008. Against this order, intra-court appeal is said to be pending. The respondent, however, started execution of the Award dated February 14, 2001 by filing Execution Petition on August 12, 2008. The appellants filed objections to the Execution Petition.

4. The question before the High Court was whether the respondent was entitled to interest @ 18% p.a. from the date of the award dated February 14, 2001 till the date of actual payment to the respondent.

5. The High Court considered the diverse provisions of the Act including Section 31(7)(a) and (b) of the Act and few decisions of this Court and ultimately held that the respondent was entitled to post-award interest @ 18% p.a. from the date of the award till the date of the actual payment. It is this order which is in appeal before us.

6. There is no dispute that the entire amount due under the Award dated February 14, 2001 was deposited by the appellants before the High Court on May 24, 2001. The question that arises for determination before us is, whether deposit of the entire award amount by the appellants on May 24, 2001 into the High Court amounts to payment to the respondent and the appellants liability to pay interest @ 18% p.a. from the date of the award ceased from that date.

7. Section 31(7)(a) and (b) of the Act reads as under:

"31(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the

whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment."

8. The above provision has been recently considered by this Court in *State of Haryana and others vs. S.L. Arora and Company* (2010)3 SCC 690. This Court held as under:

".....In a nutshell, in regard to pre-award period, interest has to be awarded as specified in the contract and in the absence of contract, as per discretion of the Arbitral Tribunal. On the other hand, in retard to the post-award period, interest is payable as per the discretion of the Arbitral Tribunal and in the absence of exercise of such discretion, at a mandatory statutory rate of 18% per annum."

This Court further observed in para 24.6 as under:

".....but if the award is silent in regard to the interest from the date of award, or does not specify the rate of interest from the date of award, then the party in whose favour an award for money has been made, will be entitled to interest at 18% per annum from the date of award. He may claim the said amount in execution even though there is no reference to any post-award interest in the award. Even if the pre-award interest is at much lower rate, if the award is silent in regard to post-award interest, the claimant will be entitled to post-award interest at the higher rate of 18% per annum.

9. Learned counsel for the parties are ad idem that the Arbitrator has not exercised any discretion in the matter pertaining to the interest for the post-award period. Obviously, in absence thereof, by virtue of Section 31(7)(b) of the Act, the award would carry interest @ 18% p.a. from the date of the award till the date of payment. Whether May 24, 2001 when the entire award amount was deposited by the appellants into the High Court is the date of payment ?

10. Payment is not defined in the Act. The Concise Oxford English Dictionary (Tenth Edition-revised) defines 'payment' '1. the action of paying or the process of being paid. 2. an amount paid or payable'. Webster Comprehensive Dictionary (International Edition) Volume two defines 'payment' '1. the act of paying. 2 Pay; requital; recompense.' The Law Laxicon, 2nd Edition reprint by P. Ramanatha Aiyar, inter alia, states 'payment is defined to be the act of paying, or that which is paid; discharge of a debt, obligation or duty; satisfaction of claim; recompense; the fulfillment of a promise or the performance of an agreement; the discharge in money of a sum due.'

11. The word 'payment' may have different meaning in different context but in the context of Section 37(1)(b); it means extinguishment of liability arising under the award. It signifies satisfaction of the award. The deposit of the award amount into the Court is nothing but a payment to the credit of the decree-holder. In this view, once the award amount was deposited by the appellants before the High Court on May 24, 2001, the liability of post-award interest from May 24, 2001 ceased. The High Court, thus, was not right in directing the appellants to pay the interest @ 18% p.a. beyond May 24, 2001.

12. The appeal is, accordingly, allowed in part. The impugned order of the High Court is modified and it is directed that the appellants shall be liable to pay interest @ 18% p.a. for the post-award period from the date of award until May 24, 2001. After May 24, 2001, the appellants are not liable to pay any interest on the award amount under Section 37(1)(b) of the

Act.

13. We are informed by Mr. Y. Prabhakara Rao, learned counsel for the appellants that the amount as per the impugned order dated March 5, 2009 was deposited by the appellants which has been withdrawn by the respondent. In light of this, we observe that the High Court shall now re-determine the amount due and payable to the respondent under the award and the post-award interest as indicated above. The excess amount, if withdrawn by the respondent shall be refunded to the appellants within two months of re-determination by the High Court.

14. No costs.

R.P. Appeal partly allowed.

N.K. BAJPAI
v.
UNION OF INDIA AND ANR.
(Civil Appeal No. 2850 of 2012 etc.)

MARCH 15, 2012

[A.K. PATNAIK AND SWATANTER KUMAR, JJ.]

Customs Act, 1962 - s. 129 (6) - Restrictions under - Constitutional validity of - Held: The restrictions imposed u/s. 129(6) is not unreasonable or ultra vires the Constitution- Every right is subject to reasonable restriction - Right to practice, being a statutory right as well as fundamental right under Article 19(1)(g) of the Constitution, can be subjected to restriction relating to the professional and technical qualifications necessary for carrying out that profession -The restriction u/s. 129(6) is limited and not absolute and is intended to serve a larger public interest - Limited restrictions are neither violative of the Fundamental Rights nor do they tantamount to denying equality under Article 14 - The restriction would be held valid except where the challenge is on the ground to legislative incompetence or when the restrictions imposed are exfacie unreasonable, arbitrary and violative of Fundamental Rights - The element of likelihood of legal bias which was sought to be prevented by the restrictions, was neither presumptuous nor without any basis or object - Constitution of India, 1950 - Articles 14 and 19(1)(g).

Judicial bias - The element of bias itself may not always necessarily vitiate an action - It depends on the facts of each case.

Retroactive Operation:

Restrictions imposed on advocates to appear before a limited forum - Held: The enforcement of restriction retroactively would not be impermissible - It is not for the courts to interfere with implementation of a restriction which is otherwise permissible in law.

Law enforced retrospectively and law in operation retroactively - Distinction between - Retrospective Operation.

Words and Phrases:

'Reasonable' - Meaning of, in the context of Constitution of India.

'Bias' - Meaning and inference of - Discussed.

The common questions for consideration in the instant appeals were (i) whether Section 129(6) of the Customs Act, 1962 (as introduced by Finance Act, 2003) stipulating that on demitting office as Member of the Customs Excise and Service Tax Appellate Tribunal (CESTAT) a person shall not be entitled to appear before the CESTAT, is ultra vires the Constitution of India and (ii) whether s. 129(6) was applicable to the appellants.

It was interalia contended on behalf of the appellants that the entire restriction was based on an illogical presumption of likelihood of bias and therefore the amendment is liable be declared ultra vires; that the provisions of s. 129(6) of the Customs Act cannot be given effect to retrospectively; and that the appellants could continue to appear before the Tribunal as they were permitted to do so in terms of s. 146A of the Customs Act, 1962, despite the provisions of s. 129(6) of the Act.

Dismissing the appeals, the Court

HELD: 1.1 Part III of the Constitution is the soul of the Constitution of India. It is not only a charter of the rights that are available to Indian citizens, but is even completely in consonance with the basic norms of human rights, recognized and accepted all over the world. The fundamental rights are basic rights, but they are neither uncontrolled nor without restrictions. Exceptions apart, normally the restriction or power to regulate the manner of exercise of a right would not frustrate the right. It is difficult to anticipate the right to any freedom or liberty without any reasonable restriction. Besides this, the State has to function openly and in public interest. The width of the expression 'public interest' cannot be restricted to a particular concept. It may relate to variety of matters including administration of justice. [Para 7]

1.2 No person can be divested of his fundamental rights. They are incapable of being taken away or abridged. All that the State can do, by exercise of its legislative power, is to regulate these rights by imposition of reasonable restrictions on them. The restriction can be imposed only by or under the authority of law. It cannot be imposed by exercise of executive power without any law to back it up. Each restriction must be reasonable. A restriction must be related to the purpose mentioned in Article 19(2). [Para 11]

1.3 The legislative determination of what restriction to impose on a freedom is final and conclusive, as it is not open to judicial review. It is difficult to define or explain the word "reasonable" with any precision. It will always be dependent on the facts of a given case with reference to the law which has been enacted to create a restriction on the right. It is neither possible nor advisable to state any abstract standard or general pattern of reasonableness as applicable uniformly to all cases. [Para 12]

1.4 In spite of there being a general presumption in favour of the constitutionality of a legislation under challenge in case of allegations of alleging violation of the right to freedom guaranteed by clause (1) of Article 19 of the Constitution, on a prima facie case of such violation being made out, the onus shifts upon the State to show that the legislation comes within the permissible restrictions set out in clauses (2) to (6) of Article 19 and that the particular restriction is reasonable. It is for the State to place appropriate material justifying the restriction and its reasonability on record. [Para 14]

1.5 The right to practice, which is not only a statutory right under the provisions of the Advocates Act but would also be a fundamental right under Article 19(1)(g) of the Constitution is subject to reasonable restrictions. The legislature is entitled to make a law relating to the professional or technical qualifications necessary for carrying on that profession. [Para 16]

1.6 The restriction imposed u/s.129(6) of the Act is not unreasonable or ultra vires. Firstly, it is not an absolute restriction. It is a partial restriction o the extent that the persons who have held the office

of the President, Vice-President or other Members of he Tribunal cannot appear, act or plead before that Trib nal. The right of such advocate to practice in the High Co rts, District Courts and other Tribunals established b the State or the Central Government other than the CESTAT remains unaffected. Thus, the field of practice is wide open, in which there is no prohibition upon the practice by a person covered under the provisions of Section 129(6) of the Customs Act. Secondly, such a restriction is intended to serve a larger public interest and to uplift the professional values and standards of advocacy in the country. It would add further to public confidence in the administration of justice by the Tribunal, in discharge of its functions. Thus, it cannot be held that the restriction has been introduced without any purpose or object. There is a clear nexus between the mischief sought to be avoided and the object aimed to be achieved. [Para 20]

1.7 Limited restrictions are neither violative of the fundamental rights, nor do they tantamount to denying the equality before law in terms of Article 14 of the Constitution. [Para 24]

1.8 Except where the challenge is on the grounds of legislative incompetence or the restriction imposed was ex facie unreasonable, arbitrary and violative of Part III of the Constitution of India, the restriction would be held to be valid and enforceable. [Para 29]

Municipal Corporation of the City of Ahmedabad and Ors. v. Jan Mohammed Usmanbhai and Anr. **(1986) 3 SCC 20: 1986 (2) SCR 700 ;** *Devata Prasad Singh Chaudhuri and Ors. v. The Hon'ble the Chief Justice and Judges of the Patna High Court* **AIR 1962 SC 201: 1962 SCR 305 - followed.**

Sukumar Mukherjee v. State of West Bengal **(1993) 3 SCC 723: 1993 (1) Suppl. SCR 339;** *S. Rangarajan v. P. Jagjivan Ram and Ors.* **(1989) 2 SCC 574: 1989 (2) SCR 204 ;** *Paradip Port Trust, Paradip v. Their Workmen* **AIR 1977 SC 36: 1977 (1) SCR 537;** *Lingappa Pochamma Appelwar v. State of Maharashtra and Anr.* **(1985) 1 SCC 479: 1985 (2) SCR 224 - relied on.**

H.S. Srinivasa Raghavachar and Ors. v. State of Karnataka **(1987) 2 SCC 692: 1987 (2) SCR 1189 - distinguished.**

Indian Council of Legal Aid and Advice v. Bar Council of India and Anr. **(1995) 1 SCC 732: 1995 (1) SCR 304 - referred to.**

2.1 It is not correct to say that the presumption of legal bias being without any basis and ill-founded, the amendment itself is liable to be declared ultra vires. It is not only the mischief of likelihood of bias which is sought to be prevented by the amendment but the amendment, has a definite purpose and object to achieve which is in the larger public interest. Such legislative attempt, not only to adhere to but to enhance the values and dignity of the legal profession, would add to the confidence of the common litigant in the administration of justice and the performance of duties by the Tribunal. [Para 30]

2.2 Imposition of restrictions is a concept inbuilt into the enjoyment of fundamental rights, as no right can exist without a corresponding reasonable restriction placed on it. When the restrictions are placed upon the carrying on of a profession or to ensure that the intent, object or purpose achieved thereby would be enhancing the purity of public life, such object would certainly be throttled if there arose a situation of conflict between private interest and public duty. The principle of private interest giving way to public interest is a settled cannon, not only of administrative jurisprudence, but of statutory interpretation as well. Having regard to the prevalent values and conditions of the profession, most of the legal

practitioners would not stoop to unhealthy practices or tactics but the Legislature, in its wisdom, has considered it desirable to eliminate any possibility of conflict between the interest and duty and aimed at achieving this object or purpose by prescribing the requisite restrictions. With the development of law, the courts are expected to consider, in contradistinction to private and public interest, the institutional interest and expectations of the public at large from an institution. These are the balancing tests which are applied by the courts even in the process of interpretation or examining of the constitutional validity of a provision. [Para 33]

2.3 Bias must be shown to be present. Probability of bias, possibility of bias and reasonable suspicion that bias might have affected the decision are terms of different connotations. They broadly fall under two categories, i.e., suspicion of bias and likelihood of bias. Likelihood of bias would be the possibility of bias and bias which can be shown to be present, while suspicion of bias would be the probability or reasonable suspicion of bias. The former lead to vitiation of action, while the latter could hardly be the foundation for further examination of action, with reference to the facts and circumstances of a given case. The correct test would be to examine whether there appears to be a real danger of bias or whether there is only a probability or even a preponderance of probability of such bias, in the circumstances of a given case. If it falls in the prior category, the decision would attract judicial castecism but if it falls in the latter, it would hardly effect the decision, much less adversely. [Para 35]

2.4 The element of bias by itself may not always necessarily vitiate an action. The Court would have to examine the facts of a given case. In the instant case, despite their absence from the object and reasons for the amendment of Section 129(6) of the Customs Act, it cannot be held that the element of bias was presumptuous or without any basis or object. It may be one of the relevant factors which probably would have weighed on the mind of the Legislature. When someone has been a member of a Tribunal over a long period, and other members have been his co-members whether judicial or technical, it is difficult to hold that there would be no possibility of bias or no real danger of bias. Even if this possibility is ruled out still, it will always be better advised and in the institutional interest that restrictions are enforced. Then alone will the mind of the litigant be free from a lurking doubt of likelihood of bias and this would e hance the image of the Tribunal. The restriction, leaves the entire field of legal profession wide open for the appellants and all persons situated alike except to practice before CESTAT. [Para 37]

2.5 Besides the possibility of bias, there is a legitimate expectation on the part of a litigant before the Tribunal that there shall not be any possibility of justice being denied or being not done fairly. [Para 38]

2.6 The contention of the petitioners that there has to be empirical data to suggest that their practice before the Tribunal resulted in instances of misdemeanor which would have propelled the respondents to insert such a provision in the enactment, has rightly been rejected by the High Court. It may not even be proper to introduce such amendments with reference to any data. Suffice it to note that these amendments are primarily based upon public perception and normal behaviour of an ordinary human being. It is difficult to define cases where element of bias would affect the decision and where it would not, by a precise line of distinction. Even in a group, a person possessing a special knowledge may be in a position to influence the group and his bias may operate in a subtle

manner. [Para 38]

2.7 The general principles of bias are equally applicable to administrative and civil jurisprudence. Members of the Tribunals, called upon to try issues in judicial or quasi-judicial proceedings should act judicially. Reasonable apprehension is equitable to possible apprehension and, therefore, the test is whether the litigant reasonably apprehends that bias is attributable to a member of the Tribunal. [Para 39]

2.8 The word 'bias' in popular English parlance stands included within the attributes and broader purview of the word 'malice', which in general connotation, means and implies 'spite' or 'ill will'. The element of 'bias' is to be inferred as per the standard and comprehension of a reasonable man. The bias may also be malicious act having some element of intention without just cause or excuse. In case of malice or ill will, it may be an actual act conveying negativity but the element of bias could be apparent or reasonably seen without any negative result and could form part of a general public perception. [Para 41]

Dr. Haniraj L. Chulani v. Bar Council, State of Maharashtraand Goa **1996 (3) SCC 342: 1996 (1) Suppl. SCR 51 - relied on.**

Manak Lal v. Dr. Prem Chand **AIR 1957 SC 425: 1957 SCR 575;** *Rasmiranjan Das v. Sarojkanta Behera and Ors.* **(2000) 10SCC 502;** *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and Ors.* **(2001) 1 SCC 182: 2000 (4) Suppl. SCR 248;** *S. Parthasarathi v. State of Andhra Pradesh* **(1974) 3 SCC 459: 1974 (1) SCR 697;** *State of Punjab v. V.K. Khanna* **(2001) 2 SCC 330 : (2000) 5 Suppl. SCR 200 - referred to.**

R. v. Sussex Justices Ex. P. McCarthy **(1924) 1 KB 256 KBD 259;** *Porter v. Magill* **(2002) 2 AC 357 - referred to.**

'Bias, Malfunction in Judicial Decision-making' by Sir Louis Blom, Q.C., (2009) Public Law 199; De Smith's JudicialReview (Sixth Edition) by Harry Woolf, Jeffey Jowell and Andrew Le Sueur - referred to.

3.1 When the appellants were enrolled as advocates as well as when they started practicing as advocates, their right was subject to the limitations under any applicable Act or under the constitutional limitations, as the case may be. One must clearly understand a distinction between a law being enforced retrospectively and a law that operates retroactively. The restriction in the present case is a clear example where the right to practice before a limited forum is being taken away in presenti while leaving all other forums open for practice by the appellants. Though such a restriction may have the effect of relating back to a date prior to the presenti. In that sense, the law stricto sensu is not retrospective, but would be retroactive. It is not for the court to interfere with the implementation of a restriction, which is otherwise valid in law, only on the ground that it has the effect of restricting the rights of the people who attain that status prior to the introduction of the restriction. It is certainly not a case of settled or vested rights, which are incapable of being interfered with. It is a settled canon of law that the rights are subject to restrictions and the restrictions, if reasonable, are subject to judicial review of a very limited scope. In the facts and circumstances of the present case it is not correct to say that enforcement of the restriction retroactively would be impermissible. [Para 43]

3.2 The law is not at all retrospective even though the retirement or date of ceasing to be a member of the Tribunal may have been on a date anterior to the date of

passing of the law. The restriction is not punitive, in that sense, but is merely a criterion for eligibility for continuing to practice law before the Tribunal. [Para 47]

3.3 Earlier, the nature of law, as substantive or procedural, was taken as one of the determinative factors for judging the retrospective operation of a statute. However, with the development of law, this distinction has become finer and of less significance. The rule against retrospectivity has also been stated, in recent years, to avoid the classification of statutes into substantive and procedural and the usage of words like 'existing' or 'vested'. [Para 48]

3.4 In such matters, in judiciously examining the question of retrospectivity or otherwise, the relevant considerations include the circumstances in which legislation was created and the test of fairness. The principles of statutory interpretation have expanded. With the development of law, it is desirable that the courts should apply the latest tools of interpretation to arrive at a more meaningful and definite conclusion. [Para 49]

3.5 In the instant case, the restriction would be applied uniformly to all the practicing advocates as well as to the advocates who would join the profession in future and would achieve the object of the Customs Act without leading to any absurd results. On the contrary, its uniform application would achieve fair results without really visiting any serious prejudice upon the class of the advocates who were earlier the members of the Tribunal as it remains open to them to practice in other tribunals, forums and courts. If an exception was carved out in their favour, it would lead to an anomaly as well as an absurd situation frustrating the very purpose and object of Section 129(6) of the Act. [Para 50]

Vijay v. State of Maharashtra and Ors. **(2006) 6 SCC 289: 2006 (4) Suppl. SCR 81;** *Dilip v. Mohd. Azizul Haq and Anr.* **(2000) 3 SCC 607: 2000 (2) SCR 280 - relied on.**

R. v. Inhabitants of St. Mary, Whitechapel **(1881) 12 QB 149; Maxwell v. Murphy (1957) 96 CLR 261 - referred to.**

Principles of Statutory Interpretation **(12th Edition, 2010) by Justice G.P. Singh - referred to.**

4. The provisions of Section 129(6) of the Customs Act and its operation cannot be faulted with. It is not correct to say that the appellants can continue to appear before the Tribunal as they are permitted to do so in terms of Section 146A of the Customs Act, despite the provisions of Section 129(6) of the Customs Act. The provisions of Section 129(6) of the Customs Act are specific and both these provisions have to be construed harmoniously. There is nothing contradictory in these provisions. Section 146(2)(c) of the Customs Act refers to the appearance by a legal practitioner who is entitled to practice as such in accordance with law. Section 129(6) places a restriction which is reasonable and valid restriction. Thus, the provisions of Section 146A of the Act would have to be read in conjunction with and harmoniously to Section 129(6) of the Customs Act and the person who earns a disqualification under this provision cannot derive any extra benefit contrary to Section 129(6) of the Customs Act from the reading of Section 146A of the Customs Act. [Para 52]

Case Law Reference:

1989 (2) SCR 204	**Relied on**	**Para 8**
1993 (1) Suppl. SCR 339	**Relied on**	**Para 21**
1986 (2) SCR 700	**Followed**	**Para 22**

1962 SCR 305	**Followed**	**Para 23**
1987 (2) SCR 1189	**Distinguished**	**Para 24**
1977 (1) SCR 537	**Relied on**	**Para 25**
1985 (2) SCR 224	**Relied on**	**Para 27**
1995 (1) SCR 304	**Referred to**	**Para 28**
1996 (1) Suppl. SCR 51		**Relied on Para 31**
(1924) 1 KB 256 KBD 259		**Referred to Para 34**
(2002) 2 AC 357	**Referred to**	**Para 34**
1957 SCR 575	**Referred to**	**Para 39**
(2000)10 SCC 502	**Referred to**	**Para 39**
2000 (4) Suppl. SCR 248		**Referred to Para 40**
1974 (1) SCR 697	**Referred to**	**Para 40**
(2001) 2 SCC 330	**Referred to**	**Para 40**
(1881) 12 QB 149	**Referred to**	**Para 45**
(1957) 96 CLR 261	**Referred to**	**Para 48**
2006 (4) Suppl. SCR 81		**Relied on Para 49**
2000 (2) SCR 280	**Relied on**	**Para 51**

CRIMINAL APPELLATE JURISDICTION : Civil Appeal No. 2850 of 2012 etc.

From the Judgment & Order dated 13.04.2009 of the High Court of Delhi in WP (C) No. 6712 of 2007.

WITH

Hari Shankar, Sudarshan Singh Rawat, Jay Kumar for the Appellant.

B. Bhattacharya, Sunil Roy, Judy James, Ajay Singh, A.K. Sharma, B. Krishna Prasad for the Respondents.

The Judgment of the Court was delivered by

Swatanter Kumar, J. 1. Leave granted.

2. This judgment shall dispose of all the above three appeals, as common questions of law arise therefrom, on somewhat similar facts for consideration of this Court. In these appeals, the following questions have been raised :

> "(i) Whether Section 129(6) of the Customs Act, 1962, which stipulates that on demitting office as Member of the Customs Excise and Service Tax Appellate Tribunal (hereinafter referred to as the "CESTAT") a person shall not be entitled to appear before the CESTAT, is ultra vires the Constitution of India?
>
> (ii) Whether the said provision applies to the petitioner, as it was introduced after the petitioner had not only joined as Member of the CESTAT but also demitted office as such Member?"

3. We may notice the basic factual premise from which the above legal questions have arisen for consideration of this Court. Primarily, we would be referring to the facts of SLP (C) No.8482 of 2010 titled P.C. Jain v. Union of India & Ors.

4. The appellant joined the Indian Customs and Central Excise Service, Class – I (later called Group 'A'), in the year 1956, where he served for a number of years, in different capacities. On 1st November, 1990, the appellant was selected as a Member (Technical) in the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT). The appellant demitted his office as Member (Technical) of CEGAT on 7th March, 1993.

As he was a law graduate, he was enrolled as an advocate with the Bar Council of India on 18th March, 1993. The CEGAT was replaced by the Central Excise and Service Tax Appellate Tribunal (for short, 'the CESTAT/Tribunal'. Vide Finance Act, 2003, Section 129(6) was introduced to the Customs Act, 1962 (for short 'Customs Act') in terms of which, the members of the Tribunal were debarred from appearing, acting or pleading before it. Aggrieved by this amendment, the appellant along with other appellants in other appeals claimed to have met the Finance Minister and submitted a detailed representation bringing out the inequities and arbitrariness claimed to be resulting from the insertion of Section 129(6) of the Customs Act. The Tribunal, on 9th July, 2007, passed an order holding that the appellant or the persons similarly situated, were not entitled to appear before it in view of the bar contained in Section 129(6) of the Customs Act. In the meanwhile, the Ministry also responded negatively to the representations submitted by the appellants. Faced with these circumstances, the appellants filed a writ petition before the High Court of Delhi at New Delhi being Writ Petition No.6712 of 2007, which was heard by a Division Bench of the High Court and was dismissed vide judgment dated 13th April, 2009, hence, giving rise to the present appeals.

5. The Tribunal took the view that the word 'appellate tribunal' as referred to in Section 129(6), is defined under Section 2(1B) of the Customs Act to mean the Customs, Excise and Service Tax Appellate Tribunal constituted under Section 129 of the Customs Act and any person ceasing to hold office as President, Vice-President or Member cannot appear before the Tribunal or its Benches anywhere in India in view of the bar in Section 129(6). One of the appellants, namely, N.K. Bajpai, was relieved from the case. The appellants had contended before the High Court that Section 129(6) of the Customs Act is ultra vires Articles 14, 19(1)(g) and 21 of the Constitution of India. It was further contended that, in any event, Section 129(6) has no applicability to the appellants, in view of the fact that the amendment was prospective, but when the appellants were appointed to the Tribunal as well as when they demitted office, the said provision was not a part of the Customs Act. Thus, they prayed for consequential relief. The High Court, by a detailed judgment, rejected both these contentions. It was of the view that the predominant rationale for introduction of this provision was to strengthen the cause of administration of justice and to remove what the Legislature, in its wisdom, felt was a perceived class bias. It was further held that the restriction imposed could not be said to be unreasonable and was held to withstand the test of Article 19(6) of the Constitution. It also held that once the right to appear, act or plead is taken away in respect of the Tribunal, since the same forum hears and adjudicates upon the matters concerning three streams of law, the persons concerned are automatically debarred from acting, appearing or pleading before such forum, i.e., the Tribunal in respect of all matters. The High Court even referred to some of the judgments of this Court, as well as to Article 220 of the Constitution, which places a prohibition or limitation on the right of a permanent Judge of the High Court to plead or act before the Court of which he had been a permanent Judge and/or before the Courts, Tribunals, Authorities over which the said Court had exercised supervisory jurisdiction.

6. Before we dwell upon the merits of the contentions raised or the correctness of the reasons given by the High Court, it will be appropriate for us to reproduce the provisions of Section 129 of the Customs Act, which read as follows :

> "129 – Appellate Tribunal—(1) The Central Government shall constitute an Appellate Tribunal to be called the Customs, Excise and Service Tax Appellate Tribunal consisting of as many judicial and technical members as it thinks fit to exercise the powers and discharge the functions conferred on the Appellate Tribunal by this Act.
>
> (2) A judicial member shall be a person who has for at

least ten years held a judicial office in the territory of India or who has been a member of the Indian Legal Service and has held a post in Grade I of that service or any equivalent or higher post for at least three years, or who has been an advocate for at least ten years.

Explanation.—For the purposes of this sub-section—

(i) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate or has held the office of a member of a Tribunal or any post, under the Union or a State, requiring special knowledge of law;

(ii) in computing the period during which a person has been advocate, there shall be included any period during which the person has held a judicial office, or the office of a member of a Tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate.

(2A) A technical member shall be a person who has been a member of the Indian Customs and Central Excise Service, Group A, and has held the post of Commissioner of Customs or Central Excise or any equivalent or higher post for at least three years.

(3) The Central Government shall appoint--

(a) a person who is or has been a Judge of a High Court; or

(b) one of the members of the Appellate Tribunal, to be the President thereof.

(4) The Central Government may appoint one or more members of the Appellate Tribunal to be the Vice-President, or, as the case may be, Vice-Presidents, thereof.

(5) A Vice-President shall exercise such of the powers and perform such of the functions of the President as may be delegated to him by the President by a general or special order in writing.

(6) On ceasing to hold office, the President, Vice-President or other Member shall not be entitled to appear, act or plead before the Appellate Tribunal."

7. Part III of the Constitution is the soul of the Constitution. It is not only a charter of the rights that are available to Indian citizens, but is even completely in consonance with the basic norms of human rights, recognized and accepted all over the world. The fundamental rights are basic rights, but they are neither uncontrolled nor without restrictions. In fact, the framers of the Indian Constitution themselves spelt out the natu e of restriction on such rights. Exceptions apart, normally t e restriction or power to regulate the manner of exercise of right would not frustrate the right. Take, for example, the most v luable right even from amongst the fundamental rights, i.e , the right to freedom of speech and expression. This ri ht is conferred by Article 19(1)(a) but in turn, the Co stitution itself requires its regulation in the interest of the 'public order' under Article 19(2). The State could impose reasonable restrictions on the exercise of the rights conferred, in the interest of the sovereignty and integrity of India, the security of the State, free relations with foreign States, public order, decency or morality or in relation to contempt of Court, defamation or incitement of an offence. Such restrictions are within the scope of constitutionally permissible restriction. Exercise of legislative power in this respect by the State can be subjected to judicial review, of course, within a limited ambit. Firstly, the challenger must show that the restriction imposed, at least prima facie, is violative of the fundamental right. It is then that the burden lies

upon the State to show that the restriction applied is by due process of law and is reasonable. If the restriction is not able to satisfy these tests or either of them, it will vitiate the law so enacted and the action taken in furtherance thereto is unconstitutional. It is difficult to anticipate the right to any freedom or liberty without any reasonable restriction. Besid s this, the State has to function openly and in public interest. The idth of the expression 'public interest' cannot be restri ted to a particular concept. It may relate to variety of mat ers including administration of justice. 8. Let us also e amine the fundamental rights and their restrictions as a constitutional concept. In the case of *S. Rangarajan v. P. Jagjivan Ram and Ors.* [(1989) 2 SCC 574], while dealing with the censorship of a film, this Court observed :

> '……There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a power keg'.'

9. Where the Court applies the test of 'proximate and direct nexus with the expression', the Court also has to keep in mind that the restriction should be founded on the principle of least invasiveness, i.e., the restriction should be imposed in a manner and to the extent which is unavoidable in a given situation. The Court would also take into consideration whether the anticipated event would or would not be intrinsically dangerous to public interest.

10. Now, we have to examine the various tests that have been applied over a period of time to examine the validity and/ or reasonability of the restrictions imposed upon the rights.

11. No person can be divested of his fundamental rights. They are incapable of being taken away or abridged. All that the State can do, by exercise of its legislative power, is to regulate these rights by imposition of reasonable restrictions on them. Upon an analysis of the law, the following tests emerge:-

(a) The restriction can be imposed only by or under the authority of law. It cannot be imposed by exercise of executive power without any law to back it up.

(b) Each restriction must be reasonable.

(c) A restriction must be related to the purpose mentioned in Article 19(2).

12. The questions before us, thus, are whether the restriction imposed was reasonable and whether the purported purpose of the same squarely fell within the relevant clauses discussed above. The legislative determination of what restriction to impose on a freedom is final and conclusive, as it is not open to judicial review. The judgments of this Court have been consistent in taking the view that it is difficult to define or explain the word "reasonable" with any precision. It will always be dependent on the facts of a given case with reference to the law which has been enacted to create a restriction on the right. It is neither possible nor advisable to state any abstract standard or general pattern of reasonableness as applicable uniformly to all cases.

13. A common thread runs through Parts III, IV and IVA of the Constitution of India. One Part enumerates the fundamental

rights, the second declares the fundamental principles of governance and the third lays down the fundamental duties of the citizens. While interpreting any of these provisions, it shall always be advisable to examine the scope and impact of such interpretation on all the three constitutional aspects emerging from these Parts. It is necessary to be clear about the meaning of the word "fundamental" as used in the expression "fundamental in the governance of the State" to describe the directive principles which have not legally been made enforceable. Thus, the word "fundamental" has been used in two different senses under our Constitution of India. The essential character of the fundamental rights is secured by limiting the legislative power and by providing that any transgression of the limitation would render the offending law pretendo void. The word "fundamental" in Article 37 of the Constitution also means basic or essential, but it is used in the normative sense of setting, before the State, goals which it should try to achieve. As already noticed, the significance of the fundamental principles stated in the directive principles have attained greater significance through judicial pronouncements.

14. As difficult as it is to anticipate the right to any freedom or liberty without any reasonable restriction, equally difficult is it to imagine the existence of a right not coupled with a duty. The duty may be a direct or indirect consequence of a fair assertion of the right. Although Part III of the Constitution of India confers rights, still the duties and restrictions are inherent thereunder. These rights are basic in nature and are recognized and guaranteed as natural rights, inherent in the status of a citizen of a free country, but are not absolute in nature and uncontrolled in operation. Each one of these rights is to be controlled, curtailed and regulated, to a certain extent, by laws made by the Parliament or the State Legislature. In spite of there being a general presumption in favour of the constitutionality of a legislation under challenge in case of allegations of alleging violation of the right to freedom guaranteed by clause (1) of Article 19 of the Constitution, on a prima facie case of such violation being made out, the onus shifts upon the State to show that the legislation comes within the permissible restrictions set out in clauses (2) to (6) of Article 19 and that the particular restriction is reasonable. It is for the State to place appropriate material justifying the restriction and its reasonability on record.

15. The Advocates Act, 1961 (hereinafter referred to as 'the Advocates Act') itself was introduced to implement the recommendations of the All India Bar Committee made in 1953. It aimed at establishment of an All India Bar Council, a common rule for the advocates and integration of the Bar into a single class of practioners known as 'advocates'. It was also to create autonomous Bar Councils, one for the whole of India and one for each State. The Advocates Act provides for various aspects of the legal profession. Under Section 29 of the Advocates Act, only one class of persons is entitled to practice the profession of law, namely, advocates. Section 30 of the Advocates Act provides that subject to the provisions of the Act, every advocate whose name is entered in the State rolls shall, as a matter of right, be entitled to practice throughout the territories to which this Act applies, in all courts including the Supreme Court of India. Such an Advocate would also be entitled to practice before any tribunal or person legally authorized to take evidence and before any other authority or person before whom such an advocate is, by or under any law for the time being in force, entitled to practice. Section 33 of the Advocates Act further states that except as otherwise provided in that Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practice in any court or before any authority or person unless he is enrolled as an advocate under the Advocates Act. A bare reading of these three provisions clearly shows that this is a statutory right given to an advocate to practice and an advocate alone is the person who can practice before the courts, tribunals, authorities and persons. But this right is statutorily regulated by two conditions – one, that a person's name should

be on the State rolls and second, that he should be permitted by the law for the time being in force, to practice before any authority or person. Where the advocate has a right to appear before an authority or a person, that right can be denied by a law that may be framed by the competent Legislature. Thus, the right to practice is not an absolute right which is free of restriction and is without any limitation. There are persons like Mukhtiars and others, who were earlier entitled to practice before the Courts, but the Advocates Act itself took away the right to practice which was available to them prior to its coming into force. Thus, the Advocates Act placed a complete prohibition upon the right to practice of those persons who were not advocates enrolled with the State Bar Council.

16. Therefore, the right to practice, which is not only a statutory right under the provisions of the Advocates Act but would also be a fundamental right under Article 19(1)(g) of the Constitution is subject to reasonable restrictions. An argument could be raised that a person who has obtained a degree of law is entitled to practice anywhere in India, his right, as enshrined in the Constitution and under the Advocates Act cannot be restricted or regulated and also that it is not necessary for him to enroll himself on any of the State rolls. This argument would be fallacious in face of the provisions of the Advocates Act as well as the restrictions contemplated in Article 19(6) of the Constitution. The Legislature is entitled to make a law relating to the professional or technical qualifications necessary for carrying on that profession.

17. We may also refer to a recent development of law in relation to right of the advocates or former judicial officers, to practice the profession of law. The Bar Council of India has been vested with the general power to make rules under Section 49 of the Advocates Act. In furtherance to this power vested with it, the Bar Council of India has framed the Bar Council of India Rules. Chapter III of these Rules deals with the conditions for the right to practice. Rule 7 of Chapter III of the said Rules is quite in pari materia with Section 129(6) of the Act and it reads as under :

> "An officer after his retirement or otherwise ceasing to be in service for any reasons, if enrolled as an Advocate shall not practice in any of the Judicial, Administrative Courts/ Tribunals/Authorities, which are presided over by an officer equivalent or lower to the post which such officer last held."

18. Rules 7 and 7A of the Bar Council of India Rules, were introduced by the Bar Council of India on 14th October, 2007.

19. This Rule clearly mandates that upon his retirement or when otherwise ceasing to be in service for any reason, a person will not be able to practice in the administrative tribunal, other tribunals, authorities, courts etc. over which he had presided and which were headed by an officer in a post equivalent to or lower than the post which he had held. The definition in the explanation of what an officer shall mean and include further widened the scope of interpretation. Not only this, requiring adherence to professional standard and values, Rule 7A further makes it mandatory that a person who has been dismissed, retrenched, compulsorily retired, removed or otherwise retired from Government Service or service of the High Court or Supreme Court on the charges of corruption, dishonesty unbecoming of an employee, etc. would not even be enrolled as an advocate on the rolls of a State Bar Council. These provisions clearly demonstrate the intention of the Legislature to place restrictions for entry to the profession of law. These restrictions have to be decided only on the touchstone of reasonableness and legislative competency. The restriction which withstands such a test would be enforceable in accordance with law.

20. The contention raised on behalf of the appellants before us is that Section 129(6) of the Customs Act imposes a complete restriction upon the appellants and, therefore, is unconstitutional. While examining the merit of this contention,

we must notice that there is no challenge to the legislative competence of the Legislature which enacted and inserted Section 129(6) of the Act. Once there is no challenge to the legislative competence and the provision remains as a valid piece of legislation on the statute book, then the only question left for this Court to examine is whether this provision is so unreasonable that it inflicts an absolute restriction upon carrying on of the profession by the appellants. For two different reasons, we are unable to hold that the restriction imposed under Section 129(6) of the Act is unreasonable or ultra vires. Firstly, it is not an absolute restriction. It is a partial restriction to the extent that the persons who have held the office of the President, Vice-President or other Members of the Tribunal cannot appear, act or plead before that Tribunal. In modern times, there are so many courts and tribunals in the country and in every State, so that this restriction would hardly jeopardize the interests of any hardworking and upright advocate. The right of such advocate to practice in the High Courts, District Courts and other Tribunals established by the State or the Central Government other than the CESTAT remains unaffected. Thus, the field of practice is wide open, in which there is no prohibition upon the practice by a person covered under the provisions of Section 129(6) of the Customs Act. Secondly, such a restriction is intended to serve a larger public interest and to uplift the professional values and standards of advocacy in the country. In fact, it would add further to public confidence in the administration of justice by the Tribunal, in discharge of its functions. Thus, it cannot be held that the restriction has been introduced without any purpose or object. In fact, one finds a clear nexus between the mischief sought to be avoided and the object aimed to be achieved.

21. Now, we may deal with some of the judgments, where similar restrictions imposed by law were found to be valid and unexceptionable. In *Sukumar Mukherjee v. State of West Bengal* [(1993)3 SCC 723, the State of West Bengal had prohibited private practice by medical practioners who were also teaching in the medical institutions. This was provided under Section 9 of the West Bengal State Health Service Act, 1990. The argument raised was that this provision was repugnant to Section 27 of the Indian Medical Council Act, 1956 which, in turn, provides for the right of a registered medical practitioner to practice, as well as an argument that it ultra vires Articles 19(1)(g), 19(6) and 14 of the Constitution of India. This Court repelled both these contentions and held that the prohibition against the members of the West Bengal Medical Education Service (WBMES) from practicing privately was not unconstitutional or repugnant to the statutory provisions. It only regulated a class of persons, i.e., the persons who were members of that service and secondly, this was intended to maintain standards of the medical education which was the very object of enacting the Indian Medical Council Act.

22. Similarly, while dealing with the question as to whether the closure of butcher houses on national holidays or on certain particular days was unconstitutional and violative of the fundamental right to carry on business in terms of Articles 19(1)(g), 19(6) and 14 of the Constitution, in the case of *Municipal Corporation of the City of Ahmedabad & Ors. v. Jan Mohammed Usmanbhai & Anr.* [(1986) 3 SCC 20], a Constitution Bench of this Court, while rejecting the challenge, held as under :

> "17. Clause (6) of Article 19 protects a law which imposes in the interest of general public reasonable restrictions on the exercise of the right conferred by sub-clause (g) of clause (1) of Article 19. Obviously it is left to the court in case of a dispute to determine the reasonableness of the restrictions imposed by the law. In determining that question the court cannot proceed on a general notion of what is reasonable in the abstract or even on a consideration of what is reasonable from the point of view of the person or persons on whom the restrictions are imposed. The right conferred by sub-clause (g) is

expressed in general language and if there had been no qualifying provision like clause (6) the right so conferred would have been an absolute one. To the persons who have this right any restriction will be irksome and may well be regarded by them as unreasonable. But the question cannot be decided on that basis. What the court has to do is to consider whether the restrictions imposed are reasonable in the interest of general public. In the *State of Madras v. V.G. Row* this Court laid down the test of reasonableness in the following terms:

> "It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

19. The expression 'in the interest of general public' is of wide import comprehending public order, public health, public security, morals, economic welfare of the community and the objects mentioned in Part IV of the Constitution. Nobody can dispute a law providing for basic amenities; for the dignity of human labour like provision for canteen, rest rooms, facilities for drinking water, latrines and urinals etc. as a social welfare measure in the interest of general public. Likewise in respect of legislations and notifications concerning the wages, working conditions or the other amenities for the working class, the courts have adopted a liberal attitude and the interest of the workers has been protected notwithstanding the hardship that might be caused to the employers. It was, therefore, open to the legislature or the authority concerned, to ensure proper holidays for the municipal staff working in the municipal slaughterhouses and provide certain closed days in the year. Even according to the observations of the High Court nobody could have any objection to the standing orders issued by the Municipal Commissioner under Section 466(1)(D)(b) if municipal slaughterhouses were closed on certain days in order to ensure proper holidays for the municipal staff working in the municipal slaughterhouses. The only objection was that the standing orders direct closure of the slaughterhouses on Janmashtami, Jain Samvatsari, October 2 (Mahatma Gandhiji's birthday), February 12 (Shraddha day of Mahatma Gandhi), January 30 (Mahatma Gandhiji'sNirwan day), MahavirJayanti and Ram Navami. These days were declared as holidays under the standing orders for the Municipal Corporation slaughterhouses.

20. The tests of reasonableness have to be viewed in the context of the issues which faced the legislature. In the construction of such laws and in judging their validity, courts must approach the problem from the point of view of furthering the social interest which it is the purpose of the legislation to promote. They are not in these matters functioning in vacuo but as part of society which is trying, by the enacted law, to solve its problems and furthering the moral and material progress of the community as a whole. (See *Jyoti Persh adv. Union Territory of Delhi*) If the expression 'in the interest of general public' is of wide import comprising public order, public security and public morals, it cannot be said that the standing orders closing the slaughterhouses on seven days is not in the interest of general public.

21. In view of the aforesaid discussion we are not prepared to hold that the closure of the slaughter house on seven

days specified in the two standing orders in any way put an unreasonable restriction on the fundamental right guaranteed to the petitioner-respondent under Article 19(1)(g) of the Constitution.

22. This leads us to the second contention raised on behalf of the respondent, which is based on Article 14 of the Constitution. The High Court had repelled this contention for a valid reason with which we fully agree.

23. It is now well established that while Article 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation and that in order to pass the test of permissible classification two conditions must be fulfilled, namely, (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) such differentia must have rational relation to the object sought to be achieved by the statute in question. The classification, may be founded on different basis, namely, geographical, or according to objects or occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. There is always a presumption in favour of constitutionality of an enactment and the burden is upon him who attacks it, to show that there has been a clear violation of the constitutional principles. The courts must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed against problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest, and finally that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common rapport, the history of the times and may assume every state of facts which can be conceived to be existing at the time of legislation.

24. The objects sought to be achieved by the impugned standing orders are the preservation, protection and improvement of livestock. Cows, bulls, bullocks and calves of cows are no doubt the most important cattle for the agricultural economy of this country. Female buffaloes yield a large quantity of milk and are, therefore, well looked after and do not need as much protection as cows yielding a small quantity of milk require. As draught cattle male buffaloes are not half as useful as bullocks. Sheep and goat give very little milk compared to the cows and the female buffaloes, and have practically no utility as draught animals. These different categories of animals being susceptible of classification into separate groups on the basis of their usefulness to society, the butchers who kill each category of animals may also be placed in distinct classes according to the effect produced on society by the carrying on of their respective occupations. The butchers who slaughter cattle formed the well defined class based on their occupation. That classification is based on intelligible differentia and distinguishes them from those who kill goats and sheep and this differentiation has a close connection with the object sought to be achieved by the impugned Act, namely the preservation, protection and the improvement of our livestock. The attainment of these objectives may well necessitate that the slaughterers of cattle should be dealt with differently than the slaughterers of say, goats and sheep. The standing orders, therefore, in our view, adopt a classification based on sound and intelligible basis and can quite clearly stand the test laid down above."

23. Another Constitution Bench of this Court, while dealing

with the provisions of the Legal Practitioners Act, 1879, a pre-constitution law, considered the correctness or effect of restrictions on the rights of a Mukhtiar to act or plead before the Civil Court, under Rule 2 of the Rules, framed under the provisions of that Act by the High Court and held that Sections 9 and 11 of that Act would have to be read together. It would be wrong to treat the mere right to practice conferred by Section 9 of the Legal Practioners Act as disassociated from the functions, powers and duties of Mukhtiar referred to in Section 11 of that Act. The right to appear before a court is controlled by these provisions. Primarily holding that Rule 2 as enacted by the High Court was not in excess of the rule-making power under Section 11 of that Act, this Court also held that the Mukhtiars cannot complain of any violation of their fundamental right to practice the profession, to which they have been enrolled under the provisions of that Act. In other words, the challenge on the ground of inequality and unreasonableness, both, were repelled by this Court. {Ref. *Devata Prasad Singh Chaudhuri & Ors. v. The Hon'ble the Chief Justice and Judges of the Patna High Court* [AIR 1962 SC 201]}.

24. There are certain legislations which restrict appearance of advocates before specialized or specific tribunals. These kinds of restrictions upon the right of the lawyers to appear before those tribunals have been challenged in the courts from time to time. The courts have consistently taken the view that limited restrictions are neither violative of the fundamental rights, nor do they tantamount to denying the equality before law in terms of Article 14 of the Constitution. In the case of *H.S. Srinivasa Raghavachar & Ors. v. State of Karnataka* [(1987) 2 SCC 692], this Court was primarily concerned with the validity of Section 44(1) of the Karnataka Land Reforms Amendment Act, 1974 which was challenged on the ground that it was ultra vires Articles 39(b) and 39(c) of the Constitution and was destructive of the basic structure of the Constitution. An ancillary question that fell for the consideration of this Court was where sub-section (8) of Section 48 of that Act, which prohibited legal practitioners from appearing in such proceedings before the Tribunals, was repugnant to Section 30 of the Advocates Act, and Section 14 of the Bar Council of India Act. The challenge was primarily accepted by this Court on the ground that it was a case of lack of legislative competence, inasmuch as the State Legislature was not competent to make a law repugnant to the laws made by the Parliament pursuant to Entries 77 and 78 of List I of the Seventh Schedule to the Constitution. This Court directed that Section 48(8) of that Act would not be enforced against the advocates to prevent them from appearing before the Tribunal. This case, relied upon by the learned counsel for the appellant, is completely different on facts and in law. In the case in hand, the consistent position is that there is no challenge to the legislative competence in amending Section 129(6) of the Customs Act. The challenge is limited to the ground of its being ultra vires Articles 19(1)(g), 19(6) and 14 of the Constitution. Therefore, the counsel cannot draw any adv ntage from that case. 25. In the case of *Paradip Port Trust, Par dip v. Their Workmen* [AIR 1977 SC 36], this Court dealt with th right of t

e legal practitioners to represent employers before the Indust ial Tribunal that too only with the consent of the opposite pa ty and leave of the Tribunal. The restriction was limited in its s ope and impact and this Court held that it was not violativ of the right of the legal practitioners as they will have to c nform to the conditions laid down in Section 36(4) of the Industrial Disputes Act, 1947.

26. Refuting contentions that this provision would be repugnant to Section 30 of the Advocates Act, this Court held that the Industrial Disputes Act was a special piece of legislation with the aim of labour welfare and representation before the adjudicative authorities therein has been specifically provided for with a clear object in view.

27. In the case of *Lingappa Pochamma Appelwar v. State of Maharashtra & Anr.* [(1985) 1 SCC 479], in somewhat similar circumstances relating to the provisions of the Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974, this Court clearly rejected the contention that an advocate enrolled under the Advocates Act, has an absolute right to appear before any of the courts and tribunals in the country. Though at that time Section 30 of the Advocates Act had not come into force, but still the Court felt that the right of an advocate to practice after being brought on the roll of the State Bar Council is, just what is conferred upon him under the Bar Councils Act, 1926 and therefore, Section 9(a) of the Maharashtra Restoration of Lands to Scheduled Tribes Act which placed that restriction was not unconstitutional or impinging on the rights of the advocates to practice. The Court also observed that it was well settled that apart from under the provisions of Article 22 of the Constitution, no litigant has a fundamental right to be represented by a lawyer in any Court.

28. In the case of *Indian Council of Legal Aid and Advice v. Bar Council of India & Anr.* [(1995) 1 SCC 732], this Court while holding that a prohibition against a person, more than 45 years of age being enrolled as an advocate was violative of Article 14 of the Constitution as being discriminatory and arbitrary, made some observations with regard to duties and functions of the advocates and Bar Councils, for the dignity and purity of the profession, which are worthy of being noticed and are accordingly reproduced :

> "3. It will be seen from the above provisions that unless a person is enrolled as an advocate by a State Bar Council, he shall have no right to practise in a court of law or before any other Tribunal or authority. Once a person fulfils the requirements of Section 24 for enrolment, he becomes entitled to be enrolled as an advocate and on such enrolment he acquires a right to practise as stated above. Having thus acquired a right to practise he incurs certain obligations in regard to his conduct as a member of the noble profession. The Bar Councils are enjoined with the duty to act as sentinels of professional conduct and must ensure that the dignity and purity of the profession are in no way undermined. Its job is to uphold the standards of professional conduct and etiquette. Thus every State Bar Council and the Bar Council of India has a public duty to perform, namely, to ensure that the monopoly of practice granted under the Act is not misused or abused by a person who is enrolled as an advocate. The Bar Councils have been created at the State level as well as the Central level not only to protect the rights, interests and privileges of its members but also to protect the litigating public by ensuring that high and noble traditions are maintained so that the purity and dignity of the profession are not jeopardized. It is generally believed that members of the legal profession have certain social obligations, e.g., to render "pro bono publico" service to the poor and the underprivileged. Since the duty of a lawyer is to assist the court in the administration of justice, the practice of law has a public utility flavour and, therefore, he must strictly and scrupulously abide by the Code of Conduct behaving the noble profession and must not indulge in any activity which may tend to lower the image of the profession in society. That is why the functions of the Bar Council include the laying down of standards of professional conduct and etiquette which advocates must follow to maintain the dignity and purity of the profession."

29. An objective analysis of the above principles makes it clear that except where the challenge is on the grounds of legislative incompetence or the restriction imposed was ex facie unreasonable, arbitrary and violative of Part III of the Constitution of India, the restriction would be held to be valid and enforceable.

30. The next contention raised on behalf of the appellants

before us is that the entire restriction is based on an illogical presumption of likelihood of bias. The presumption of legal bias being without any basis and ill-founded, the amendment itself is liable to be declared ultra vires. This contention, again, does not carry any weight. This argument is misconceived on facts and law, both. It is not only the mischief of likelihood of bias which is sought to be prevented by the amendment but the amendment, has a definite purpose and object to achieve which is in the larger public interest. Such legislative attempt, not only to adhere to but to enhance the values and dignity of the legal profession, would add to the confidence of the common litigant in the administration of justice and the performance of duties by the Tribunal.

31. For example, a person who is otherwise qualified to be admitted as an advocate, but is either in full or part time service or employment, or is engaged in any trade, business or profession, shall not be admitted as an advocate, was a restriction imposed by the Bar Council of State of Maharasthra and Goa. Upon challenge, this Court had taken the view tha

under Article 19(1)(g), all citizens have a right to ractice any profession or carry on any occupation, trade or bu iness. The term 'any profession' may include even pluralit of professions. However, this is not an absolute right a d is subject to reasonable restrictions under Article 19 6). It cannot be gainsaid that litigants are also members of general public and if in their interest, any rule imposes a estriction on the entry to the legal profession and if such rest iction is founded to be reasonable, Article 19(1)(g) would not et stultified {*Dr. Haniraj L. Chulani v. Bar Council, State of M harashtra & Goa* [(1

96) 3 SCC 342]}. 32. In this very case, the Court also ob erved that these well- established connotations and contours of the re uirements of the legal profession itself supply the necessary g idelines to the concerned Bar Councils or Legislatures to rame Rules for regulating the entry of the persons to the profession.

33. This judgment is relatable to the legal profession and we have already noticed the judgments of this Court relating to other professions. Imposition of restrictions is a concept inbuilt into the enjoyment of fundamental rights, as no right can exist without a corresponding reasonable restriction placed on it. When the restrictions are placed upon the carrying on of a profession or to ensure that the intent, object or purpose achieved thereby would be enhancing the purity of public life, such object would certainly be throttled if there arose a situation of conflict between private interest and public duty. The principle of private interest giving way to public interest is a settled cannon, not only of administrative jurisprudence, but of statutory interpretation as well. Having regard to the prevalent values and conditions of the profession, most of the legal practitioners would not stoop to unhealthy practices or tactics but the Legislature, in its wisdom, has considered it desirable to eliminate any possibility of conflict between the interest and duty and aimed at achieving this object or purpose by prescribing the requisite restrictions. With the development of law, the courts are expected to consider, in contradistinction to private and public interest, the institutional interest and expectations of the public at large from an institution. These are the balancing tests which are applied by the courts even in the process of interpretation or examining of the constitutional validity of a provision.

34. Under the English Law, the genesis of bias has been described as the perception that the court is free from bias, that it is objectively impartial stems from the overworked aphorism of Lord Hewart C.J. in *R. v. Sussex Justices Ex. P. McCarthy* [(1924) 1 KB 256 KBD at 259] wherein he said, "It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done." However, later the courts

there felt that too heavy a reliance upon the Hewart aphorism in instances of alleged bias produces the danger that the appearance of bias or injustice becomes more important than the absence of actual bias, the doing of justice itself. It is, therefore, of importance that perceived bias is not too readily inferred, such as to negate the doing of justice. In *Porter v. Magill* [(2002) 2 AC 357], the House of Lords finally decided the proper test for finding perceived or apparent bias, after judicial debate for over two decades, which displayed the welcome interplay of judicial pronouncements within the jurisdictions of the English common law, Scotland and Strasbourg jurisprudence. The test is now whether the fair-minded observer, having considered the facts, would consider that there was a reasonable possibility that the tribunal was biased. [See Sir Louis Blom, Q.C., 'Bias, Malfunction in Judicial Decision-making', (2009) Public Law 199].

35. Bias must be shown to be present. Probability of bias, possibility of bias and reasonable suspicion that bias might have affected the decision are terms of different connotations. They broadly fall under two categories, i.e., suspicion of bias and likelihood of bias. Likelihood of bias would be the possibility of bias and bias which can be shown to be present, while suspicion of bias would be the probability or reasonable suspicion of bias. The former lead to vitiation of action, while the latter could hardly be the foundation for further e amination of action, with reference to the facts and circumstances f a given case. The correct test would be to examine whether th re appears to be a real danger of bias or whether there is only a p obability or even a preponderance of probability of such bias in the circumstances of a given case. If it falls in the prior category, the decision would attract judicial castecism but if it falls in the latter, it would hardly effect the decision, much less adversely.

36. Harry Woolf, Jeffey Jowell and Andrew Le Sueur, in their recent book De Smith's Judicial Review (Sixth Edition) have referred to the concept of 'automatic disqualification', that is, where the element of bias is present and would lead to disqualification on its own. This rule was invoked to invalidate the composition of a disciplinary tribunal of the Council of the Inns of Court, since one of the members of the tribunal had been a member of the Professional Conduct and Complaints Committee of the Bar Council (PCCC) which was the body responsible for the decision to prosecute a member of the Bar before that Tribunal. It was held by the Visitors to the Inns of Court that each member of the PCCC had a common interest in the prosecution and, therefore, was acting as a judge in his or her own cause. The rule was not free of exceptions. It could even be applied with certain flexibility. On the subject of judicial bias, a greater degree of flexibility has to be applied in cases of automatic disqualification. For example, where the public became aware that a senior member of a firm was acting against one of the parties to the litigation, but, on another matter, it was held that automatic disqualification would not be necessary, as the connection between the firm's success in the case and its profits was "tenuous" and the party had effectively waived the right to challenge an adverse decision in the former litigation.

37. The element of bias by itself may not always necessarily vitiate an action. The Court would have to examine the facts of a given case. Reverting to the facts of the present case, despite their absence from the object and reasons for the amendment of Section 129(6) of the Customs Act it cannot be held that the element of bias was presumptuous or without any basis or object. It may be one of the relevant factors which probably would have weighed on the mind of the Legislature. When you have been a member of a Tribunal over a long period, and other members have been your co-members whether judicial or technical, it is difficult to hold that there would be no possibility of bias or no real danger of bias. Even if we rule out this possibility, still, it will always be better advised and in the institutional interest that restrictions are enforced. Then alone

will the mind of the litigant be free from a lurking doubt of likelihood of bias and this would enhance the image of the Tribunal. The restriction, as already discussed, leaves the entire field of legal profession wide open for the appellants and all persons situated alike except to practice before CESTAT.

38. Besides the possibility of bias, there is a legitimate expectation on the part of a litigant before the Tribunal that there shall not be any possibility of justice being denied or being not done fairly. These are the concepts which are very difficult to be defined and demarcated with precision. Some element of uncertainty would be prevalent. There can be removal of doubts to the facts of a given case that would help in determining matters with somewhat greater uncertainty. The contention of the petitioners that there has to be empirical data to suggest their practice before the Tribunal resulted in instances of misdemeanor which would have propelled the respondents to insert such a provision in the enactment, has rightly been rejected by the High Court. It may not even be proper to introduce such amendments with reference to any data. Suffice it to note that these amendments are primarily based upon public perception and normal behaviour of an ordinary human being. It is difficult to define cases where element of bias would affect the decision and where it would not, by a precise line of distinction. Even in a group, a person possessing a special knowledge may be in a position to influence the group and his bias may operate in a subtle manner.

39. The general principles of bias are equally applicable to our administrative and civil jurisprudence. Members of the Tribunals, called upon to try issues in judicial or quasi-judicial proceedings should act judicially. Reasonable apprehension is equitable to possible apprehension and, therefore, the test is whether the litigant reasonably apprehends that bias is attributable to a member of the Tribunal. Repelling the apprehension of bias in administrative action, the Courts have taken the view that in the case where a remote relationship existed, separated by six degrees, which was the foundation of challenge of selection to a post of clerk in the Gram Panchayat High School, the challenge was not sustainable. It is difficult to rule out the possibility of a reasonable apprehension in the minds of the litigants who approach the Tribunal for justice, if the reasonable restriction introduced in Section 129(6) of the Customs Act is not enforced. Reference can be made to the judgments of this Court in the case of *Manak Lal v. Dr. Prem Chand* [AIR 1957 SC 425] and Rasmiranjan Das v. Sarojkanta Behera & Ors.[(2000) 10 SCC 502].

40. This Court in the case of *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and Ors.* [(2001) 1 SCC 182], having regard to the changing structure of the society, stated that modernization of the society with the passage of time had its due impact on the concept of bias as well. The courts have applied the tests of real likelihood and reasonable suspicion. These doctrines were discussed in the case of *S. Parthasarathi v. State of Andhra Pradesh* [(1974) 3 SCC 459]. The Court found that 'real likelihood' and 'reasonable suspicion' were terms really inconsistent with each other and the Court must make a determination, on the basis of the whole evidence before it, whether a reasonable man would, in the circumstance, infer that there is real likelihood of bias or not. The Court has to examine the matter from the view point of the people. The term 'bias' is used to denote a departure from the standing of even ended justice. After discussing this law, another Bench of this Court in the case of *State of Punjab v. V.K. Khanna* [(2001) 2 SCC 330], finally held as under:-

> "8. The test, therefore, is as to whether there is a mere apprehension of bias or there is a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom. In the event, however, the conclusion is otherwise that there is existing

a real danger of bias administrative action cannot be sustained. If on the other hand allegations pertain to rather fanciful apprehension in administrative action, question of declaring them to be unsustainable on the basis therefor, would not arise."

41. The word 'bias' in popular English parlance stands included within the attributes and broader purview of the word 'malice', which in general connotation, means and implies 'spite' or 'ill will'. It is also now a well settled proposition that existence of the element of 'bias' is to be inferred as per the standard and comprehension of a reasonable man. The bias may also be malicious act having some element of intention without just cause or excuse. In case of malice or ill will, it may be an actual act conveying negativity but the element of bias could be apparent or reasonably seen without any negative result and could form part of a general public perception.

42. Now, we shall proceed to examine the merits of the contention raised that the provisions of Section 129(6) of the Customs Act cannot be given effect to retrospectively. The argument advanced is that the appellants were enrolled as advocates when the provisions of Section 129(6) were not on the statute book. After ceasing to be members of the Tribunal and starting their practice as advocates, such a bar was not operative. Now, after the lapse of so many years, their right to practice before such Tribunals cannot be taken away and to that extent, in any case, the provisions of Section 129(6) cannot be made retrospective.

43. As already noticed by us above, the right to practice law is a statutory right. The statutory right itself is restricted one. It is controlled by the provisions of the Advocates Act, 1961 as well as the rules framed by the Bar Council in that Act. A statutory right cannot be placed at a higher pedestal to a fundamental right. Even a fundamental right is subject to restriction and control. At the cost of repetition, we may notice that it is not possible to imagine a right without restriction and controls in the present society. When the appellants were enrolled as advocates as well as when they started practicing as advocates, their right was subject to the limitations under any applicable Act or under the constitutional limitations, as the case may be. One must clearly understand a distinction between a law being enforced retrospectively and a law that operates retroactively. The restriction in the present case is a clear example where the right to practice before a limited forum is being taken away in presenti while leaving all other forums open for practice by the appellants. Though such a restriction may have the effect of relating back to a date prior to the presenti. In that sense, the law stricto sensu is not retrospective, but would be retroactive. It is not for the Court to interfere with the implementation of a restriction, which is otherwise valid in law, only on the ground that it has the effect of restricting the rights of the people who attain that status prior to the introduction of the restriction. It is certainly not a case of settled or vested rights, which are incapable of being interfered with. It is a settled canon of law that the rights are subject to restrictions and the restrictions, if reasonable, are subject to judicial review of a very limited scope.

44. We do not find any reason to accept the submission that enforcement of the restriction retroactively would be impermissible, particularly in the facts and circumstances of the present case.

45. We may refer to the case of *R. v. Inhabitants of St. Mary, Whitechapel* [(1881) 12 QB 149] whereby under Section 2 of the Poor Removal Act, 1846, 'No woman residing in any parish with her husband at the time of his death shall be removed… from such parish, for twelve calendar months after his death, if she so long continue a widow.' In this case, a widow was sought to be removed within such period of 12 months, on the grounds that her husband had died before the coming into force of that Act. The question was whether that provision

applied retrospectively. Lord Denman, C.J, held that 'the statute is, in its direct operation, prospective, as it relates to future removals only and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from its time antecedent to its passing'. Thus, the provision was held not to be retrospective.

46. Examined the case of the appellants from this angle, it would mean that the law is not at all retrospective even though the retirement or date of ceasing to be a member of the Tribunal may have been on a date anterior to the date of passing of the law.

47. We may also notice that the restriction is not punitive, in that sense, but is merely a criterion for eligibility for continuing to practice law before the Tribunal.

48. Earlier, the nature of law, as substantive or procedural, was taken as one of the determinative factors for judging the retrospective operation of a statute. However, with the development of law, this distinction has become finer and of less significance. Justice G.P. Singh, in his *Principles of Statutory Interpretation* (12th Edition, 2010) has stated that the classification of a statute, as either a substantive or procedural law, does not necessarily determine whether it may have retrospective operation. For example, a statute of limitation is generally regarded as procedural, but its application to a past cause of action has the effect of reviving or extinguishing a right to sue. Such an operation cannot be said to be procedural. It has also been noted that the rule of retrospective construction is not applicable merely because a part of the requisites for its action is drawn from a time antecedent to the passing of the relevant law. For these reasons, the rule against retrospectivity has also been stated, in recent years, to avoid the classification of statutes into substantive and procedural and the usage of words like 'existing' or 'vested'. Referring to a judgment of the Australian High Court in the case of *Maxwell v. Murphy* [(1957) 96 CLR 261], it is recorded as follows :

> "One such formulation by Dixon C.J. is as follows : 'The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But given rights and liabilities fixed by reference to the past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption'."

49. In such matters, in judiciously examining the question of retrospectivity or otherwise, the relevant considerations include the circumstances in which legislation was created and the test of fairness. The principles of statutory interpretation have expanded. With the development of law, it is desirable that the Courts should apply the latest tools of interpretation to arrive at a more meaningful and definite conclusion. The doctrine of fairness has also been applied by this Court in the case of *Vijay v. State of Maharashtra & Ors.*[(2006) 6 SCC 289]. A restriction was introduced providing that a person shall not be a member of a Panchayat or continue as such, if he has been elected as Councilor of Zila Parishad or as a member of the Panchayat Samiti. This restriction was held to be retrospective and applicable to the existing members of the Panchayat also. Applying the rule of literal construction, this Court held that when a literal reading of the provision giving retrospective effect does not produce absurdity or anomaly, the same would not be construed only prospective. This was further strengthened by the application of the rule of fairness.

50. In the present case, the restriction would be applied uniformly to all the practicing advocates as well as to the

advocates who would join the profession in future and would achieve the object of the Customs Act without leading to any absurd results. On the contrary, its uniform application would achieve fair results without really visiting any serious prejudice upon the class of the advocates who were earlier the members of the Tribunal as it remains open to them to practice in other tribunals, forums and courts. If an exception was carved out in their favour, it would lead to an anomaly as well as an absurd situation frustrating the very purpose and object of Section 129(6) of the Act.

51. Still in another case titled *Dilip v. Mohd. Azizul Haq & Anr.* [(2000) 3 SCC 607], this Court, while dealing with the question whether the amendment in the Rent Control Order, which had earlier only covered 'houses', and was amended to encompass 'premises' could be allowed to agreements entered into, prior in time, clearly held that the provision came into force when the appeal was still pending and, though the provision is prospective in force, it has retroactive effect. This provision merely provides for a limitation to be imposed for the future, which in no way affects anything done by a party in the past and the statutes providing for new remedies or new manners for enforcement of the existing rights will apply to future as well as past causes of action. This Court also held that the presumption against retrospective legislation does not necessarily apply to an enactment merely because a part of the requisites for its action are drawn from a time antecedent to its passing.

52. In light of these principles, the provisions of Section 129(6) of the Customs Act and its operation cannot be faulted with. Another half-hearted attempt was made to raise a contention that the appellants can continue to appear before the Tribunal as they are permitted to do so in terms of Section 146A of the Customs Act, despite the provisions of Section 129(6) of the Customs Act. We are unable to find any merit in this contention as well. The provisions of Section 129(6) of the Customs Act are specific and both these provisions have to be construed harmoniously. We find nothing contradictory in these three provisions. Section 146(2)(c) of the Customs Act refers to the appearance by a legal practitioner who is entitled to practice as such in accordance with law. Section 129(6) places a restriction, which is reasonable and valid restriction, as held by us above. Thus, the provisions of Section 146A of the Act would have to be read in conjunction with and harmoniously to Section 129(6) of the Customs Act and the person who earns a disqualification under this provision cannot derive any extra benefit contrary to Section 129(6) of the Customs Act from the reading of Section 146A of the Customs Act. Thus, we have no hesitation in rejecting this contention as well.

53. For the reasons afore-recorded, we dismiss all the aforesaid appeals, however, without any order as to costs.

K.K.T. Appeals dismissed.

HARDEEP KAUR
v.
MALKIAT KAUR
(Civil Appeal No. 2870 of 2012)

MARCH 16, 2012

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

Code of Civil Procedure, 1908 - s. 100 - Second appeal - Formulation of substantial question of law - Requirement of - Held: Formulation of substantial question of law at the initial stage before hearing the second appeal is mandatory - Decision of the High Court is vitiated because no substantial question of law was formulated.

The question for consideration in the present appeal was whether a second appeal lies only on a substantial question of law and is it essential for the High Court to

formulate a substantial question of law before interfering with the judgment and decree of the lower appellate court.

Allowing the appeal, the Court

HELD: 1. As a matter of law, the High Court is required to formulate substantial question of law involved in the second appeal at the initial stage if it is satisfied that the matter deserves to be admitted and the second appeal has to be heard and decided on such substantial question of law. In view of sub-section (5) of Section 100, at the time of hearing of second appeal, it is open to the High Court to re-formulate substantial question/s of law or formulate fresh substantial question/s of law or hold that no substantial question of law is involved. The High Court cannot proceed to hear the second appeal without formulating a substantial question of law in the light of the provisions contained in Section 100 CPC. [Para 10]

2. The High Court ignored and overlooked the mandatory requirement of the second appellate jurisdiction as provided in Section 100 CPC and that vitiates its decision as no substantial question of law was framed and yet the judgment and decree of the first appellate court was reversed. [Para 13]

Kshitish Chandra Purkait v. Santosh Kumar Purkait and Ors. **(1997) 5 SCC 438: 1997 (1) Suppl. SCR 201;** *Dnyanoba Bhaurao Shemade v. Maroti Bhaurao Marnor* **(1999) 2 SCC 471;** *Panchugopal Barua and Ors. v. Umesh Chandra Goswami and Ors.* **(1997) 4 SCC 713: 1997 (2) SCR 12;** *Sheel Chand v. Prakash Chand* **(1998) 6 SCC 683: 1998 (1) Suppl. SCR 297;** *Kanai Lal Garari and Ors. v. Murari Ganguly and Ors.* **(1999) 6 SCC 35;** *Ishwar Dass Jain (Dead) through L.Rs. v. Sohan Lal (Dead) by L.Rs.* **(2000) 1 SCC 434: 1999 (5) Suppl. SCR 24;** *Roop Singh (Dead) through L.Rs. v. Ram Singh (Dead) through L.Rs.* **(2000) 3 SCC 708: 2000 (2) SCR 605;** *Santosh Hazari v. Purushottam Tiwari (Deceased) by L.Rs.* **(2001) 3 SCC 179: 2001 (1) SCR 948;** *Chadat Singh v. Bahadur Ram and Ors.* **(2004) 6 SCC 359: 2004 (3) Suppl. SCR 298;** *Sasikumar and Ors. v. Kunnath Chellappan Nair and Ors.* **(2005) 12 SCC 588: 2005 (4) Suppl. SCR 363;** *C.A. Sulaiman and Ors. v. State Bank of Travancore, Alwayee and Ors.* **(2006) 6 SCC 392: 2006 (4) Suppl. SCR 152;** *Bokka Subba Rao v. Kukkala Balakrishna and Ors.* **(2008) 3 SCC 99: 2008 (2) SCR 753;** *Narayanan Rajendran and Anr. v. Lekshmy Sarojini and Ors.* **(2009) 5 SCC 264: 2009 (2) SCR 71;** *Municipal Committee, Hoshiarpur v. Punjab State Electricity Board and Ors.* **(2010) 13 SCC 216: 2010 (13) SCR 658;** *Umerkhan v. Bismillabi alias Babulal Shaikh and Ors.* **(2011) 9 SCC 684;** *Shiv Cotex v. Tirgun Auto Plast Private Limited and Ors.* **(2011) 9 SCC 678- relied on.**

M.S.V. Raja and Anr. v. Seeni Thevar and Ors. **(2001) 6 SCC 652 :2001 (1) Suppl. SCR 513 - distinguished.**

Case Law Reference:

1997 (1) Suppl. SCR 201	**Relied on**	**Para 10**
(1999) 2 SCC 471	**Relied on**	**Para 10**
1997 (2) SCR 12	**Relied on**	**Para 10**
1998 (1) Suppl. SCR 297	**Relied on**	**Para 10**
(1999) 6 SCC 35	**Relied on**	**Para 10**
1999 (5) Suppl. SCR 24	**Relied on**	**Para 10**
2000 (2) SCR 605	**Relied on**	**Para 10**
2001 (1) SCR 948	**Relied on**	**Para 10**
2004 (3) Suppl. SCR 298	**Relied on**	**Para 10**

2005 (4) Suppl. SCR 363 Relied on Para 10

2006 (4) Suppl. SCR 152 Relied on Para 10

2008 (2) SCR 753 Relied on Para 10

2009 (2) SCR 71 Relied on Para 10

2010 (13) SCR 658 Relied on Para 10

(2011) 9 SCC 684 Relied on Para 11

(2011) 9 SCC 678 Relied on Para 11

2001 (1) Suppl. SCR 513 Distinguished Para 13

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2870 of 2012.

From the Judgment & Order dated 09.03.2011 of the High Court of Punjab & Haryana at Chandigarh in Regular Second Appeal No. 1679 of 2001.

Gagan Gupta for the Appellant.

Neeraj Kumar Jain, Umang Shankar, Urga Shankar Prasad for the Respondent.

The Judgment of the Court was delivered by

R.M. Lodha, J. 1. Leave granted.

2. The defendant is in appeal aggrieved by the judgment dated March 9, 2011 of the High Court of Punjab and Haryana whereby the Single Judge of that Court allowed the second appeal filed by the respondent – plaintiff; set aside the judgment and decree dated January 5, 2001 passed by the District Judge, Sangrur and restored the judgment and decree dated April 21, 1997 passed by the Civil Judge, Junior Division, Dhuri.

3. The short question that arises for consideration in this appeal by special leave is whether a second appeal lies only on a substantial question of law and it is essential for the High Court to formulate a substantial question of law before interfering with the judgment and decree of the lower appellate court. This question arises in this way. The respondent (hereinafter referred to as `plaintiff') filed a suit for specific performance of the contract dated May 22, 1993. According to the plaintiff, the appellant (hereinafter referred to as `defendant') being co-owner having 1/12th share in the agricultural land admeasuring 183 bighas 19 biswas situate in Ferozepur Kuthala, Tehsil Dhuri, by an agreement dated May 22, 1993, agreed to sell 15 bighas 4 biswas of land to the plaintiff at the rate of Rs. 15000/- per bigha. The defendant received Rs. 1,48,000/- as earnest money. The sale deed was to be executed on or before March 10, 1994 and the possession of the land was also to be delivered at the time of registration of the sale deed on receipt of remaining consideration of Rs. 80,000/-. The defendant got the time for execution of sale deed extended upto May 10, 1995 with the consent of the plaintiff. However, despite repeated requests by the plaintiff, she did not execute the sale deed. It is the plaintiff's case that she had been always ready and willing to perform her part of the contract, but since the defendant failed to perform her part of the contract, the suit for specific performance of the contract had to be filed.

4. The defendant contested the suit and denied the execution of the agreement of sale dated May 22, 1993. She also denied having received any earnest money. She stated that she was illiterate lady and did not know how to write and sign and the subject agreement was false and fabricated document. On the pleadings of the parties, the trial court framed the following issues:-

1. Whether the defendant executed an agreement to sell on 22.5.93 and executed writing dated 10.3.94 on the back of the agreement and received Rs. 1,48,000/- as earnest money?

2. Whether plaintiff is entitled to specific performance of the agreement and for possession?

3. Whether the plaintiff has got no cause of action to file the present suit?

4. Whether the plaintiff is ready and willing and is still ready and willing to perform her part of contract?

5. Relief.

5. On recording the evidence and thereafter hearing the parties, the trial court decided issue nos. 1 to 4 in favour of the plaintiff and decreed the plaintiff's suit on April 21, 1997 by directing the defendant to execute the sale deed by May 31, 1997, failing which it was declared that plaintiff would be entitled to get the same executed through court on payment of remaining consideration.

6. The defendant challenged the judgment and decree of the trial court in appeal before the District Judge, Sangrur. The District Judge, Sangrur, on hearing the parties, although did not interfere with the finding of the trial court in respect of the execution of agreement dated May 22, 1993, but held that both the parties had contributed towards frustration of the execution of the sale deed and, therefore, the plaintiff was not entitled to specific performance of the agreement. The District Judge, accordingly, modified the decree of the trial court by directing refund of Rs. 1,48,000/- along with interest at the bank rate from the date of the agreement until realization.

7. Being not satisfied with the judgment and decree dated January 5, 2001 passed by the District Judge, Sangrur, the plaintiff preferred second appeal before the Punjab and Haryana High Court. As noted above, the Single Judge allowed the appeal; set aside the judgment and decree of the first appellate court and restored the judgment and decree of the trial court.

8. The perusal of the judgment of the High Court shows that no substantial question of law has been framed and yet second appeal was allowed.

9. Sections 100, 101 and 103 of the Code of Civil Procedure, 1908 (for short, `CPC') read as follows:-

"S.-100.- Second appeal.—(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question :

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court

to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

"S.101.-Second appeal on no other grounds.- No second appeal shall lie except on the ground mentioned in section 100."

"S.103.- Power of High Court to determine issues of fact. – In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal, -

(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred to in section 100."

10. The jurisdiction of the High Court in hearing a second appeal under Section 100 CPC has come up for consideration before this Court on numerous occasion. In long line of cases, this Court has reiterated that the High Court has a duty to formulate the substantial question/s of law before hearing the second appeal. As a matter of law, the High Court is required to formulate substantial question of law involved in the second appeal at the initial stage if it is satisfied that the matter deserves to be admitted and the second appeal has to be heard and decided on such substantial question of law. The two decisions of this Court in this regard are: *Kshitish Chandra Purkait v. Santosh Kumar Purkait and Others*[1], and *Dnyanoba Bhaurao Shemade v. Maroti Bhaurao Marnor*[2]. It needs to be clarified immediately that in view of sub-section (5) of Section 100, at the time of hearing of second appeal, it is open to the High Court to re-formulate substantial question/s of law or formulate fresh substantial question/s of law or hold that no substantial question of law is involved. This Court has repeatedly said that the judgment rendered by the High Court under Section 100 CPC without following the procedure contained therein cannot be sustained. That the High Court cannot proceed to hear the second appeal without formulating a substantial question of law in light of the provisions contained in Section 100 CPC has been reiterated in *Panchugopal Barua and Others v. Umesh Chandra Goswami and Others*;[3], *Sheel Chand v. Prakash Chand*[4]*; Kanai Lal Garari and Others v. Murari Ganguly and Others*[5]*; Ishwar Dass Jain (Dead) through L.Rs. v. Sohan Lal (Dead) by L.Rs.*[6]*; Roop Singh (Dead) through L.Rs. v. Ram Singh (Dead) through L.Rs.*[7]*; Santosh Hazari v. Purushottam Tiwari (Deceased) by L.Rs.*[8]*; Chadat Singh v. Bahadur Ram and Others*[9]*; Sasikumar and Others v. Kunnath Chellappan Nair and Others*[10]*; C.A. Sulaiman and Others v. State Bank of Travancore, Alwayee and Others*[11]*; Bokka Subba Rao v. Kukkala Balakrishna and Others*[12]*; Narayanan Rajendran*[13] and *Another v. Lekshmy Sarojini and Others and Municipal Committee, Hoshiarpur v. Punjab State Electricity Board and Others*[14].

11. Some of the above decisions and the provisions contained in Sections 100, 101 and 103 CPC were considered in a recent decision of this Court in *Umerkhan v. Bismillabi alias Babulal Shaikh and Others.*[15]. One of us (R.M. Lodha,J.) speaking for the Bench in *Umerkhan*[15] stated the legal position with regard to the jurisdiction of the High Court in hearing a second appeal in paragraphs 11 and 12 of the Report (page 687) thus:

> "11. In our view, the very jurisdiction of the High Court in hearing a second appeal is founded on the formulation of a substantial question of law. The judgment of the High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating a substantial question of law. The second appellate jurisdiction of the High Court under

Section 100 is not akin to the appellate jurisdiction under Section 96 of the Code; it is restricted to such substantial question or questions of law that may arise from the judgment and decree appealed against. As a matter of law, a second appeal is entertainable by the High Court only upon its satisfaction that a substantial question of law is involved in the matter and its formulation thereof. Section 100 of the Code provides that the second appeal shall be heard on the question so formulated. It is, however, open to the High Court to reframe substantial question of law or frame substantial question of law afresh or hold that no substantial question of law is involved at the time of hearing the second appeal *but reversal of the judgment and decree passed in appeal by a court subordinate to it in exercise of jurisdiction under Section 100 of the Code is impermissible without formulating substantial question of law and a decision on such question"*.

(emphasis supplied)

12. This Court has been bringing to the notice of the High Courts the constraints of Section 100 of the Code and the mandate of the law contained in Section 101 that no second appeal shall lie except on the ground mentioned in Section 100, yet it appears that the fundamental legal position concerning jurisdiction of the High Court in second appeal is ignored and overlooked time and again. The present appeal is unfortunately one of such matters where the High Court interfered with the judgment and decree of the first appellate court in total disregard of the above legal position."

The above principle of law concerning jurisdiction of the High Court under Section 100 CPC laid down in *Umerkhan*[15] has been reiterated in a subsequent decision in *Shiv Cotex v. Tirgun Auto Plast Private Limited and Others.*[16]. This Court through one of us (R.M. Lodha,J.) observed in paragraph 11 of the Report (page 681) as follows:-

"The judgment of the High Court is gravely flawed and cannot be sustained for more than one reason. In the first place, the High Court, while deciding the second appeal, failed to adhere to the necessary requirement of Section 100 CPC and interfered with the concurrent judgment and decree of the courts below without formulating any substantial question of law. The formulation of substantial question of law is a must before the second appeal is heard and finally disposed of by the High Court. This Court has reiterated and restated the legal position time out of number that formulation of substantial question of law is a condition precedent for entertaining and deciding a second appeal……".

12. The relevant discussion in the judgment by the High Court reads as follows:

"After hearing learned counsel for the parties and going through the records of the case, this appeal deserves acceptance and the judgment and decree passed by the trial court deserves to be restored for the reasons to be given hereinafter.

In this case, the defendant-respondent could not produce any evidence on record to show that the said agreement to sell was forged or a fabricated document or it was the result of fraud or misrepresentation. The plaintiff-appellant proved on record that she had always been ready and willing to perform her part of the agreement. In fact, filing of the suit by the plaintiff-appellant itself showed that she was ready and willing to perform her part of the agreement. The defendant-respondent had denied her signatures on the agreement to sell (Exhibit P.1) and the endorsement (Exhibit P.3) made on the back of the agreement, vide which the date of execution of the sale deed was extended from 10.3.1994 to 10.5.1995 by claiming that she did not

know how to write and sign. However, there is evidence of Telu Ram (P.W.4), produced by the plaintiff. Telu Ram (P.W.4) had brought the original file No. 2110 concerning the defendant-respondent Hardeep Kaur whereby she had taken loan. On the application (Exhibit P.5) for taking loan, on the receipt of payment of loan amount (Exhibit P.6) and on the other documents pertaining to the sanction of loan (Exhibits P.7 to P.12), the defendant had put her signatures. It, thus, belied the stand of the defendant that she usually thumb marked the documents and had not signed the agreement to sell (Exhibit P.1) and the endorsement (Exhibit P.3). Both these documents i.e., Exhibit P.1 and P.3 prove in certain terms that the defendant had agreed to sell the land measuring 15 Bighas 4 Biswas to the plaintiff for Rs. 2,38,000/-. Major part of the sale consideration i.e., Rs. 1,48,000/- had already been paid at the time of execution of the agreement to sell (Exhibit P.1). The remaining amount of sale consideration of Rs. 80,000/- was deposited by the plaintiff in the trial court. It shows that the plaintiff has always been ready and willing to perform her part of the agreement. Under the circumstances, the lower appellate court was not justified in confining the relief of the plaintiff to the return of earnest money only.

Under the circumstances, this appeal succeeds. The same is, accordingly, allowed. The judgment and decree passed by the lower appellate court are set aside and those of the trial court are restored. However, there shall be no order as to costs."

13. Apparently, the High Court has ignored and overlooked the mandatory requirement of the second appellate jurisdiction as provided in Section 100 CPC and that vitiates its decision as no substantial question of law has been framed and yet the judgment and decree of the first appellate court has been reversed. However, Mr. Neeraj Kumar Jain, learned senior counsel for the respondent, submitted that though no substantial question of law has been expressly framed by the High Court while accepting the second appeal, but the above discussion by the High Court clearly shows that the High Court considered the questions whether the plaintiff was entitled to the grant of decree of specific performance of the contract once execution of agreement has been duly proved and the plaintiff was always ready and willing to perform her part of the contract and whether the first appellate court has correctly exercised the discretion in terms of Section 20 of the Specific Relief Act, 1963 while refusing the decree for specific performance of the contract as was ordered by the trial court. In this regard, he relied upon a decision of this Court in *M.S.V. Raja and Another v. Seeni Thevar and Others*[17].

14. In paragraph 18 (pages 659-660) of the Report in *M.S.V. Raja*[17] this Court observed as follows:

> "We are unable to accept the argument of the learned Senior Counsel for the appellants that the impugned judgment cannot be sustained as no substantial question of law was formulated as required under Section 100 CPC. In para 22 of the judgment the High Court has dealt with substantial questions of law. Whether a finding recorded by both the courts below with no evidence to support it was itself considered as a substantial question of law by the High Court. It is further stated that the other questions considered and dealt with by the learned Judge were also substantial questions of law. Having regard to the questions that were considered and decided by the High Court, it cannot be said that substantial questions of law did not arise for consideration and they were not formulated. Maybe, substantial questions of law were not specifically and separately formulated. In this view, we do not find any merit in the argument of the learned counsel in this regard."

15. In *M.S.V. Raja*[17] this Court found that the High Court in paragraph 22 of the judgment under consideration therein had dealt with substantial questions of law. The Court further observed that the finding recorded by both the courts below with no evidence to support it was itself considered as a substantial question of law by the High Court. It was further observed that the other questions considered and dealt with by the learned Judge were substantial questions of law. Having regard to the questions that were considered and decided by the High Court, it was held by this Court that it could not be said that the substantial questions of law did not arise for consideration and they were not formulated. The sentence `maybe substantial questions of law were not specifically and separately formulated' in *M.S.V. Raja*[17] must be understood in the above context and peculiarity of the case under consideration. The law consistently stated by this Court that formulation of substantial question of law is a sine qua non for exercise of jurisdiction under Section 100 CPC admits of no ambiguity and permits no departure.

16. In the present case, the High Court has allowed the second appeal and set aside the judgment and decree of the first appellate court without formulating any substantial question of law, which is impermissible and that renders the judgment of the High Court unsustainable.

17. Consequently, the appeal is allowed and the impugned judgment of the High Court is set aside. The second appeal (R.S.A. No. 1679 of 2001 – *Malkiat Kaur vs. Hardeep Kaur*) is restored to the file of the High Court for fresh consideration in accordance with law. No order as to costs.

K.K.T. Appeal allowed.

HEAD MASTER, LAWRENCE SCHOOL LOVEDALE
v.

JAYANTHI RAGHU & ANR.
(Civil Appeal No. 2868 2012)

MARCH 16, 2012.

[DALVEER BHANDARI AND DIPAK MISRA, JJ.]

Service Law:

Deemed confirmation - Appointment letter stipulating that the appointee would be on probation for a period of two years which could be extended for another one year - After the employee competed three years of service, her services terminated without holding an inquiry - Held: The status of confirmation has to be earned and conferred - The wider interpretation cannot be placed on the Rule to infer that the probationer gets the status of a deemed confirmed employee after expiry of three years of probationary period as that would defeat the basic purpose and intent of the Rule which clearly postulates "if confirmed"- A confirmation, as is demonstrable from the language employed in the Rule, does not occur with efflux of time - As it is hedged by a condition, an affirmative or positive act is the requisite by the employer - In considered opinion of the Court, an order of confirmation is required to be passed - The order of High Court is set aside to the extent that the employee had acquired the status of confirmed employee and, therefore, holding of enquiry was imperative - Lawrence School Lovedale (Nilgiris) Rules - r. 4.9.

Words and Phrases:

Expression "if confirmed" as occurring in r.4.9 of Lawrence School Lovedale (Nilgiris) Rules - Connotation of - Explained.

Respondent no. 1 was appointed as a teacher in the appellant School with effect from 1.9.1993 under an appointment letter stipulating that she would be on prob

tion for a period of two years which could be extended for another one year. In November 1995, she was stated to have received some unauthorised amount. After recording the proceeding, by order dated 18.6.1997, the services of respondent no. 1 were terminated. The order was challenged in a writ petition and the Single Judge of the High Court set it aside holding that the same was stigmatic in nature and could not have been passed without an inquiry. In the writ appeal filed by the school, though the Division Bench of the High Court observed that the proceeding did not cast any stigma, it ultimately held that in the absence of any provision for extension of probation beyond a period of three years, the services of the teacher would be treated as confirmed after 1.9.1996.

In the instant appeal filed by the School, the question for consideration before the Court was: "Whether the appellant-school was justified under the Rules treating the respondent-teacher as a probationer and not treating her as a deemed confirmed employee ?"

Allowing the appeal, the Court

HELD: 1.1 On a plain reading of the letter of appointment, it is apparent that respondent no. 1 was appointed as a Mistress in the School on probation for a period of two years with a stipulation that it may be extended by another year. There is nothing in the terms of the letter of appointment from which it can be construed hat after the expiry of the period of probation, she would e treated as a deemed confirmed employee. In this factua

backdrop, the interpretation to be placed on r. 4.9 of the Lawrence School Lovedale (Nilgiris) Rules assumes imme se signification. This Court is only required to constr e the word 'if confirmed' in their contextual use in r.4.9. The Division Bench of the High Court has associated the words with the entitlement of the age of superannuation. In the considered opinion of this Court, the interpretation placed by the High Court is unacceptable. The words have to be understood in the context they are used. Rule 4.9 has to be read as a whole to understand the purport and what the Rule conveys and means. Regard being had to the tenor of the Rules, the words "if confirmed", read in proper context, confer a status on the appointee which consequently entitles him to continue on the post till the age of 55 years, unless he is otherwise removed from service as per the Rules. [para 8 and 20]

The High Court of Madhya Pradesh through Registrar and Others v. Satya Narayan Jhaver **2001 (1) Suppl. SCR 532= 2001 AIR 3234 = 2001 (7) SCC 161 - relied on**

Sukhbans Singh v. State of Punjab **1963 SCR 416= 1962 AIR 1711;** *G.S. Ramaswamy and Ors. v. Inspector-General of Police, Mysore* **1964 SCR 279=1966 AIR 175;** *State of Uttar Pradesh v. Akbar Ali Khan* **1966 AIR 1842;** *State of Punjab v. Dharam Singh* **1968 SCR 1=1968 AIR 1210;** *Samsher Singh v. State of Punjab and another* **1975 (1) SCR 814 = 1974 (2) SCC 831;** *Om Prakash Maurya v. U.P. Co-operative Sugar Factories Federation, Lucknow and others* **1986 SCR 78=1986 AIR 1844;** *Municipal Corporation, Raipur v. Ashok Kumar Misra* **1991 (2) SCR 320=1991 AIR 1402; and** *Dayaram Dayal v. State of M.P.* **AIR 1997 SC 3269 - referred to.**

Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others **1987 (2) SCR 1 = 1987 (1) SCC 424;** *S.N. Sharma v. Bipen Kumar Tiwari and others* **1970 (3) SCR 946 = 1970 (1) SCC 653; and** *State of Tamil Nadu v. Kodaikanal Motor Union (P) Ltd.* **1986 (2) SCR 927 = 1986 (3) SCC 91 - referred to.**

1.2 When the language employed under r. 4.9 is scrutinised, it can safely be concluded that the entitlement to continue till the age of superannuation, i.e., 55 years, is not absolute. The power and right to remove is not obliterated. The status of confirmation has to be earned and conferred. Had the rule making authority intended that there would be automatic confirmation, r.4.9 would have been couched in a different language. That being not so, the wider interpretation cannot be placed on the Rule to infer that the probationer gets the status of a deemed confirmed employee after expiry of three years of probationary period as that would defeat the basic purpose and intent of the Rule which clearly postulates "if confirmed". [para 23]

1.3 A confirmation, as is demonstrable from the language employed in the Rule, does not occur with efflux of time. As it is hedged by a condition, an affirmative or positive act is the requisite by the employer. In considered opinion of the Court, an order of confirmation is required to be passed. The Division Bench has clearly flawed by associating the words 'if confirmed' with the entitlement of the age of superannuation without appreciating that the use of the said words as a fundamental qualifier negatives deemed confirmation. Thus, the irresistible conclusion is that the present case would squarely fall in the last line of cases as has been enumerated in paragraph 11 of Satya Narayan Jhaver and, therefore, the principle of deemed confirmation is not attracted. [para 23]

1.4 The order of the High Court is set aside to the extent that respondent no. 1 had acquired the status of confirmed employee and, therefore, holding of enquiry is imperative. As far as the conclusion recorded by the Division Bench that no stigma was cast on the respondent is concerned, the same having gone unchallenged, the order in that regard is not disturbed. [para 24]

Case Law Reference:

2001 (1) Suppl. SCR 532	**relied on**	**para 5 and 17**
1963 SCR 416	**referred to**	**para 10**
1964 SCR 279	**referred to**	**para 11**
1966 AIR 1842	**referred to**	**para 12**
1968 SCR 1	**referred to**	**para 13**
1975 (1) SCR 814	**referred to**	**para 14**
1986 SCR 78	**referred to**	**para 15**
1991 (2) SCR 320	**referred to**	**para 16**
1987 (2) SCR 1	**referred to**	**para 17**
1987 (2) SCR 1	**referred to**	**para 20**
1970 (3) SCR 946	**referred to**	**para 21**
1986 (2) SCR 927	**referred to**	**para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2868 of 2012.

From the Judgment & Order dated 26.03.2008 of the High Court of Judicature at Madras in W.A. No. 4157 of 2004.

K.V. Vishwanathan, Rohini Musa, Binu Tamta for the Appellant.

Shweta Bharti, Amit Pawan, Nidhi Chaudhary, Vikash Verma, Neha Kapoor, Kenanda for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. Questioning the legal acceptability of the Judgment and Order dated 26.03.2008 passed by the High Court of Judicature at Madras in W.A. No. 4157 of 2004 whereby the finding recorded by the learned Single Judge in W.P. No. 15963 of 1997 to the effect that the order of termination in respect of the first respondent, a teacher, being stigmatic in nature and having been passed without an enquiry warranted quashment was dislodged by the Division Bench on the foundation that the order of termination did not cast any stigma, but concurred with the ultimate conclusion on the base that she was a confirmed employee and hence, holding of disciplinary enquiry before passing an order of termination was imperative, the present appeal by special leave has been preferred under Article 136 of the Constitution of India.

3. The factual matrix lies in a narrow compass. The first respondent herein was appointed on the post of a Mistress with effect from 01.09.1993. It was stipulated in the letter of appointment that she would be on probation for a period of two years which may be extended for another one year, if necessary. In November 1995, while she was working as a Mistress in the appellant's school, as alleged, she had received some amount from one Nathan. A meeting was convened on 09.09.1997 and in the proceeding, certain facts were recorded which need not be adverted to inasmuch as the said allegations though treated stigmatic by the learned Single Judge, yet the Division Bench, on a studied scrutiny of the factual scenario, has opined in categorical terms that the same do not cast any stigma. The said conclusion has gone unassailed as no appeal h s been preferred by the fir

t respondent. 4. To proceed with the narration, aft r the proceeding was recorded on 18.06.1997, an order of termination was passed against the first respondent. As has been stated earlier, the order of termination was assailed before the Writ Court and the learned Single Judge axed the order on the ground that the same was stigmatic in nature. The order passed by the learned Single Judge was challenged in Writ Appeal under Clause 15 of the Letters Patent by the present appellant and at that juncture, a contention was canvassed by the first respondent that by virtue of the language employed in Rule 4.9 of the Rules of Lawrence School, Lovedale (Nilgiris) (for short, 'the Rules'), she had earned the status of a confirmed employee having satisfactorily completed the period of probation and, therefore, her services could not have been dispensed with without holding an enquiry. In essence, the proponement was that she was deemed to have been a confirmed employee of the school and hence, it was obligatory on the part of the employer to hold an enquiry before putting an end to her services.

5. The Division Bench interpreted the Rule and placed reliance on a three-Judge Bench Decision of this Court in The High Court of Madhya Pradesh through *Registrar and Others v. Satya Narayan Jhaver*[1] and came to hold as follows:-

> "In terms of Rule 4.9 of the Rules, the maximum period of probation would be only three years and the rule does not provide any further extension of probation. If that be so, the Headmaster of the school would be entitled to pass orders as to the confirmation before the expiry of the maximum period of three years i.e., 1.9.1996. Factually no such order was passed in this case and the teacher was allowed to serve beyond the period of 1.9.1996 till the order of termination dated 18.6.1997 was passed. In the absence of any provision for extension beyond a period of thr e years, in law, as stated by the Supreme Court, the ser ices of the teacher would be treated as confirmed after 1 9.1996. Mr. K. R. Vijayakumar, learned counsel for the school as submitted that the said rule 4.9 contemplates that only "if confirmed" the probation would come to an end. The

said submission is based on the rule that the appointee, if confirmed, shall continue to hold office till the age of 55 years. In our opinion, the said rule relates to the upper age limit for the entire service, i.e., in the event of a probationer is confirmed, he would be entitled to continue till the age of 55 years. The said rule does not in any way empowers the Headmaster or the Chairman, as the case may be, to extend the period of probation beyond the maximum period of three years."

6. Assailing the legal substantiality of the order, Mr. K.V. Viswanathan, learned senior counsel, has submitted that the Division Bench has grossly erred by coming to the conclusion that after the expiry of the probation period, the first respondent became a confirmed employee. It is his further submission that if the language employed in Rule 4.9 of the Rules, especially the words "if confirmed", are appreciated in proper perspective, there can be no trace of doubt that an affirmative act was required to be done by the employer without which the employee could not be treated to be a confirmed one. The learned senior counsel would further contend that the High Court has clearly flawed in its interpretation of the Rule by connecting the factum of confirmation with the fixation of upper age limit for superannuation. It is also urged by him that the Division Bench has clearly faulted in its appreciation of the law laid down in *Satya Narayan Jhaver* (supra) inasmuch as the case of the first respondent squarely falls in the category where a specific act on the part of the employer is an imperative requisite.

7. Combating the aforesaid submissions, Ms. Shweta Basti, learned counsel appearing for the first respondent, submitted that the order passed by the High Court is absolutely impeccable since on a careful scanning of the Rule, it is discernible that it does not confer any power on the employer to extend the period of probation beyond the maximum period as stipulated in the Rule and, therefore, the principle of deemed confirmation gets attracted. It is proponed by her that the emphasis placed on the term "if confirmed" by the appellant is totally misconcieved and unwarranted because its placement in the Rule luminously projects that it has an insegregable nexus wit the age of retirement and it has no postulate which would estroy the concept of deemed confirmation. It has been fur her put forth that the Rule neither lays down any postulate that the employee shall pass any test nor does it stipulate any condition precedent for the purpose of confirmation. Lastly, it is contended that a liberal interpretation is necessary regard being had to the uncertainties that is met with by a probationer after the expiry of the probation period and unless the beneficent facet is taken note of, the caprice of the employer would prevail and the service career of an employee would be fossilized.

8. To appreciate the rivalised submissions raised at the Bar, we have carefully perused the letter of appointment and on a plain reading of the same, it is apparent that the first respondent was appointed as a Mistress in the School on probation for a period of two years with a stipulation that it may be extended by another year. There is nothing in the terms of the letter of appointment from which it can be construed that after the expiry of the period of probation, she would be treated as a deemed confirmed employee. In this factual backdrop, the interpretation to be placed on Rule 4.9 of the Rules assumes immense signification. The said Rule reads as follows: -

"4.9 All appointments to the staff shall ordinarily be made on probation for a period of one year which may at the discretion of the Headmaster or the Chairman in the case of members of the staff appointed by the Board be extended up to two years. The appointee, if confirmed, shall continue to hold office till the age of 55 years, except as otherwise provided in these Rules. Every appointment shall be subject to the conditions that the appointee is certified as medically fit for service by a Medical Officer nominated by the Board or by the Resident Medical Officer of the School."

9. Keeping in abeyance the interpretation to be placed on the Rule for a while, it is obligatory to state that there is no dispute at the Bar that the first respondent had completed the period of probation of three years. Thus, the fulcrum of the controversy is whether the appellant-school was justified under the Rules treating the respondent-teacher as a probationer and not treating her as a deemed confirmed employee. We have reproduced the necessary paragraph from the decision of the High Court and highlighted how the Division Bench has analysed and interpreted the Rule in question. The bedrock of the analysis, as is perceivable, is the sentence in Rule 4.9 "the appointee, if confirmed, shall continue to hold office till the age of 55 years" fundamentally relates to the fixation of the upper age limit for the entire service. It has been held that it deals with the entitlement of an employee to continue till the age of 55 years.

10. Before we proceed to appreciate whether the interpretation placed on the Rule is correct or not, it is apposite to refer to certain authorities in the field. In *Sukhbans Singh v. State of Punjab*[2], the Constitution Bench has opined that a probationer cannot, after the expiry of the probationary period, automatically acquire the status of a permanent member of the service, unless of course, the rules under which he is appointed expressly provide for such a result.

11. In *G.S. Ramaswamy and Ors. v. Inspector-General of Police, Mysore, another Constitution Bench*[3], while dealing with the language employed under Rule 486 of the Hyderabad District Police Manual, referred to the decision in *Sukhbans Singh* (supra) and opined as follows: -

> "It has been held in that case that a probationer cannot after the expiry of the probationary period automatically acquire the status of a permanent member of a service, unless of course the rules under which he is appointed expressly provide for such a result. Therefore even though a probationer may have continued to act in the post to which he is on probation for more than the initial period of probation, he cannot become a permanent servant merely because of efflux of time, unless the Rules of service which govern him specifically lay down that the probationer will; be automatically confirmed after the initial period of probation is over. It is contended on behalf of the petitioners before us that the part of r. 486 (which we have set out above) expressly provides for automatic confirmation after the period of probation is over. We are of opinion that there is no force in this contention. It is true that the words used in the sentence set out above are not that promoted officers will be enable or qualified for promotion at the end of their probationary period which are the words to be often found in the rules in such eases; even so, though this part of r. 486 says that "promoted officers will be confirmed at the end of their probationary period", it is qualified by the words "if they have given satisfaction". Clearly therefore the rule does not contemplate automatic confirmation after the probationary period of two years, for a promoted officer can only be confirmed under this rule if he has given satisfaction."

12. In *State of Uttar Pradesh v. Akbar Ali Khan*[4], *another* Constitution Bench ruled that if the order of appointment itself states that at the end of the period of probation, in the absence of any order to the contrary, the appointee will acquire a substantive right to the post even without an order of confirmation. In all other cases, in the absence of such an order or in the absence of such a service rule, an express order of confirmation is necessary to give him such a right. Where after the period of probation, an appointee is allowed to continue in the post without an order of confirmation, the only possible view to take is that by implication, the period of probation has been extended, and it is not a correct proposition to state that an appointee should be deemed to be confirmed from the mere fact that he is allowed to continue after the end of the period of

probation.

13. In *State of Punjab v. Dharam Singh, the Constitution Bench*[5], after scanning the anatomy of the Rules in question, addressed itself to the precise effect of Rule 6 of the Punjab Educational Service (Provincialised Cadre) Class III Rules, 1961. The said Rule stipulated that the total period of probation including extensions, if any, shall not exceed three years. This Court referred to the earlier view which had consistently stated that when a first appointment or promotion is made on probation for a specific period and the employee is allowed to continue in the post after the expiry of the period without any specific order of confirmation, he should be deemed to continue in his post as a probationer only in the absence of any indication to the contrary in the original order of appointment or promotion or the service rules. Under these circumstances, an express order of confirmation is imperative to give the employee a substantive right to the post and from the mere fact that he is allowed to continue in the post after the expiry of the specified period of probation, it is difficult to hold that he should be deemed to have been confirmed. When the service rules fixed a certain period of time beyond which the probationary period cannot be extended and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. It is so as such an implication is specifically negatived by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it.

14. In *Samsher Singh v. State of Punjab and another*[6], the seven-Judge Bench was dealing with the termination of services of the probationers under Rule 9 of the Punjab Civil Services (Punishment and Appeal) Rules, 1952 and Rule 7(3) of the Punjab Civil Services (Judicial Branch) Rules, 1951. In the said case, the law laid down by the Constitution Bench in the case of *Dharam Singh* (supra) was approved but it was distinguished because of the language of the relevant rule, especially explanation to Rule 7(1), which provided that every subordinate Judge in the first instance be appointed on probation for two years and the said period may be extended from time to time either expressly or impliedly so that the total period of probation including extension does not exceed three years. The explanation to the said Rule stipulated that the period of probation shall be deemed to have been extended if a subordinate Judge is not confirmed on the expiry of the period of probation. Be it noted, reliance was placed on the decision in *Dharam Singh* (supra). The larger Bench discussed the principle laid down in Dharam Singh's case and proceeded to state as follows: -

> "In *Dharam Singh's* case (supra) the relevant rule stated that the probation in the first instance is for one year with the proviso that the total period of probation including extension shall not exceed three years. In Dharam Singh's case he was allowed to continue without an order of confirmation and therefore the only possible view in the absence of anything to the contrary in the Service Rules was that by necessary implication he must be regarded as having been confirmed."

After so stating, the Bench referred to Rule 7(1) and came to hold as follows: -

> ".....the explanation to rule 7(1) shows that the period of probation shall be deemed to have been extended impliedly if a Subordinate Judge is not confirmed on the expiry of this period of probation. This implied extension where a Subordinate Judge is not confirmed on the expiry of the period of probation is not found in *Dharam Singh's* case (supra). This explanation in the present case does not mean that the implied extension of the probationary period is only between two and three years.

The explanation on the contrary means that the provision regarding the maximum period of probation for three years is directory and not mandatory unlike in *Dharam Singh's* case (supra) and that a probationer is not in fact confirmed till an order of confirmation is made."

(Emphasis supplied)

15. In *Om Prakash Maurya v. U.P. Co-operative Sugar Factories Federation, Lucknow and others*[7], a two-Judge Bench was dealing with the case of confirmation under the U.P. Cooperative Societies Employees Service Regulations, 1975. After referring to Regulations 17 and 18, it was held that as the proviso to Regulation 17 restricts the power of the appointing authority in extending the period of probation beyond the period of one year and Regulation 18 provides for confirmation of an employee on the satisfactory completion of the probationary period, it could safely be held that the necessary result of the continuation of an employee beyond two years of probationary period is that he would be confirmed by implication.

16. In *Municipal Corporation, Raipur v. Ashok Kumar Misra*[8], while dealing with Rule 14 of the Madhya Pradesh Government Servants' General Conditions of Service Rules, 1961, after referring to earlier pronouncements, it has been held that if the rules do not empower the appointing authority to extend the probation beyond the prescribed period, or where the rules are absent about confirmation or passing of the prescribed test for confirmation it is an indication of the satisfactory completion of probation.

17. It is apt to note here that the learned counsel for both the sides have heavily relied on the decision in *High Court of Madhya Pradesh thru. Registrar and others v. Satya Narayan Jhavar*[9]. In the said case, the three-Judge Bench was considering the effect and impact of Rule 24 of the Madhya Pradesh Judicial Service (Classification, Recruitment and Conditions of Services) Rules, 1955. It may be mentioned that the decision rendered in *Dayaram Dayal v. State of M.P.*[10], which was also a case under Rule 24 of the said Rules, was referred to the larger Bench. In *Dayaram Dayal* (supra), it had been held that if no order for confirmation was passed wi hin the maximum period of probation, the probationer judicia officer could be deemed to have been confirmed after expiry of four years period of probation. After referring to the decisions in *Dharam Singh* (supra), *Sukhbans Singh* (supra) and *Shamsher Singh* (supra) and other authorities, the three-Judge Bench expressed thus:-

"11. The question of deemed confirmation in service Jurisprudence, which is dependent upon language of the relevant service rules, has been subject matter of consideration before this Court times without number in various decisions and there are three lines of cases on this point. One line of cases is where in the service rules or the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. Other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry order of termination has not been passed. The last line of cases is where though under the rules maximum period of probation is prescribed, but the same require a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period

of probation has expired and neither any order of confirmation has been passed nor the person concerned has passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired."

(underlining is ours)

After so stating, it was further clarified as follows: -

"38. Ordinarily a deemed confirmation of a probationer arises when the letter of appointment so stipulates or the Rules governing service condition so indicate. In the absence of such term in the letter of appointment or in the relevant Rules, it can be inferred on the basis of the relevant Rules by implication, as was the case in *Dharam Singh* (supra). But it cannot be said that merely because a maximum period of probation has been provided in Service Rules, continuance of the probationer thereafter would ipso facto must be held to be a deemed confirmation which would certainly run contrary to Seven Judge Bench Judgment of this Court in the case of *Shamsher Singh* (supra) and Constitution Bench decisions in the cases of *Sukhbans Singh* (supra), *G.S. Ramaswamy* (supra) and *Akbar Ali Khan* (supra)."

18. Regard being had to the aforesaid principles, the present Rule has to be scanned and interpreted. The submission of Mr. Viswanathan, learned senior counsel for the appellant, is that the case at hand comes within the third category of cases as enumerated in para-11 of *Satya Narayan Jhaver* (supra). That apart, it is urged, the concept of deemed confirmation, ipso facto, would not get attracted as there is neither any restriction nor any prohibition in extending the period of probation. On the contrary, the words "if confirmed" require further action to be taken by the employer in the matter of confirmation.

19. On a perusal of Rule 4.9 of the Rules, it is absolutely plain that there is no prohibition as was the rule position in *Dharam Singh* (supra). Similarly, in *Om Prakash Maurya* (supra), there was a restriction under the Regulations to extend the period of probation. That apart, in the rules under consideration, the said cases did not stipulate that something else was required to be done by the employer and, therefore, it was held that the concept of deemed confirmation got attracted.

20. Having so observed, we are only required to analyse what the words "if confirmed" in their contextual use would convey. The Division Bench of the High Court has associated the said words with the entitlement of the age of superannuation. In our considered opinion, the interpretation placed by the High Court is unacceptable. The words have to be understood in the context they are used. Rule 4.9 has to be read as a whole to understand the purport and what the Rule conveys and means. In *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others*[11], it has been held as follows: -

"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. The interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and

discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

Keeping the said principle in view, we are required to appreciate what precisely the words "if confirmed" contextually convey. Regard being had to the tenor of the Rules, the words "if confirmed", read in proper context, confer a status on the appointee which consequently entitles him to continue on the post till the age of 55 years, unless he is otherwise removed from service as per the Rules.

21. It is worth noting that the use of the word "if" has its own significance. In this regard, we may usefully refer to the decision in *S.N. Sharma v. Bipen Kumar Tiwari and others*[12]. In the said case, a three-Judge Bench was interpreting the words "if he thinks fit" as provided under Section 159 of the Code of Criminal Procedure, 1898. It related to the exercise of power by the Magistrate. In that context, the Bench observed thus: -

"The use of this expression makes it clear that Section 159 is primarily meant to give to the Magistrate the power of directing an investigation in cases where the police decide not to investigate the case under the proviso to Section 157(1), and it is in those cases that, if he thinks fit, he can choose the second alternative. If the expression "if he thinks fit" had not been used, it might have been argued that this section was intended to give in wide terms the power to the Magistrate to adopt any of the two courses of either directing an investigation, or of proceeding himself or deputing any Magistrate subordinate to him to proceed to hold a preliminary enquiry as the circumstances of the case may require.

Without the use of the expression "if he thinks fit", the second alternative could have been held to be independent of the first; but the use of this expression, in our opinion, makes it plain that the power conferred by the second clause of this section is only an alternative to the power given by the first clause and can, therefore, be exercised only in those cases in which the first clause is applicable."

22. In *State of Tamil Nadu v. Kodaikanal Motor Union (P) Ltd.*[13], the Court, while interpreting the words "if the offence had not been committed" as used in Section 10-A(1) of the Central Sales Tax Act, 1956, expressed the view as follows: -

"In our opinion the use of the expression 'if' simpliciter, was meant to indicate a condition, the condition being that at the time of assessing the penalty, that situation should be visualised wherein there was no scope of committing any offence. Such a situation could arise only if the tax liability fell under sub-section (2) of Section 8 of the Act."

23. Bearing in mind the aforesaid conceptual meaning, when the language employed under Rule 4.9 is scrutinised, it can safely be concluded that the entitlement to continue till the age of superannuation, i.e., 55 years, is not absolute. The power and right to remove is not obliterated. The status of confirmation has to be earned and conferred. Had the rule making authority intended that there would be automatic confirmation, Rule 4.9 would have been couched in a different language. That being not so, the wider interpretation cannot be placed on the Rule to infer that the probationer gets the status of a deemed confirmed employee after expiry of three years of probationary period as that would defeat the basic purpose and intent of the Rule which clearly postulates "if confirmed". A confirmation, as is demonstrable from the language employed in the Rule, does not occur with efflux of time. As it is hedged by a condition, an affirmative or positive act is the requisite by the employer. In our considered opinion, an order of confirmation is required to

be passed. The Division Bench has clearly flawed by associating the words 'if confirmed' with the entitlement of the age of superannuation without appreciating that the use of the said words as a fundamental qualifier negatives deemed confirmation. Thus, the irresistible conclusion is that the present case would squarely fall in the last line of cases as has been enumerated in paragraph 11 of *Satya Narayan Jhaver* (supra) and, therefore, the principle of deemed confirmation is not attracted.

24. In the result, the appeal is allowed and the judgment and order passed by the High Court are set aside to the extent that the first respondent had acquired the status of confirmed employee and, therefore, holding of enquiry is imperative. As far as the conclusion recorded by the Division Bench that no stigma was cast on the respondent is concerned, the same having gone unchallenged, the order in that regard is not disturbed. The parties shall bear their respective costs.

R.P. Appeal allowed.

STATE OF ORISSA & ORS.
v.
UJJAL KUMAR BURDHAN
(Criminal Appeal No. 546 of 2012)

MARCH 19, 2012

[D.K. JAIN AND ANIL R. DAVE, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

s.482 - Inherent jurisdiction of court - Scope of - Allegation of irregularities against the respondent - Departmental inquiries - Preliminary inquiry revealing certain irregularities in the procurement and milling of paddy - Vigilance Cell of the Police department directed by State to conduct a inquiry regarding the alleged criminal acts - Writ petition by respondent - High Court directing the completion of the said inquiry within twelve weeks - Respondent fil ng yet another writ petition praying for quashing of inquiry proceedings by the vigilance department on the ground that a inquiry had already been conducted on the same complaint - By ay of an interim order, High Court directing State Government n t to take any coercive action against the respondent till further orders - For a similar relief, respondent filing another pet tion u/s.482 - High Court quashing the investigation proceed ngs - On appeal, held: Comm

ncement and completion of an investigation is necessary to t st the veracity of the alleged commission of an offenc - Any kind of hindrance or obstruction of the process of law fr m taking its normal course, without any supervening circumstance , in a casual manner, merely on the whims and fancy o the court tantamounts to miscarriage of justice - High Co rt had itself directed the completion of inquiry within a set ime-frame of twelve weeks, which was subsequently i

terjected by an interim order and finally the entire investiga ion/inquiry came to be quashed by the impugned judgment - It seems incongruous that in the first instance the court set into motion the process of law only to ultimately quash it on the specious plea that it would cause unnecessary embarrassment to the respondent - High Court's interference with the investigation was totally unwarranted - The investigation initiated against the respondent restored and the Vigilance Cell directed to proceed with and complete the investigation expeditiously, in accordance with law.

s.482 - Scope of - Discussed.

CRIMINAL LAW: Existence of an arbitration agreement - Held: Cannot take the criminal acts out of the jurisdiction of the courts of law.

The respondent was the owner of a proprietary concern. The Food and Supply department of the State

Government initiated an inquiry against the said concern, relating to the processing of paddy for and on behalf of the Food Corporation of India. Preliminary inquiry revealed certain irregularities in the procurement and milling of paddy by the respondent. The State Government directed the Vigilance Cell of the Police department to conduct a preliminary inquiry regarding the alleged criminal acts. The respondent filed a writ petition before the High Court. The High Court while ordering the issue of the enforcement certificate to the respondent pending the ongoing inquiry, directed the completion of the said inquiry within twelve weeks. In compliance with that order, the Civil Supply Department issued enforcement certificate to the respondent. However, the respondent filed yet another writ petition inter-alia, praying for quashing of inquiry proceedings initiated by the State vigilance department on the ground that an inquiry had already been conducted on the same complaint by the department concerned. By way of an interim order, the High Court directed the State Government not to take any coercive action against the respondent till further orders. As a result thereof, the preliminary inquiry came to a standstill. For a similar relief, respondent filed another petition under Section 482, Cr.P.C. The High Court quashed the investigation proceedings. The instant appeal was filed by the State Government as also its two functionaries, viz. Director-cum-Addl. D.G.P., Vigilance and Dy. Superintendent of Police, Vigilance Cell.

Allowing the appeal, the Court

HELD: 1. It is true that the inherent powers vested in the High Court under Section 482 of the Code are very wide. Nevertheless, inherent powers do not confer arbitrary jurisdiction on the High Court to act according to whims or caprice. This extra-ordinary power has to be exercised sparingly with circumspection and as far as possible, for extra-ordinary cases, where allegations in the complaint or the first information report, taken on its face value and accepted in their entirety do not constitute the offence alleged. Unless a case of gross abuse of power is made out against those incharge of investigation, the High Court should be loath to interfere at the early/premature stage of investigation. [Para 7]

2. In the fact-situation at hand, the impugned decision is clearly indefensible. In the instant case, the S.P., Vigilance Cell, had merely approved the opening of an inquiry and converted it into a Cell File. The preliminary inquiry was yet to commence and an FIR was yet to be lodged. In the first instance, the High Court stayed the preliminary inquiry by an interim order in the Writ Petition, and then by the impugned judgment quashed the same. Commencement and completion of an investigation is necessary to test the veracity of the alleged commission of an offence. Any kind of hindrance or obstruction of the process of law from taking its normal course, without any supervening circumstances, in a casual manner, merely on the whims and fancy of the court tantamounts to miscarriage of justice, which seems to be the case here. [Para 10]

3. The circumstances that have weighed with the High Court, do not justify the conclusion it has arrived at. The High Court has allowed the petition under Section 482 of the Code, inter-alia, on the following grounds; firstly, the enforcement certificate had been issued to the respondent which evidences compliance with the Rice and Paddy Procurement (Levy) and Restriction on sale and Movement Order, 1982. The observation came to be made by losing sight of the fact that the said enforcement certificate had been issued pursuant to the order passed by the High Court. The second ground was that the two

inquires on the same facts had already been conducted, wherein the respondent had been exonerated. The High Court committed a grave error of fact in observing that the respondent had been exonerated in the two inquiries held previously as both the inquiry reports had in fact concluded that the respondent had committed serious irregularities and proper action needs to be initiated against him. As far as the two previous inquiries are concerned, it may also be noted that those inquiries were departmental inquiries and what has been quashed by the impugned judgment is the initiation of police investigation. Both the inquiries are entirely different in nature; operate in different fields and have different object and consequences. Further, the impugned order also noted that in view of the arbitration agreement between the agent and the Government, all the alleged violations fell within the purview of Arbitration and Conciliation Act, 1996 and therefore, the respondent could not be held liable for any criminal offence. This observation was against the well settled principle of law that the existence of an arbitration agreement cannot take the criminal acts out of the jurisdiction of the courts of law. [Paras 11, 12]

4. The High Court also adversely commented upon the progress of the preliminary inquiry and recorded that no new material has been placed on record by the Vigilance Cell. This has been recorded without having regard to the fact that the High Court by another order, dated 5th September 2005, had, by way of an interim order, directed the State Government not to take any coercive steps against the respondent, with the result that there was no occasion for the department concerned to bring to the fore any material to unravel the truth. The High Court had itself, by order dated 18th July, 2005 directed the completion of inquiry within a set time-frame of twelve weeks, which was subsequently interjected by an interim order and finally the entire investigation/inquiry came to be quashed by the impugned judgment. It seemed incongruous that in the first instance the court set into motion the process of law only to ultimately quash it on the specious plea that it would cause unnecessary embarrassment to the respondent. The High Court's interference with the investigation was totally unwarranted and therefore, the impugned order cannot be sustained. The impugned judgment is quashed and the investigation initiated against the respondent is restored and the Vigilance Cell of the State is directed to proceed with and complete the investigation expeditiously, in accordance with law. [Paras 13, 14]

State of West Bengal and Ors. v. Swapan Kumar Guha and Ors. (1982) 1 SCC 561: 1982 SCC (Cri) 283: (1982) 3 SCR 121; Jeffrey J. Diermeier & Anr. v. State of West Bengal & Anr. (2010) 6 SCC 243: 2010 (7) SCR 128; S.W. Palanitkar & Ors. v. State of Bihar & Anr. (2002) 1 SCC 241: 2001 (4) Suppl. SCR 397 - relied on.

Case Law Reference:

(1982) 3 SCR 121	**relied on**	**Para 8**
2010 (7) SCR 128	**relied on**	**Para 9**
2001 (4) Suppl. SCR 397		**relied on Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 546 of 2012.

From the Judgment & Order dated 12.02.2008 of the High Court of Orissa at Cuttack, in MC No. 2808 of 2006.

Suresh Chandra Tripathy for the Appellants.

Randhir Singh Jain, Ruchika Jain, Dhananjai Jain for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J.: 1. Leave granted.

2. This appeal by special leave, assails the judgment dated 12th February, 2008, rendered by a learned Single Judge of the High Court of Orissa at Cuttack. By the impugned order, on a petition under Section 482 of the Code of Criminal Procedure, 1973 (for short "the Code"), the investigation initiated by the Vigilance Department of the State Government into the allegations of irregularities in the receipt of excess quota, recycling of rice and distress sale of paddy by one M/s Haldipada Rice Mill, a proprietary concern of the respondent, has been quashed.

3. On receipt of a complaint, the civil supply department of the State Government initiated an inquiry against the said concern, relating to the processing of paddy for and on behalf of the Food Corporation of India. Preliminary inquiry conducted by the Food and Supply department revealed certain irregularities in the procurement and milling of paddy by the respondent. A subsequent departmental inquiry recommended initiation of a proper administrative action against the respondent. Consequently, the State Government directed the Vigilance Cell of the Police department to conduct a preliminary inquiry regarding the alleged criminal acts.

4. In the meantime, on filing of a Writ Petition, being W.P. No.8315 of 2005, by the respondent, a Division Bench of the High Court while ordering the issue of the enforcement certificate to the respondent pending the ongoing inquiry, directed the completion of the said inquiry within twelve weeks of the receipt of that order. In compliance with that order, the Civil Supply Department of the State Government issued enforcement certificate to the respondent. However, the respondent filed yet another Writ Petition, being W.P. No.10761 of 2005, inter-alia, praying for quashing of inquiry proceedings initiated by the State vigilance department on the ground that an inquiry had already been conducted on the same complaint by the department concerned. By way of an interim order, the High Court directed the State Government not to take any coercive action against the respondent till further orders. As a result thereof, the preliminary inquiry came to a standstill. For a similar relief, respondent filed another petition, being Crl.M.C.No.2808 of 2006 under Section 482 of the Code in which the impugned order has been passed. Aggrieved by the said order, the State Government as also its two functionaries, viz. Director-cum-Addl. D.G.P., Vigilance and Dy. Superintendent of Police, Vigilance Cell have preferred this appeal.

5. Mr. Suresh Chandra Tripathy, learned counsel appearing for the appellants submitted that it is settled law that a preliminary inquiry ought not to be quashed by the High Court in exercise of its jurisdiction under Section 482 of the Code. He argued that the High Court was not at all justified in interfering with the investigation at the threshold even before the registration of an FIR, particularly when in his report dated 4th June 2005, the civil supply officer had reported fabrication and forgery of accounts maintained by the respondent as also violation of the guidelines laid down in the Food and Procurement Policy for the marketing season 2004-2005. Referring us to the order dated 18th July 2005, passed by a Division Bench of the High Court in W.P.(C) No.8315 of 2005, whereby, as aforesaid, a direction was issued for expediting the inquiry, learned counsel stressed that having observed that if in the inquiry any irregularity is established, the respondent could be proceeded under the relevant provisions of law, the High Court committed a serious illegality in law in quashing the same inquiry/investigation.

6. Per contra, Mr. Randhir Jain, learned counsel appearing for the respondent supported the impugned judgment and submitted that the respondent was being harassed by repeated investigations on the same set of facts. It was alleged that the

inquiry was ordered at the behest of an Ex-M.L.A. who belonged to the ruling party and with whom the respondent shared a long history of animosity and antagonism. He thus, contended that the appeal deserved to be dismissed.

7. It is true that the inherent powers vested in the High Court under Section 482 of the Code are very wide. Nevertheless, inherent powers do not confer arbitrary jurisdiction on the High Court to act according to whims or caprice. This extra-ordinary power has to be exercised sparingly with circumspection and as far as possible, for extra-ordinary cases, where allegations in the complaint or the first information report, taken on its face value and accepted in their entirety do not constitute the offence alleged. It needs little emphasis that unless a case of gross abuse of power is made out against those incharge of investigation, the High Court should be loath to interfere at the early/premature stage of investigation.

8. In *State of West Bengal and Ors. Vs. Swapan Kumar Guha and Ors.*[1], emphasising that the Court will not normally interfere with an investigation and will permit the inquiry into the alleged offence, to be completed, this Court highlighted the necessity of a proper investigation observing thus:

> "An investigation is carried on for the purpose of gathering necessary materials for establishing and proving an offence which is disclosed. When an offence is disclosed, a proper investigation in the interests of justice becomes necessary to collect materials for establishing the offence, and for bringing the offender to book. In the absence of a proper investigation in a case where an offence is disclosed, the offender may succeed in escaping from the consequences and the offender may go unpunished to the detriment of the cause of justice and the society at large. Justice requires that a person who commits an offence has to be brought to book and must be punished for the same. If the court interferes with the proper investigation in a case where an offence has been disclosed, the offence will go unpunished to the serious detriment of the welfare of the society and the cause of the justice suffers. It is on the basis of this principle that the court normally does not interfere with the investigation of a case where an offence has been disclosed....Whether an offence has been disclosed or not must necessarily depend on the facts and circumstances of each particular case....If on a consideration of the relevant materials, the court is satisfied that an offence is disclosed, the court will normally not interfere with the investigation into the offence and will generally allow the investigation into the offence to be completed for collecting materials for proving the offence."
>
> (emphasis supplied by us)

9. On a similar issue under consideration, in *Jeffrey J. Diermeier & Anr. Vs. State of West Bengal & Anr.*[2], while explaining the scope and ambit of the inherent powers of the High Court under Section 482 of the Code, one of us (D.K. Jain, J.) speaking for the Bench, has observed as follows:

> "20……The section itself envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code; (ii) to prevent abuse of the process of Court; and (iii) to otherwise secure the ends of justice. Nevertheless, it is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction of the Court. Undoubtedly, the power possessed by the High Court under the said provision is very wide but it is not unlimited. It has to be exercised sparingly, carefully and cautiously, ex debito justitiae to do real and substantial justice for which alone the court exists. It needs little emphasis that the inherent jurisdiction does not confer an arbitrary power on the High Court to act according to whim or caprice. The power exists to prevent abuse of authority

and not to produce injustice."

10. Bearing in mind the afore-said legal position with regard to the scope and width of the power of the High Court under Section 482 of the Code, we are constrained to hold that in the fact-situation at hand, the impugned decision is clearly indefensible. In the present case, the S.P., Vigilance Cell, had merely approved the opening of an inquiry and converted it into a Cell File. The preliminary inquiry was yet to commence and an FIR was yet to be lodged. In the first instance, the High Court stayed the preliminary inquiry by an interim order in the Writ Petition, and then by the impugned judgment quashed the same. It goes without saying that commencement and completion of an investigation is necessary to test the veracity of the alleged commission of an offence. Any kind of hindrance or obstruction of the process of law from taking its normal course, without any supervening circumstances, in a casual manner, merely on the whims and fancy of the court tantamounts to miscarriage of justice, which seems to be the case here.

11. We are convinced that the circumstances that have weighed with the High Court, do not justify the conclusion it has arrived at. The High Court has allowed the petition under Section 482 of the Code, inter-alia, on the following grounds; firstly, the enforcement certificate had been issued to the respondent which evidences compliance with the Rice and Paddy Procurement (Levy) and Restriction on sale and Movement Order, 1982. The observation came to be made by losing sight of the fact that the said enforcement certificate had been issued pursuant to the order dated 18th July 2005, passed by the High Court in W.P. (C) No.8315 of 2005. Secondly, two inquires on the same facts had already been conducted, wherein the respondent had been exonerated. The High Court has committed a grave error of fact in observing that the respondent had been exonerated in the two inquiries held previously as both the inquiry reports had in fact concluded that the respondent had committed serious irregularities and proper action needs to be initiated against him. As far as the two previous inquiries are concerned, it may also be noted that those inquiries were departmental inquiries and what has been quashed by the impugned judgment is the initiation of police investigation. Both the inquiries are entirely different in nature; operate in different fields and have different object and consequences.

12. Further, the impugned order also notes that in view of the arbitration agreement between the agent and the Government, all the alleged violations fell within the purview of Arbitration and Conciliation Act, 1996 and therefore, the respondent could not be held liable for any criminal offence. This observation is against the well settled principle of law that the existence of an arbitration agreement cannot take the criminal acts out of the jurisdiction of the courts of law. On this aspect, in *S.W. Palanitkar & Ors. Vs. State of Bihar & Anr.*[3], this Court has echoed the following views:

> "22. Looking to the complaint and the grievances made by the complainant therein and having regard to the agreement, it is clear that the dispute and grievances arise out of the said agreement. Clause 29 of the agreement provides for reference to arbitration in case of disputes or controversy between the parties and the said clause is wide enough to cover almost all sorts of disputes arising out of the agreement. As a matter of fact, it is also brought to our notice that the complainant issued a notice dated 3-10-1997 to the appellants invoking this arbitration clause claiming Rs.15 lakhs. It is thereafter the present complaint was filed. For the alleged breach of the agreement in relation to commercial transaction, it is open to the Respondent 2 to proceed against the appellants for his redressal for recovery of money by way of damages for the loss caused, if any. Merely because there is an arbitration clause in the agreement, that cannot prevent criminal prosecution against the accused if an act

constituting a criminal offence is made out even prima facie."

(Emphasis supplied)

13. The High Court has also adversely commented upon the progress of the preliminary inquiry and has recorded that no new material has been placed on record by the Vigilance Cell. This has been recorded without having regard to the fact that the High Court by another order, dated 5th September 2005, had, by way of an interim order, directed the State Government not to take any coercive steps against the respondent, with t e result that there was no occasion for the department conce ned to bring to the fore any material to unravel the truth. It is also pertinent to note here that the High Court had itself, by order dated 18th July, 2005 directed the completion of inquiry within a set time-frame of twelve weeks, which was subsequently interjected by an interim order and finally the entire investigation/inquiry came to be quashed by the impugned judgment. It seems incongruous that in the first instance the court set into motion the process of law only to ultimately quash it on the specious plea that it would cause unnecessary embarrassment to the respondent.

14. For all these reasons, in our opinion, High Court's interference with the investigation was totally unwarranted and therefore, the impugned order cannot be sustained. We, accordingly, allow the appeal, quash and set aside the impugned judgment and restore the investigation initiated against the respondent and direct the Vigilance Cell of the State to proceed with and complete the investigation expeditiously, in accordance with law.

D.G. Appeal allowed.

RAM DHARI JINDAL MEMORIAL TRUST

v.

UNION OF INDIA AND OTHERS

(CIVIL APPEAL No. 3813 of 2007)

MARCH 21, 2012

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

LAND ACQUISITION ACT, 1894:

ss.17(1), 17(4), 5A - Invocation of power of urgency and elimination of enquiry u/s.5-A - Permissibility - Held: If the government seeks to invoke its power of urgency, it has to first form the opinion that the land for the stated public purpose is urgently needed - However, use of power of urgency u/s.17(1) and (4) of the Act ipso facto does not result in elimination of enquiry u/s.5A and, therefore, if the government intends to eliminate enquiry, then it has to apply its mind on the aspect that urgency is of such nature that necessitates elimination of such enquiry - Use of the power of urgency and dispensation of enquiry by the Government in a routine manner for the "planned development of city" or "development of residential area" and thereby depriving the owner or person interested of a very valuable right u/s.5-A may not meet the statutory test nor could be readily sustained - Ordinarily, therefore, invocation of urgency power by the government for a Residential Scheme that does not fall in exceptional category cannot be held to be legally sustainable - In the instant case, competent authority miserably failed to show that the stated purpose 'Rohini Residential Scheme' could not have brooked the delay of few months and the conclusion of the enquiry u/s.5A of the Act would have frustrated the said public purpose - In view of that s.4 and s.6 Notifications quashed - Competent authority to invite objections u/s.5-A of the Act.

ss.17(1), 17(4), 5A - Burden to prove that use of power of urgency was justified - Held: Lies on the government - Where the government invokes urgency power u/s.17(1) and (4) for the public purpose like 'planned development of city'

or 'development of residential area' or 'Residential Scheme', the initial presumption in favour of the government does not arise and the burden lies on the government to prove that the use of power was justified and dispensation of enquiry was necessary.

Due to acute shortage of houses in the city of Delhi, the Delhi Government formulated the plan for development. A Notification under Section 4(1) of the Land Acquisition Act, 1894 was issued indicating that land stated therein was likely to be required by the Delhi Government for the public purpose namely Rohini Residential Scheme, Delhi. In the said Notification, it was mentioned that Lt. Governor, Delhi was satisfied that provisions of sub-section (1) of Section 17 of the Act were applicable to the land mentioned in the Notification and under sub-section (4) of Section 17 has directed that all the provisions of Section 5A of the Act would not apply. On April 3, 2000, a declaration was made by the Government of Delhi under Section 6 of the Act stating that the land mentioned therein was acquired for the public purpose namely Rohini Residential Scheme. The appellant-owner of the land under acquisition challenged the acquisition notifications on the ground that Lt. Governor did not apply his mind for dispensation of the enquiry under Section 5A of the Act and that resort to the urgency provisions contained in Section 17 of the Act was unwarranted and unjustified. The High Court dismissed the writ petitions. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. If the government seeks to invoke its power of urgency, it has to first form the opinion that the land for the stated public purpose is urgently needed. Such opinion has to be founded on the need for immediate possession of the land for carrying out the purpose for which land is sought to be compulsorily acquired. The use of power of urgency under Section 17(1) and (4) of the Land Acquisition Act, 1894 ipso facto does not result in elimination of enquiry under Section 5A and, therefore, if the government intends to eliminate enquiry, then it has to apply its mind on the aspect that urgency is of such nature that necessitates elimination of such enquiry. The satisfaction of the government on twin aspects viz; (i) need for immediate possession of the land for carrying out the stated purpose and (ii) urgency is such that necessitates dispensation of enquiry is a must and permits no departure for a valid exercise of power under Section 17(1) and (4). Use of the power of urgency and dispensation of enquiry under Section 5A of the Act by the Government in a routine manner for the "planned development of city" or "development of residential area" and thereby depriving the owner or person interested of a very valuable right under Section 5-A may not meet the statutory test nor could be readily sustained. Ordinarily, therefore, invocation of urgency power by the government for a Residential Scheme - that does not fall in exceptional category cannot be held to be legally sustainable. The exercise of power by the Lt. Governor, Delhi under Section 17(1) and (4) has to be held bad in law. There was no other material available on record to indicate that there was application of mind by the Lt. Governor, Delhi on the aspect that urgency was of such nature that necessitated dispensation of enquiry under Section 5A of the Act. The respondents miserably failed to show that the stated purpose 'Rohini Residential Scheme' could not have brooked the delay of few months and the conclusion of the enquiry under Section 5A of the Act would have frustrated the said public purpose. [Paras 18-19]

Anand Singh and another vs. State of Uttar Pradesh and

others **(2010) 11 SCC 242: 2010 (9) SCR 133 - relied on.**

2. Where the government invokes urgency power under Section 17(1) and (4) for the public purpose like 'planned development of city' or 'development of residential area' or 'Residential Scheme', the initial presumption in favour of the government does not arise and the burden lies on the government to prove that the use of power was justified and dispensation of enquiry was necessary. In the instant case, the respondents miserably failed to show to the satisfaction of the Court that power of urgency and dispensation of enquiry under Section 5A has been exercised with justification. The action of the Lt. Governor, Delhi, in the facts of the case whereby he directed that the provisions of Section 5A shall not apply, if allowed to stand, it would amount to depriving a person of his property without authority of law. The power of urgency by the Government under Section 17 for a public purpose like Residential Scheme cannot be invoked as a rule but has to be by way of exception. No material was available on record that justified dispensation of enquiry under Section 5A of the Act. The High Court was clearly wrong in holding that there was sufficient urgency in invoking the provisions of Section 17 of the Act. The Section 4 and Section 6 Notification are quashed. The Competent Authority may invite objections under Section 5A of the Act pursuant to the Section 4 Notification and proceed with the matter in accordance with law. [paras 20-21]

Nandeshwar Prasad vs. The State of U.P. (1964) 3 SCR 425; Sarju Prasad Sinha vs. The State of U.P. AIR 1965 SC 1783; Union of India vs. Mukesh Hans (2004) 8 SCC 14; Munshi Singh and others Vs. Union of India (1973) 2 SCC 337: 1973 (1) SCR 973; Union of India vs. Krishan Lal Arneja AIR 2004 SC 3582: 2004 (1) Suppl. SCR 801; Sri Ballabh Marbles vs. Union of India 117 (2005) DLT 387; Vasant Kunj Enclave Housing Welfare Society vs.Union of India 2006 (89) DRJ 406; Raja Anand Brahma Shah vs. State of U.P.(1967) 1 SCR 373; Jage Ram vs. State of Haryana (1971) 1 SCC 671; Narayan Govind Gavate vs. State of Maharashtra (1977) 1 SCC 133: 1977 (1) SCR 763; State of Punjab vs. Gurdial Singh (1980) 2 SCC 471 1980 (1) SCR 1071:; Deepak Pahwa vs. Lt. Governor of Delhi (1984) 4 SCC 308: 1985 (1) SCR 588; State of U.P. vs. Pista Devi (1986) 4 SCC 251: 1986 (3) SCR 743; Rajasthan Housing Board vs. Shri Kishan (1993) 2 SCC 84: 1993 (1) SCR 269; Chameli Singh s. State of U.P. (1996) 2 SCC 549: 1995 (6) Suppl. SCR 827; Meerut Development Authority vs Satbir Singh (1996) 11 SCC 462: 1996 (6) Suppl. SCR 529; Om Prakash vs. State of U.P.(1998) 6 SCC 1: 1998 (3) SCR 643; Hindustan Petroleum Corpn. Ltd. vs. Darius Shapur Chenai (2005) 7 SCC 627: 2005 (3) Suppl. SCR 388; Mahadevappa Lachappa Kinagi vs. State of Karnataka (2008) 12 SCC 418; Babu Ram vs. Statte of Haryana (2009) 10 SCC 115: 2009 (14) SCR 1111; Tika Ram vs. State of U.P. (2009) 10 SCC 689: 2009 (14) SCR 905 - referred to.

Case Law Reference:

(1964) 3 SCR 425	referred to	Para 11
AIR 1965 SC 1783	referred to	Para 11
(2004) 8 SCC 14	referred to	Para 11, 17
1973 (1) SCR 973	referred to	Para 11
2004 (1) Suppl. SCR 801	referred to	Para 11
117 (2005) DLT 387	referred to	Para 12
2006 (89) DRJ 406	referred to	Para 12

2010 (9) SCR 133	**relied on**	**Para 17**
(1967) 1 SCR 373	**referred to**	**Para 17**
(1971) 1 SCC 671	**referred to**	**Para 17**
1977 (1) SCR 763	**referred to**	**Para 17**
1980 (1) SCR 1071	**referred to**	**Para 17**
1985 (1) SCR 588	**referred to**	**Para 17**
1986 (3) SCR 743	**referred to**	**Para 17**
1993 (1) SCR 269	**referred to**	**Para 17**
1995 (6) Suppl. SCR 827	**referred to**	**Para 17**
1996 (6) Suppl. SCR 529	**referred to**	**Para 17**
1998 (3) SCR 643	**referred to**	**Para 17**
2005 (3) Suppl. SCR 388	**referred to**	**Para 17**
(2008) 12 SCC 418	**referred to**	**Para 17**
2009 (14) SCR 1111	**referred to**	**Para 17**
2009 (14) SCR 905	**referred to**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3813 of 2007.

From the Judgment & Order dated 09.07.2007 of the High Court of Delhi at New Delhi in CM No. 10476 of 2007 in W.P. (C) No. 5821 of 2000.

Dhruv Mehta, Aruneshwar Gupta, Manish Raghav, Nikhil Singh, Shri Ram Krishna for the Appellant.

A. Sharan, Vishnu B. Saharya (for Saharya & Co.) Rachana Srivastava for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The judgment of the Delhi High Court dated July 9, 2007 is impugned in this appeal.

2. It is the case of the respondents that there was requirement of houses for nearly 8 lakh persons within the reach of common man in Delhi. To meet the shortage of housing accommodation, the Delhi Development Authority (DDA) sought requisition of the land for its scheme known as "Rohini Residential Scheme" (hereinafter referred to as "the Scheme"). The said Scheme was initially planned in three phases - Phases I, II, and III. The three phases in the Scheme were developed. Even then, the acute shortage of houses in the city of Delhi continued. Accordingly, the plan for development of Rohini Phases IV and V was formulated.

3. On the requisition of the DDA, on October 27, 1999, a Notification under Section 4(1) of the Land Acquisition Act, 1894 (for short "the Act") was issued indicating that land stated therein was likely to be required by the Government of Delhi for the public purpose namely; Rohini Residential Scheme, Delhi. In the said Notification, it was also mentioned that Lt. Governor, Delhi was satisfied that provisions of sub-section (1) of Section 17 of the Act were applicable to the land mentioned in the Notification and he was pleased under sub-section (4) of Section 17 to direct that all the provisions of Section 5A of the Act would not apply.

4. On April 3, 2000, a declaration was made by the Government of Delhi under Section 6 of the Act stating that the land mentioned therein was acquired for the public purpose namely; Rohini Residential Scheme.

5. Another notification of the same date was issued under Section 7 of the Act directing the Land Acquisition Collector,

Narela to take orders for acquisition of the said land and take possession of the land mentioned therein.

6. The appellant in the present appeal claims to be the owner of the land ad-measuring 14 Bighas 18 Biswas in Khasra Nos. 22 and 39 of Village Shahbad-Daulatpur after the said land came to be donated to it by the erstwhile owners. The appellant further claims that a school has been set up on the above land which imparts education to a large number of students. The appellant challenged the acquisition of the above land which forms part of the above notifications before the Delhi High Court. Large number of other Writ Petitions also came to be filed before the High Court challenging the above notifications.

7. Before the High Court, diverse grounds in challenging the acquisition of the subject land were set up; two of such grounds being that Lt. Governor has not applied his mind for dispensation of the enquiry under Section 5A of the Act and that resort to the urgency provisions contained in Section 17 of the Act was unwarranted and unjustified.

8. The respondents contested the group of Writ Petitions and justified their action including invocation of urgency clause and dispensation of the enquiry under Section 5A of the Act.

9. The Division Bench of the High Court, on hearing the parties, was not persuaded by the contentions of the appellant and the other writ petitioners which formed part of the group matters and dismissed the Writ Petitions being devoid of merit on July 9, 2007. It is from this judgment that the present appeal has arisen.

10. The High Court in the impugned judgment noticed the contentions of the Writ Petitioners in paragraph 2 as follows:

> "The contention of the petitioners is that the Lt. Governor had not specifically authorised invocation of Section 17(4) of the stridently Land Acquisition Act and that this is all the more significant since the draft of the Notification placed before him adverts to Section 17(4). According to the petitioners, the only inference that can be drawn is that the Lt. Governor did not approve of dispensing with the petitioners valuable rights to object to the acquisition. The further contention is that since the petitioners have not been permitted to avail of their rights to file objections under Section 5A and have not been given an opportunity of being heard the entire acquisition should be struck down. It has also been argued on behalf of the petitioners that even assuming that Section 17(4) need not in terms have to be mentioned by the Lt. Governor while granting his approval to the Scheme and that reference only to Section 17(1) would suffice, the Lt. Governor has not properly exercised his mind in approving the waiver and withdrawal of the petitioners valuable right under section 5A of the Act. In other words, it is their stance that resort to the emergency provisions contained in Section 17 of the Act were unwarranted and unjustified in the facts of the present case."

11. The High Court noted the statutory provisions contained in Sections 4,5A,6,8,9,11,16 & 17 of the Act and referred to the decisions of this Court relating to the interpretation of Section 17 of the Act in the cases namely; *Nandeshwar Prasad vs. The State of U.P.*[1]; *Sarju Prasad Sinha vs. The State of U.P.*[2];, *Union of India vs. Mukesh Hans*[3]; *Munshi Singh and others Vs. Union of India*[4]; *Union of India vs. Krishan Lal Arneja*[5]. With regard to decisions of this Court in *Nandeshwar Prasad*[1], Krishan Lal Arneja[5] and *Mukesh Hans*[3], the High Court, observed as follows:

> "We have carefully perused the judgments in Nandeshwar Prasad, Krishan Lal Arneja and Mukesh Hans and in order to ascertain whether it had been argued that a separate decision must be taken under Section 17(1) or (2) on the

one hand and Section 17(4) on the other; or that even if Section 17(1) or 17(2) are resorted to objections under Section 5A must be invited and decided before an acquisition can be completed. Our research is that these contentions had not been raised. Therefore, the dictum in Quinn assumes great significance. We will nonetheless give due deference to all the observations made by the Apex Court, even though we find from the pleadings before us, that grounds predicated on the above arguments have not been articulated in the petitions. Indubitably, these are legal contentions and we would be loath to ignore them solely for the reason that they have not been pleaded. But this state of affairs has obviously been occasioned because of the views ventilated in Mukesh Hans."

12. The High Court then considered the three decisions of that Court in *Sri Ballabh Marbles vs. Union of India*[6]; *Chaman Lal Malhotra vs. Union of India*, W.P. (C) 4002 of 1997 decided on August 8, 2005 and Vasant Kunj Enclave Housing Welfare Society vs. Union of India7 and observed that they were not persuaded to follow the line of reasoning in the above three cases relied upon by the Writ Petitioners.

13. The High Court also considered the Act XXXVIII of 1923 whereby the Act came to be amended. The High Court indicated its opinion in the following words:

"In our considered opinion Section 17(4) is not a fasciculous of the Act, a sub-pandect or a self-contained code having its own realm of operation. Its sole purpose is to clarify that Sections 17(1) and (2) continue to operate as they did prior to 1923. If Section 17(4) is to function in its own field, the factual matrix attending thereto should be spelt out on the lines delineated in its preceding sub-sections (1) and (2). On a careful perusal of the provision of Section 17(4) it will be evident that it contemplates the formation of an opinion by the Government as to existence of the fact situation postulated either by Section 17 (1), thereby enabling possession to be taken over after fifteen days, or under Section 17(2) empowering the taking of similar action after only two days. Originally, neither of these provisions had Section 5A within their respective sights. Sections 17(1) and (2) predated the introduction of the rights of landowners/occupiers to object to the acquisition of their lands. Furthermore, we think it hallucinatory to visualize the taking over of possession in less than two days. We have not come across a case where a citizen is dispossessed instantaneously with the taking of a decision to acquire his land. If this is the practical reality, we are unable to conceive of a situation of such urgency as would justify or necessitate the formation of an opinion in respect of a decision to be taken other than in the factual matrix disclosed in sub-section (1) or sub-section (2) of Section 17 (i.e. signing and executing virtually instantly) reference to which would not have been necessary if there were other and even more extreme situations (in practical terms unthinkable to us), envisaged by sub-section (4) alone. This is why we have said that Section 17(4) is not a self-contained sub code; if theoretically there is urgency which does not brook even a delay of forty-eight hours, it should have been articulated in painstakingly minute detail, so that its abuse is safeguarded against. It is equally unrealistic to expect that objections, which are normally numerous, can be decided in two days or even in fifteen days. The original intendment of Section 17 of the Act was merely clarified in Section 17(4) to continue even after the introduction of Section 5A, viz that in emergent situations acquisition proceedings could be concluded virtually instantly."

14. The High Court, thereafter again considered few decisions of this Court and held as under:

"The conclusion that we have arrived at as a result of the

above discussion is that Section 17, as a composite whole, is a pandect within the Land Acquisition Act, in much the same manner in which Section 25B of the Delhi Rent Control Act has been viewed by the Hon'ble Supreme Court. Section 17 deals with the entire spectrum of emergencies which call for urgent action leading to expropriation of private property. It empowers the State to take possession of lands required for public purposes in two categories of contingencies - (a) in urgent circumstances as adumbrated in the first sub-section enabling dispossession after fifteen days and (b) situations specifically spelt out in the second sub-section empowering immediate dispossession, i.e. after two days. These provisions were available to the State from the very inception of the Act, and had the result of permitting the Government to take possession along with the publishing of a notification under Section 4, leaving the matter of computing and tendering compensation to follow. The introduction in 1923 of the right to file objections under Section 5A within thirty days of the Section 4 Notification required necessary clarification that where circumstances obtain necessitating urgent action, it could be taken. This was clarified by the simultaneous inclusion of Section 17(4), which notably does not have its own field of operation, distinct of sub-sections (1) and (2). Therefore, once the Government is subjectively satisfied that circumstances chronicled in the first two sub-sections exist, the effect is the suspension of the right to file Objections under Section 5A. In the present case Section 17(1) has been resorted to, it would not be open to the Authorities to take possession of the property till the expiration of fifteen days from the publication of the Notification. We have come to this conclusion respectfully and humbly mindful of observations made by their Lordships in Nandeshwar Prasad, Krishan Lal Arneja and Mukesh Hans, in which cases the argument that separate orders under Section 17(4) are essential, were not raised.

Proceeding on the basis that no legal impropriety or infirmity has been committed in failing to make a mention of Section 17(4) of the Act, the controversy is still not set at rest. This is because it is axiomatic and uncontrovertable that the Lt. Governor must, on the basis of material available in the records placed before him, arrive at a soundly considered and informed decision that such grave urgency exists as justifies overriding the basic rights of the land owners, which partake the character of fundamental rights. In State of Punjab -vs- Gurdial Singh, AIR 1980 SC 319 it has been observed that - "it is fundamental that compulsory taking of a man's property is a serious matter and the smaller the man the more serious the matter. Hearing him before depriving him is both reasonable and preemptive of arbitrariness, and denial of this administrative fairness is constitutional anathema except for good reasons. Save in real urgency where public interest does not brook even the minimum time needed to give a hearing, land acquisition authorities should not, having regard to Article 14 & 19 of the Constitution of India, brook an inquiry under Section 17 of the Act. Here a slumbering process, pending for years and suddenly exciting itself into immediate forcible taking, makes a travesty of emergency powers." It is also trite that the attitude of the Administration should be neither cavalier nor casual (*Dora Phalauli -vs- State of Punjab,* (1979) 4 SCC 485). While we prefer not to get bogged down by the semantics and syntax of Section 17, we are unwilling to dilute the stringent rigours which must be satisfied before the circumvention of Section 5A passes judicial muster."

15. While dealing with the question whether the decision of the Lt. Governor to dispense with Section 5A of the Act was properly taken or not, the Division Bench observed thus:

"It cannot possibly be over-emphasized that such a decision must be taken with due caution with even greater care than while deciding objections under Section 5A. Judicial review of such decisions would entail a jural investigation as to whether there was adequate material before the Authority concerned and whether the outcome was predicated on cogitation centered on such material. Courts will be loathe to substitute the subjective satisfaction of the authority with their own. Before Section 5A objections are disposed of, the objectors must be given an opportunity of being heard. In the present case it is palpably clear that the Lt. Governor had looked into the ambit of Section 17(1) of the Act, and finding that the circumstances postulated therein exist, had approved of the draft notification which clarified that the provisions of Section 5A would not apply. We do not need to locate a reasoned order so long as the impugned administrative decision appears to have been taken on the basis of the material available on the record."

16. The High Court considered few other decisions of this Court and ultimately held as follows:

"We find that there was abundant material available for forming a subjective opinion that public purpose would be sub served through the acquisition and that there was sufficient urgency in invoking the provisions of Section 17 valuable but not unalienable of the Act fully mindful that the consequence was the deprivation of the rights of persons having an interest in the land of filing Objections under Section 5A of the Act."

17. In a recent decision of this Court in Anand Singh and another vs. State of Uttar Pradesh and others8, this court considered elaborately the power of urgency conferred upon the Government under Section 17 of the Act, its invocation and dispensation of enquiry under Section 5A of the Act. This Court speaking through one of us (R.M. Lodha,J.) in *Anand Singh*[8] considered the previous decisions of this Court in Raja Anand Brahma *Shah vs. State of U.P.*[9]; *Jage Ram vs. State of Haryana*[10]; *Narayan Govind Gavate vs. State of Maharashtra*[11]; *State of Punjab vs. Gurdial Singh*[12]; *Deepak Pahwa vs. Lt. Governor of Delhi*[13]; *State of U.P. vs. Pista Devi*[14]; *Rajasthan Housing Board vs. Shri Kishan*[15]; *Chameli Singh s. State of U.P.*[16]; *Meerut Development Authority vs Satbir Singh*[17]; *Om Prakash vs. State of U.P.*[18]; *Union of India vs. Mukesh Hans*[3]; *Hindustan Petroleum Corpn. Ltd. vs. Darius Shapur Chenai*[19]; *Mahadevappa Lachappa Kinagi vs. State of Karnataka*[20]; *Babu Ram vs. Statte of Haryana*[21] and *Tika Ram vs. State of U.P.*[22] and culled out the legal position as follows:

"When the Government proceeds for compulsory acquisition of a particular property for public purpose, the only right that the owner or the person interested in the property has, is to submit his objections within the prescribed time under Section 5-A of the Act and persuade the State authorities to drop the acquisition of that particular land by setting forth the reasons such as the unsuitability of the land for the stated public purpose; the grave hardship that may be caused to him by such expropriation, availability of alternative land for achieving public purpose etc. Moreover, the right conferred on the owner or person interested to file objections to the proposed acquisition is not only an important and valuable right but also makes the provision for compulsory acquisition just and in conformity with the fundamental principles of natural justice.

The exceptional and extraordinary power of doing away with an enquiry under Section 5-A in a case where possession of the land is required urgently or in an unforeseen emergency is provided in Section 17 of the Act. Such power is not a routine power and save circumstances warranting immediate possession it should

not be lightly invoked. The guideline is inbuilt in Section 17 itself for exercise of the exceptional power in dispensing with enquiry under Section 5-A. Exceptional the power, the more circumspect the Government must be in its exercise. The Government obviously, therefore, has to apply its mind before it dispenses with enquiry under Section 5-A on the aspect whether the urgency is of such a nature that justifies elimination of summary enquiry under Section 5-A.

A repetition of the statutory phrase in the notification that the State Government is satisfied that the land specified in the notification is urgently needed and the provision contained in Section 5-A shall not apply, though may initially raise a presumption in favour of the Government that prerequisite conditions for exercise of such power have been satisfied, but such presumption may be displaced by the circumstances themselves having no reasonable nexus with the purpose for which the power has been exercised. Upon challenge being made to the use of power under Section 17, the Government must produce appropriate material before the Court that the opinion for dispensing with the enquiry under Section 5-A has been formed by the Government after due application of mind on the material placed before it.

It is true that power conferred upon the Government under Section 17 is administrative and its opinion is entitled to due weight, but in a case where the opinion is formed regarding the urgency based on considerations not germane to the purpose, the judicial review of such administrative decision may become necessary.

As to in what circumstances the power of emergency can be invoked are specified in Section 17(2) but circumstances necessitating invocation of urgency under Section 17(1) are not stated in the provision itself. Generally speaking, the development of an area (for residential purposes) or a planned development of city, takes many years if not decades and, therefore, there is no reason why summary enquiry as contemplated under Section 5-A may not be held and objections of landowners/persons interested may not be considered. In many cases, on general assumption likely delay in completion of enquiry under Section 5-A is set up as a reason for invocation of extraordinary power in dispensing with the enquiry little realizing that an important and valuable right of the person interested in the land is being taken away and with some effort enquiry could always be completed expeditiously.

The special provision has been made in Section 17 to eliminate enquiry under Section 5-A in deserving and cases of real urgency. The Government has to apply its mind on the aspect that urgency is of such nature that necessitates dispensation of enquiry under Section 5-A. We have already noticed a few decisions of this Court. There is conflict of view in the two decisions of this Court viz. *Narayan Govind Gavate v. State of Maharashtra,* (1977) 1 SCC 133, and *State of U.P. v. Pista Devi,* (1986) 4 SCC 251. In *Om Prakash v. State of U.P.,* (1998) 6 SCC 1, this Court held that decision in Pista Devi (supra) must be confined to the fact situation in those days when it was rendered and the two-Judge Bench could not have laid down a proposition contrary to the decision in *Narayan Govind Gavate* (supra). We agree.

As regards the issue whether pre-notification and post-notification delay would render the invocation of urgency power void, again the case law is not consistent. The view of this Court has differed on this aspect due to different fact situation prevailing in those cases. In our opinion such delay will have material bearing on the question of invocation of urgency power, particularly in a situation

where no material has been placed by the appropriate Government before the Court justifying that urgency was of such nature that necessitated elimination of enquiry under Section 5-A.

In a country as big as ours, a roof over the head is a distant dream for a large number of people. The urban development continues to be haphazard. There is no doubt that planned development and housing are matters of priority in a developing nation. The question is as to whether in all cases of 'planned development of the city' or 'for the development of residential area', the power of urgency may be invoked by the Government and even where such power is invoked, should the enquiry contemplated under Section 5-A be dispensed with invariably. We do not think so. Whether `planned development of city' or `development of residential area' cannot brook delay of a few months to complete the enquiry under Section 5-A? In our opinion, ordinarily it can. The Government must, therefore, do a balancing act and resort to the special power of urgency under Section 17 in the matters of acquisition of land for the public purpose viz. 'planned development of city' or 'for development of residential area' in exceptional situation.

Use of the power by the Government under Section 17 for `planned development of the city' or `the development of residential area' or for `housing' must not be as a rule but by way of an exception. Such exceptional situation may be for the public purpose viz. rehabilitation of natural calamity affected persons; rehabilitation of persons uprooted due to commissioning of dam or housing for lower strata of the society urgently; rehabilitation of persons affected by time bound projects, etc. The list is only illustrative and not exhaustive. In any case, sans real urgency and need for immediate possession of the land for carrying out the stated purpose, heavy onus lies on the Government to justify the exercise of such power.

It must, therefore, be held that the use of the power of urgency and dispensation of enquiry under Section 5-A by the Government in a routine manner for the 'planned development of city' or 'development of residential area' and thereby depriving the owner or person interested of a very valuable right under Section 5-A may not meet the statutory test nor could be readily sustained."

18. If the government seeks to invoke its power of urgency, it has to first form the opinion that the land for the stated public purpose is urgently needed. Such opinion has to be founded on the need for immediate possession of the land for carrying out the purpose for which land is sought to be compulsorily acquired. The use of power of urgency under Section 17(1) and (4) of the Act ipso facto does not result in elimination of enquiry under Section 5A and, therefore, if the government intends to eliminate enquiry, then it has to apply its mind on the aspect that urgency is of such nature that necessitates elimination of such enquiry. The satisfaction of the government on twin aspects viz; (i) need for immediate possession of the land for carrying out the stated purpose and (ii) urgency is such that necessitates dispensation of enquiry is a must and permits no departure for a valid exercise of power under Section 17(1) and (4). In paragraph 51 of the case of Anand Singh8, it has been held that use of the power of urgency and dispensation of enquiry under Section 5A of the Act by the Government in a routine manner for the "planned development of city" or "development of residential area" and thereby depriving the owner or person interested of a very valuable right under Section 5-A may not meet the statutory test nor could be readily sustained (emphasis supplied). Ordinarily, therefore, invocation of urgency power by the government for a Residential Scheme - that does not fall in exceptional category as illustrated in para 50 of Anand Singh8 - cannot be held to be legally sustainable.

19. Adverting now to the Notification dated October 27, 1999, the statement made therein is to the effect "the Lt. Governor, Delhi is satisfied also that provisions of sub-section (1) of Section 17 of the said Act are applicable to this land and is further pleased under sub-section (4) of the said Section to direct that all the provisions of Section 5A shall not apply". For what has been stated just above in immediately preceding paragraph, the exercise of power by the Lt. Governor, Delhi under Section 17(1) and (4) has to be held bad in law. Moreover, except the above statement in the Notification, there is no other material available on record which indicates that there has been application of mind by the Lt. Governor, Delhi on the aspect that urgency was of such nature that necessitated dispensation of enquiry under Section 5A of the Act. The respondents have miserably failed to show that the stated purpose 'Rohini Residential Scheme' could not have brooked the delay of few months and the conclusion of the enquiry under Section 5A of the Act would have frustrated the said public purpose.

20. Where the government invokes urgency power under Section 17(1) and (4) for the public purpose like 'planned development of city' or 'development of residential area' or 'Residential Scheme', the initial presumption in favour of the government does not arise and the burden lies on the government to prove that the use of power was justified and dispensation of enquiry was necessary. In the present case, the respondents have miserably failed to show to the satisfaction of the Court that power of urgency and dispensation of enquiry under Section 5A has been exercised with justification. The action of the Lt. Governor, Delhi, in the facts of the case whereby he directed that the provisions of Section 5A shall not apply, if allowed to stand, it would amount to depriving a person of his property without authority of law.

21. The power of urgency by the Government under Section 17 for a public purpose like Residential Scheme cannot be invoked as a rule but has to be by way of exception. As noted above, no material is available on record that justifies dispensation of enquiry under Section 5A of the Act. The High Court was clearly wrong in holding that there was sufficient urgency in invoking the provisions of Section 17 of the Act.

22. Consequently, the appeal is allowed. The Notification dated October 27, 1999 to the effect "the Lt. Governor, Delhi is satisfied also that provisions of sub-section (1) of Section 17 of the said Act are applicable to this land and is further pleased under sub-section (4) of the said Section to direct that all the provisions of Section 5(A) shall not apply" insofar as appellant's land is concerned is quashed. The declaration dated April 3, 2000 issued and published under Section 6 of the Act concerning the subject property is also quashed. The Competent Authority may now invite objections under Section 5A of the Act pursuant to the Notification dated October 27, 1999 and proceed with the matter in accordance with law. No order as to costs.

SAYED DARAIN AHSAN @ DARAIN

v.

STATE OF WEST BENGAL & ANR.

(Criminal Appeal No. 1195 of 2006)

MARCH 22, 2012

[A. K. PATNAIK AND SWATANTER KUMAR, JJ.]

INDIAN PENAL CODE, 1860:

s.302/34 - Victim stated to have been shot dead by 8-10 persons - Two accused prosecuted and convicted and sentenced to life - One of the accused filing the appeal - Held: High Court has rightly sustained the conviction of the appellant on the evidence of four eyewitnesses as corroborated by the medical evidence.

EVIDENCE:

Expert evidence - Oral testimony that 8-10 persons fired at the victim from their revolvers - From the dead body, 303 rifle bullet recovered - Held: FSL report is clear that the fire arms used by the appellant and his associates were improvised firearms capable of firing .303 rifle cartridges - Considering the evidence on record and the opinions of experts, there is no doubt that the deceased has not been shot by a rifle from a long distance but by improvised or country-made handguns capable of firing .303 rifle cartridges from a short distance.

Test Identification parade - Failure to conduct TIP - Held: Appellant and the four eyewitnesses belonged to the same locality and the eyewitnesses knew the appellant before the incident and were able to immediately identify the appellant at the time of the incident - It is only if the appellant was a stranger to the eyewitnesses that test identification parade would have been necessary at the time of investigation.

CODE OF CRIMINAL PROCEDURE, 1973:

s.313 - Examination of accused - Plea that FSL report was not put to accused in his examination u/s 313 - Held: The evidence of IO was recorded by the court in the presence of the appellant and the FSL report was marked as Ext.14 and the court had also put it to the appellant during his examination that the seized articles were sent to the Forensic Science Laboratory, yet the appellant has stated in his reply before the court that he was not aware - Thus, although the content of the said report was not put to the appellant in his examination u/s 313, Cr.P.C., the appellant was not in any way prejudiced - Penal Code, 1860 - s.302/34.

The appellant and another accused were charged with an offence punishable u/s 302/34 IPC. The prosecution case was that at about 9.45 P.M. on 11.2.2001, the victim was encircled by 8-10 persons and shot dead. PWs 3,4, 5 and 7, who were the local residents, identified the two accused. The trial court convicted and sentenced them to imprisonment for life u/s 302/34 IPC. The High Court dismissed the appeal filed by the appellant.

In the instant appeal, it was, intr alia, contended for the appellant that the ocular evidence of PWs 3, 4, 5 and 7 being inconsistent with the medical evidence, ought not to have been relied upon, as the witnesses deposed before the court that the appellant and his associates all fired at the deceased from their revolvers, but the medical evidence revealed that the deceased had sustained only one bullet injury and the bullet recovered from the dead body was that of a .303 rifle. The case of the appellant was that 'R', the younger brother of the deceased, got him killed for the property and set up his (R's) friends as witnesses against the appellant and, therefore, all the eye-witnesses being interested witnesses should not have been believed.

Dismissing the appeal, the Court

HELD: 1.1 The consistent version of all the four eyewitnesses, namely PW-3, PW-4, PW-5 and PW-7 is that the appellant and his associates fired at the deceased. PW-12, the doctor who carried out the post mortem on the dead body, stated that in his opinion the death was due to the effects of gun shot injury which was ante-mortem and homicidal in nature. This obviously refers to injury No.7. Regarding injury No.6, he has stated that it was not possible for him to say that the injury was caused by grazing by the bullet or not. Thus the medical evidence is also clear that the death of the deceased was caused by a bullet injury. The medical evidence clearly supports and does not contradict the ocular evidence of

PW-3, PW-4, PW-5 and PW-7 that the deceased was killed by the gun shots fired by the appellant and his associates. In the facts of the instant case the, medical evidence does not go so far as to rule out all possibility of the ocular evidence being true. Hence, the ocular evidence cannot be disbelieved. [para 7-9]

Abdul Sayeed vs. State of Madhya Pradesh **2010 (13) SCR 311 = (2010) 10 SCC 259;** *Ram Narain Singh vs. State of Punjab* **1976 (1) SCR 27 = (1975) 4 SCC 497;** *State of Haryana vs. Bhagirath* **1999 (3) SCR 529 = (1999) 5 SCC 96;** *Solanki Chimanbhai Ukabhai vs. State of Gujarat* **(1983) 2 SCC 174;** *Mani Ram vs. State of U.P.* **1994 (1) Suppl. SCR 63 = (1994 Supp (2) SCC 289;** *Khambam Raja Reddy vs. Public Prosecutor* **2006 (6) Suppl. SCR 446 = (2006) 11 SCC 239;** *State of U.P. vs. Dinesh* **2009 (2) SCR 1175 = (2009) 11 SCC 566; and** *State of U.P. vs. Hari Chand* **2009 (7) SCR 149 = (2009) 13 SCC 542 - relied on**

1.2 Though according to the eyewitnesses the assailants had fired from revolvers, the FSL report dated 04.06.2001 is clear that the fire arms used by the appellant and his associates were improvised firearms capable of firing .303 rifle cartridges. Considering the evidence on record and the opinions of experts there is no doubt that the deceased has not been shot by a rifle from a long distance but by improvised or country-made handguns capable of firing .303 rifle cartridges from a short distance. PW-3 has described these as guns, whereas PW-5 has described these as revolvers because he has not been able to distinguish a revolver from a country-made handgun. PW-4 and PW-7 are silent on whether the appellant and his associates have used guns or revolvers. Some of these eyewitnesses have said that all the assailants fired but they could not have known how many projectiles were actually ejected from these defective improvised firearms as a result of firing. One bullet has been recovered from the occipital region of the deceased and another bullet and an empty cartridge have been recovered from the place of occurrence. Therefore, the fact that the other bullets were not recovered either from the body of the deceased or from the place of occurrence does not belie the prosecution story that the appellant and his associates fired and killed the deceased. [para 10 and 12]

Firearms in Criminal Investigation & Trials **Fourth Edition by Dr. B.R. Sharma published by the Universal Law Publishing Co. - referred to.**

1.3 There is no material on record to support the plea that 'R', the younger brother of the deceased, had actually killed him and had set up the witnesses against the appellant and that PW-3, PW-4, PW-5 and PW-7 were directly or indirectly connected with him and were all interested witnesses. At the time of the incident, PW-3 and PW-4 were chatting separately and PW5 and PW-7 were gossiping in front of the shop of PW-6 near the place of occurrence. All the four eyewitnesses were of the locality in which the incident took place and their evidence would show that they have stated whatever they have actually observed. Although, during cross examination the defence has suggested to these witnesses that their evidence implicating the appellant is false, the defence has not been able to create a reasonable doubt about the veracity of their evidence. Therefore, it cannot be accepted that the four eyewitnesses were directly or indirectly connected with the younger brother of the deceased and had implicated the appellant for the offence at his instance and he was the man behind the killing of the deceased. [para 13]

1.4 As regards the plea that no Test Identification Parade was held at the time of investigation, it is

significant to note that the appellant and the four eyewitnesses belonged to the same locality. The eyewitnesses knew the appellant before the incident and were able to immediately identify him at the time of the incident. It is only if the appellant was a stranger to the eyewitnesses that the Test Identification Parade would have been necessary at the time of investigation. [para 14]

1.5 So far as the plea that the FSL Report dated 04.06.2001 was not put to the appellant in his examination u/s 313 Cr.P.C. is concerned, it is evident that PW-24, the investigating officer, has stated in his evidence that he received four Forensic Science Laboratory Reports on different dates and he has been cross examined on behalf of the appellant. The evidence of PW-24 was recorded by the court in the presence of the appellant and the FSL report dated 04.06.2001 was marked as Ext.14 and the court had also put it to the appellant during his examination that the seized articles were sent to the Forensic Science Laboratory, yet the appellant has stated in his reply before the court that he was not aware. The appellant could have stated if he had anything to say on the report dated 04.06.2001. Thus, although the content of the said report was not put to the appellant in his examination u/s 313, Cr.P.C., the appellant was not in any way prejudiced. [para 15]

State of Punjab v. Swaran Singh **2005 (1) Suppl. SCR 786 = AIR 2005 3114 - relied on.**

1.6 The High Court has held in the impugned judgment that all the eyewitnesses have given a vivid and true account of the incident; that they had seen the occurrence on close range and as they were residents of the locality they had no problem in identifying the assailants; that there was nothing on record suggesting that they nurtured ill feeling and harboured enmity against the appellant; and that the evidence of the eyewitnesses is consistent and finds due corroboration from the post mortem report. In the considered opinion of this Court, the High Court has rightly sustained the conviction of the appellant on the evidence of four eyewitnesses as corroborated by the medical evidence. [para 16]

State of Punjab v. Rajinder Singh **2009 (13) SCR 609 = (2009) 15 SCC 612;** *Sharad Birdhichand Sarda v. State of Maharashtra* **1985 (1) SCR 88 = (1984) 4 SCC 116;** *Gamini Bala Koteswara Rao & Ors. v. State of Andhra Pradesh through Secretary* **2009 (14) SCR 1 = (2009) 10 SCC 636 - cited.**

Case Law Reference:

1994 (1) Suppl. SCR 63	**cited**	**para 5**
2009 (13) SCR 609	**cited**	**para 5**
1985 (1) SCR 88	**cited**	**para 5**
2009 (14) SCR 1	**cited**	**para 6**
2010 (13) SCR 311	**relied on**	**para 9**
1976 (1) SCR 27	**relied on**	**para 9**
1999 (3) SCR 529	**relied on**	**para 9**
(1983) 2 SCC 174	**relied on**	**para 9**
1994 (1) Suppl. SCR 63		**relied on para 9**
2006 (6) Suppl. SCR 446		**relied on para 9**
2009 (2) SCR 1175	**relied on**	**para 9**

2009 (7) SCR 149 relied on para 9

2005 (1) Suppl. SCR 786 relied on para 15

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1195 of 2006.

From the Judgment & Order dated 12.05.2006 of the High Court at Calcutta in C.R.A. No. 244 of 2003.

S.B. Sanyal, Rauf Rahim, Yadunandan Bansal, Abhijit P. Medh, Chanchal Kr. Ganguli, Soumitra Chosh Choudhary, B.P. Yadav, Abhijit Sengupta, Pijush K. Roy, Mithilesh Kumar S. for the appearing parties.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. This is an appeal by way of special leave under Article 136 of the Constitution of India against the judgment dated 12.05.2006 of the High Court of Calcutta in C.R.A. No.244 of 2003 affirming the conviction of the appellant under Section 302 read with Section 34 of the Indian Penal Code (for short 'IPC') as well the sentence of life imprisonment imposed on the appellant by the trial court and dismissing the appeal of the appellant.

2. The facts briefly are that an FIR was lodged with the Officer-in-charge of the Garden Reach Police Station, Calcutta, on 11.02.2001 at about 10.18 P.M. by Md. Rashid Khan. In the FIR, Rashid stated that on 11.02.2001 at about 9.45 P.M. when he was sitting along with Md. Shamim Ansari at the junction of Iron Gate Road and Risaldar Gate Road and gossiping, Md. Jahangir alias Mughal walked along Iron Gate Road towards Garden Reach Road at about 9.50 P.M. Suddenly, they heard a sound of firing from the side of Iron Gate Road and both went there running and saw that eight to ten persons had encircled Mughal and were firing at him again and again. Mughal fell down on the street and the assailants fled away from the spot in different directions and he could recognize the appellant as one of the assailants. Thereafter, Rashid and Shamim and some people who had gathered from neighbouring areas took Mughal to Hannan Nursing Home at B-79, Iron Gate Road, where Mughal was declared dead. The Officer-in-Charge of the Police Station registered a case under Sections 120B/302, IPC, and 25(1B)(a)/27 of the Arms Act against the appellant and directed Sub-nspector B.C. Sarkar to take up the investigation of he case. After investigation, chargesheet was filed against the app llant and Abuzar Hossain under Section 302/34, IPC, and the case w s committed to the Sessions Court for trial. 3. At the trial the prosecution examined as many as 24 witnesses. Rashid was examined as PW-3 and Shamim was examined as PW-4. Both PW-3 and PW-4 supported the prosecution case as narrated in he FIR. Besides these two eyewitnesses, two more eyewitness s, who on 11.02.2001 at about 9.00 P.M., were gossiping in fron of a shop near the place of occurrence, Yusuf and Jahid, were examined as PW-5 and PW-7 and they also supported the prosecution case as narrated in the FIR. The trial court, after considering the evidence of the four eyewitnesses as well as the medical and other evidence on record, held that both the accused persons, the appellant and Abuzar Hossain, were guilty of the offence under Section 302/34, IPC. The trial court also heard the parties on the question of sentence and sentenced each of the two accused persons to suffer life imprisonment and also each of the accused persons to pay a fine of Rs.5,000/- and in default to suffer R.I. for one more year. Aggrieved, the appellant filed C.R.A. No.244 of 2003 before the High Court but the High Court dismissed the appeal and affirmed the conviction and sentence imposed on the appellant by the trial court.

4. Mr. S.B. Sanyal, learned senior counsel for the appellant, submitted that the ocular evidence of PW-3, PW-4, PW-5 and PW-7 ought not to have been believed because it is inconsistent with the medical evidence in the present case. He submitted that these witnesses have said before the Court

that the appellant and his associates surrounded the deceased and all of them fired at the deceased but the medical evidence reveals that there was only one bullet injury on deceased. He further submitted that as per the Forensic Science Laboratory report dated 04.06.2001, the bullet fired was of a .303" rifle, but the eyewitnesses have said that the assailants had fired from revolvers. He submitted that if a rifle has been actually used to kill the deceased, the firing must have taken place from a long distance and not from a short distance as alleged by the eyewitnesses. He further submitted that the truth is that Raju, who was the younger brother of the deceased, was interested in the property of the deceased, who was a wealthy person, and it is Raju who had killed the deceased and had set up the witnesses against the appellant. He submitted that evidence on record establishes that Raju and PW-3 reside in the same premises and PW-4 is a close friend of PW-3, PW-5 knew Raju since his boyhood and PW-7 was a close friend of both PW-4 as well as Raju and PW-5 and PW-7 are friends. He vehemently argued that all the eyewitnesses were, therefore, interested witnesses and should not have been believed. He further argued that no Test Identification Parade was held at the time of investigation and it was not possible for the witnesses to identify the appellant as one of the persons who fired at the deceased.

5. Mr. Sanyal cited the decision of this Court in *Mani Ram & Ors. v. State of U.P.* [1994 Supp.(2) SCC 289] for the proposition that where the direct evidence was not supported by the expert evidence, it would be difficult to convict the accused on the basis of such evidence. He also relied on *State of Punjab v. Rajinder Singh* [(2009) 15 SCC 612] in which it was held that the prosecution story was doubtful because there was clear inconsistency between medical evidence and ocular evidence. He submitted that the report dated 04.06.2001 of the Forensic Science Laboratory was not put to the appellant in his examination under Section 313 of the Criminal Procedure Code (for short 'Cr.P.C.'). He cited the decision of this Court in *Sharad Birdhichand Sarda v. State of Maharashtra* [(1984) 4 SCC 116] in which it has been held that the circumstances, which were not put to the accused in his examination under Section 313 of the Criminal Procedure Code, 1973, have to be completely excluded from consideration. According to Mr. Sanyal, therefore, this is a fit case in which the appellant should be acquitted of the charges under Section 302/34, IPC, and the judgments of the High Court and the trial court should be set aside.

6. Mr. Chanchal Kumar Ganguli, learned counsel appearing for the State, on the other hand, strongly relied on the evidence of eyewitnesses, namely, PW-3, PW-4, PW-5, and PW-7 who had all supported the prosecution case. He submitted that all the eyewitnesses have named the appellant as the person who was holding a gun and who shot the deceased. He referred to the report dated 04.06.2001 of the Forensic Science Laboratory which clearly revealed that the two bullets (Ext.B & I) were fired through an improvised fire arm, one hit the deceased in the occipital region and the other grazed the deceased in the temporal region. He also referred to the seizure list Ext.-2 to show that an empty cartridge and one bullet head were also found at the place of occurrence. He submitted that the contention of Mr. Sanyal that the report dated 04.06.2001 of the Forensic Science Laboratory was not put to the appellant in his examination under Section 313, Cr.P.C., is not correct. He referred to the question put by the trial court to the appellant in which it was brought to the notice of the appellant that the I.O. sent the seized articles to the Forensic Science Laboratory after completion of the investigation and only thereafter the chargesheet was filed against the appellant. He cited the decision in *Gamini Bala Koteswara Rao & Ors*. v. *State of Andhra Pradesh through Secretary* [(2009) 10 SCC 636] in which this Court has taken a view on facts that the medical evidence did not in any way contradict the ocular evidence. He submitted that there is no inconsistency between the ocular evidence and the medical evidence in this case and

this Court should also accept the ocular evidence of the four eyewitnesses who had seen the appellant firing at the deceased.

7. We may first deal with the arguments of Mr. Sanyal that the medical evidence in this case is such as to make the prosecution story as told by PW-3, PW-4, PW-5 and PW-7 improbable. We extract hereinbelow the relevant portions of the evidence of PW-3, PW-4, PW-5 and PW-7:

> "PW-3 – I heard a sound of firing in the direction of B-35, Iron Gate Road. On hearing this we ran towards the B-35, Iron Gate Road and found Daren with 8/10 others surrounded Mogal from all sides. Daren and his associates were armed with gun. They uttered in a single voice that Mogal should be finished. Saying this they fired at Mogal, Mogal fell on the ground with bullet injury.
>
> PW-4 – After some time I heard a sound of firing from the direction of B-35, Iron Gate Road. I myself and Rashid ran a few distance and found Daren and eight or ten others. Some of them Mughal from behind and no by the side of Mughal. They all uttered in a voice that Mughal should be finished. Saying this Daryen and his associates started firing upon Mughal. As a result of such firing Mughal fell on the B-35, Iron Gate Road.
>
> PW-5 – I found also Mughal Bhai coming from the side of Bangalee Bazar and when he arrived near the mouth of the lane at B-35, Iron Gate Road at that time Daryen, Abuzar Hossain and other associates Daryen detained Mughal Bhai. There were about 8/10 persons armed with revolvers. The Daryen and his associates surrounded Mughal from his left side and back side. One of those 8/10 persons fired from the revolver and then Daryen and Abuzar Hossain said to his associates to kill Jahangir @ Mughal. Immediately all the persons fired upon Jahangir @ Mughal. I could identify only Daryen and Abuzar Hossain (identified on the dock). Mughal instantly fell down on the ground.
>
> PW-7 – At about 9.50 p.m. I found that Mughal Bahi was coming from the side of Bangalee Bazar towards ourselves and when he reached near B-35, Iron Gate Road at that time Daryen and Abuzar Hossain and others encircled Mughal from his behind and side. Out of those persons somebody fired. Then Daryen, Abuzar and others abusd filthily Mughal and started firing at random and fired about 6/7 times. They also uttered, "Saleko Khatam Kar do". (identified the accused Daryen and Abuzar on the dock)."

It will be clear from the evidence of PW-3, PW-4, PW-5 and PW-7 that the consistent version of all the four eyewitnesses is that the appellant and his associates fired at the deceased and as a result the deceased fell down.

8. The medical evidence of this case is of Dr. Amitava Das, PW-12, who carried out the post mortem on the dead body of deceased. He has stated that on the dead body of the deceased he found the following injuries:

> "1. Injury abrasion 1"x ½" over left forehead. 1 ½ left to mid-line and ½" above left eye-brow.
>
> 2. Abrasion -1"x ½" over left side of face just above the monistic and 2" left to mid-line.
>
> 3. Abrasion – 2"x1" over interior aspect of lower part of right chest-wall 9" below right clavicle and 2 ½" right to interior mid-line.
>
> 4. Graze abrasion-4"x1" over posterior aspect of lower part of right arm and right elbow.
>
> 5. Graze Abrasion 1½" x 1" over posterior aspect of left elbow.

6. One lacerated wound - ½" x ¼" into bone over right side temporal region, 1" right of outer of Canvas of right eye and 4" above the right angle of mandible and 5.5" above right heel with evidence of gutter fracture involving outer table of right temporal bone-might have been caused by a grazing bullet.

7. One wound of entrance of gun-shot injury of size ½" to ½" more or less oval in shape with radish margin with abrasion 0.2" surrounding it with brushing underneath with evidence of no protrusion of fat and evidence of turning of body hair was placed over right side of posterior aspect of neck just below the hair border just right to posterior mid-line 1" below external occipital pursuance 5 ft.2" above right heel."

He has also stated that in his opinion the death was due to the effects of gun shot injury which was ante-mortem and homicidal in nature. This obviously refers to injury No.7. Regarding injury No.6, he has stated that it was not possible for him to say that the injury was caused by grazing by the bullet or not. Thus the medical evidence is also clear that the death of the deceased was caused by a bullet injury. The medical evidence clearly supports and does not contradict the ocular evidence of PW-3, PW-4, PW-5 and PW-7 that the deceased was killed by the gun shots fired by the appellant and his associates.

9. In a recent judgment in *Abdul Sayeed vs. State of Madhya Pradesh* [(2010) 10 SCC 259] this Court after considering its earlier decisions in *Ram Narain Singh vs. State of Punjab* [(1975) 4 SCC 497], *State of Haryana vs. Bhagirath* [(1999) 5 SCC 96], *Solanki Chimanbhai Ukabhai vs. State of Gujarat* [(1983) 2 SCC 174], *Mani Ram vs. State of U.P.* [(1994 Supp (2) SCC 289], *Khambam Raja Reddy vs. Public Prosecutor* [(2006) 11 SCC 239], *State of U.P. vs. Dinesh* [(2009) 11 SCC 566 and *State of U.P. vs. Hari Chand* [(2009) 13 SCC 542] has held:

"though the ocular testimony of witness has greater evidentiary value vis-à-vis medical evidence when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence maybe disbelieved".

In the facts of the present case, as we have seen, the medical evidence does not go so far as to rule out all possibility of the ocular evidence being true. Hence, the ocular evidence cannot be disbelieved.

10. We now turn to the submission of Mr. Sanyal that as per the Forensic Science Laboratory Report dated 04.06.2001 the bullet was of .303" rifle whereas the eyewitnesses have said that the assailants had fired from revolvers. PW-12 who carried out the post-mortem on the dead body of the deceased has stated that 8 articles were preserved after the post mortem and these included skin from wound of entry and foreign body (bullet). PW-24 who took up further investigation of the case has deposed that on 16.02.2001 he received sealed packets collected from CMOH, Alipore during autopsy like blood, foreign body (bullet) hair etc. and on 16.04.2001 he sent these articles to Forensic Science Laboratory and thereafter received the reports from the Forensic Science Laboratory on different dates. The report dated 04.06.2001 of the Forensic Science Laboratory contains the result of examination of some of these articles. These articles are an envelope marked A containing one deformed fired case of a .303" rifle cartridge (Ext. A), an envelope marked B containing one fired-nose bullet of .315"/ 8mm caliber (Ext. B), the glass Phial marked I containing one fired metal jacketed bullet of improvised make having dark brown bloody stains (Ext. I) and a glass phial J containing semi-solid substance said to be a piece of human skin (Ext. J). The results of the examination of these articles as given in the report

dated 04.06.2001 of the Forensic Science Laboratory are as follows:

> "The physical condition of ext.A suggested that it was used for firing through an improvised firearm capable of firing .303" rifle cartridges.
>
> Although exhibits B and I were not of identical calibers but both were found to have been fired through improvised firearm. The scratch mark-patterns on B and I were found to match characteristically while compared under microscope. Hence it was revealed that both the exhibits B and I were fired through the same improvised firearm.
>
> No opinion could be given on exhibit J as it was unfit for any examination."

The report dated 04.06.2001 of the Forensic Science Laboratory thus is clear that the fire arms used by the appellant and his associates were improvised firearms capable of firing .303" rifle cartridges.

11. Dr. B.R. Sharma in his book on Firearms in Criminal Investigation & Trials published by the Universal Law Publishing Co., Fourth Edition, has in Chapter 11 on "*Improvised Firearms*" classified country-made firearms with reference to the ammunition used in them: *12 bore firearms and .303 firearms.* Dr. Sharma has also classified country-made firearms according to the manner in which they are fired: *shoulder firearms or the handguns.* Dr. Sharma has stated that country-made firearms are non-standard firearms and they are not tested or proved for their fire-worthiness and are, therefore, usually imperfect contrivances. He has also stated that the poor construction of the firearms affects the firing process in many respects and sometimes the incomplete combustion inhibits a complete and proper development of pressure and the projectiles do not acquire standard velocities or striking energies.

12. Considering the evidence on record and the opinions of experts we have discussed, we have no doubt that the deceased has not been shot by a rifle from a long distance but by improvised or country-made handguns capable of firing .303 rifle cartridges from a short distance. PW-3 has described these as guns, whereas PW-5 has described these as revolvers because he has not been able to distinguish a revolver from a country-made handgun. PW-4 and PW-7 are silent on whether the appellant and his associates have used guns or revolvers. Some of these eyewitnesses have said that all the assailants fired but they could not have known how many projectiles were actually ejected from these defective improvised firearms as a result of firing. One bullet has been recovered from the occipital region of the deceased and another bullet and an empty cartridge have been recovered from the place of occurrence. Hence, in the present case, the fact that the other bullets were not recovered either from the body of the deceased or from the place of occurrence does not belie the prosecution story that the appellant and his associates fired and killed the deceased.

13. We may now consider the argument of Mr. Sanyal that Raju who was the younger brother of the deceased had actually killed the deceased and had set up the witnesses against the appellant and that PW-3, PW-4, PW-5 and PW-7 were directly or indirectly connected with Raju and were all interested witnesses. We do not find any material on record to support the contention of Mr. Sanyal that Raju was behind the killing of the deceased. The witnesses PW-3 and PW-4 were chatting at the junction of Risaldar Gate Road and Iron Gate Road and PW5 and PW-7 were gossiping in front of the shop of PW-6. All four eyewitnesses were of the locality in which the incident took place and happened to be at the place of occurrence at the time of the incident and their evidence would show that they have stated whatever they have actually observed. Although, during cross examination the defence has suggested to these witnesses that their evidence implicating the appellant is false, the defence has not been able to create a reasonable doubt

about the veracity of their evidence. We cannot therefore accept the submission of Mr. Sanyal that the four eyewitnesses were directly or indirectly connected with Raju and had implicated the appellant for the offence at the instance of Raju who was the man behind the killing of the deceased.

14. We also do not find any merit in the submission of Mr. Sanyal that as no Test Identification Parade was held at the time of investigation, the eyewitnesses could not have identified the appellant as one of the persons who fired at the deceased. The appellant, PW-3 and PW-4 were residents of Iron Gate Road, which was the part of the Garden Reach Police Station. PW-5 and PW-7 were residents of Bichali Ghat Road which is also part of the same Police Station Garden Reach. Hence, the appellant and the four eyewitnesses belonged to the same locality and the four eyewitnesses knew the appellant before the incident and were able to immediately identify the appellant at the time of the incident. It is only if the appellant was a stranger to the eyewitnesses that Test Identification Parade would have been necessary at the time of investigation.

15. Coming now to the submission of Mr. Sanyal that the Report dated 04.06.2001 of the Forensic Science Laboratory was not put to the appellant in his examination under Section 313 Cr.P.C., we find that PW-24 has stated in his evidence that he has received four Forensic Science Laboratory Reports on different dates and PW-4 has been cross examined on behalf of the appellant. We also find from the examination of the appellant under Section 313 Cr. P.C. that the court did put a question to him that PW-24 who took up further investigation of the case sent the seized articles to the Forensic Science Laboratory including articles collected from ACMOH Alipore and after completion of investigation submitted charge-sheet against both the accused persons under Sections 302/34 IPC and sought a reply from the appellant. The evidence of PW-24 was recorded by the Court in the presence of the appellant and the report dated 04.06.2001 of the Forensic Science Laboratory was marked as Ext.14 on 24.02.2003 and the Court had also put it to the appellant during his examination on 04.03.2003 that the seized articles were sent to the Forensic Science Laboratory, yet the appellant has stated in his reply before the Court that he was not aware. The appellant could have stated on 04.03.2001 if he had anything to say on the report dated 04.06.2001 of the Forensic Science Laboratory. Thus, although the content of the report dated 04.06.2001 of the Forensic Science Laboratory was not put to the appellant in his examination under Section 313, Cr.P.C., the appellant was not in any way prejudiced. In *State of Punjab v. Swaran Singh* (AIR 2005 3114), this Court has held relying on the earlier decisions of this Court that where the accused was not in any way prejudiced by not giving him an opportunity to answer specifically regarding evidence which was recorded in his presence, such evidence cannot be excluded from consideration by the Court.

16. We find that the High Court has held in the impugned judgment that all the eyewitnesses have given a vivid and true account of the incident and had seen the occurrence on close range and as they were residents of the locality they had no problem in identifying the assailants and there was nothing on record suggesting that they nurtured ill feeling and harboured enmity against the appellant and that the evidence of the eyewitnesses was consistent and finds due corroboration from the post mortem report. In our considered opinion, the High Court has rightly sustained the conviction of the appellant on the evidence of four eyewitnesses as corroborated by the medical evidence.

17. In the result, we find no merit in the appeal which is accordingly dismissed.

R.P. Appeal dismissed.

STATE OF RAJASTHAN
v.

MOHAN LAL & ORS.
(Criminal Appeal No. 316 of 2005)

MARCH 23, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 - ss. 148, 302/149, 323, 324/149 and 325 - Prosecution under - Conviction by trial court - High Court acquitting the accused u/s. 302/149 and convicting them under rest of the provisions - On appeal, held: High Court was justified in holding that the injuries were simple in nature on non-vital parts of the body and were not sufficient to cause death - Prosecution failed to establish the charge of murder beyond reasonable doubt - Sentence for the period already undergone is also justified.

The respondents accused were prosecuted u/ss. 148, 302/149, 323, 324/149 and 325 IPC for having caused death of one person and causing injury to another. Trial Court convicted the accused under all the provisions. On appeal, High Court partly allowed the appeal. It convicted the accused u/ss. 148, 323, 324/149 and 325 IPC, while acquitted them u/s. 302/149 IPC holding that the injuries were simple in nature on non-vital parts of the body and thus were not sufficient to cause death in the ordinary course of nature. Hence, the present appeal.

Allowing the appeal, the Court

HELD: 1.1 The High Court was justified in holding that the prosecution had not been able to establish the charge of murder beyond a reasonable doubt. The High Court has correctly observed that8 the deposition of (PW-13) had clearly established that the injuries sustained by the deceased were all simple in nature inflicted upon non-vital parts of the body. It is also difficult to attribute any knowledge to the accused that the injuries inflicted by them were likely to cause death, the same being simple in nature. The doctor had also clearly admitted in cross-examination that no finding was recorded in the post-mortem report Exh.P-21 that the injuries in question were sufficient in the ordinary course of nature to cause death. There was, in that view of the matter and in the absence of any other evidence to support the charge levelled against the accused, no reason to find them guilty of murder. [Paras 6 and 8]

1.2 The trial court had placed heavy reliance upon the presence of blood clots below the scalp and inside the middle portion of the skull of the deceased to come to the conclusion that the death may have been caused by the injuries on the head which is a vital part of the body. The trial court failed to note that there was no external injury reported by the doctor on any part of the head. If the respondents really intended to commit the murder of the deceased and if they were armed with weapons like 'lathis' and 'dhariyas' of which the latter is a sharp-edged weapon, it is difficult to appreciate why they would not have attacked on any vital part of his body. The absence of any injury on any vital part and particularly the absence of external injury on the skull clearly show that the accused had not intended to cause the death of the deceased nor caused any bodily injury as was likely to cause death. [Para 7]

2. On the question of sentence, there is no compelling reason to interfere. The incident in question is more than 12 years old. The respondents have already suffered incarceration for four years which should suffice having regard to the totality of the circumstances in which the incident in question appears to have taken place. [Para 8]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal

No. 316 of 2005.

From the Judgment & Order dated 02.12.2003 of the High Court of Judicature for Rajasthan at Jodhpur in D.B. Criminal Appeal No. 509 of 2001.

Ansar Ahmad Chaudhary for the Appellant.

V.J. Francis, Anupam Mishra for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal by special leave assails the correctness of the judgment and order dated 2nd December, 2003 passed by the High Court of Judicature for Rajasthan at Jodhpur whereby Criminal Appeal No.509 of 2001 filed by the respondents against their conviction and sentence for offences punishable under sections 148, 302/149, 323, 324/ 149 and 325 of the IPC has been partly allowed and while setting aside the conviction and sentence of the respondents under Section 302/149, affirmed their conviction for the remaining offences with the direction that the period already undergone by them shall suffice.

2. The facts giving rise to the filing of the charge-sheet against the respondents, their trial and conviction as also the filing of the appeal before the High Court have been set out at considerable length in the impugned judgment passed by the High Court. We need not therefore re-count the same over again except to the extent the same is absolutely necessary to understand the genesis of the prosecution case and the submissions made before us at the bar. Suffice it to say that Shambhu Lal (PW-1), Piru (PW-7) and Lalu (deceased) all real brothers and residents of village Sewana in the State of Rajasthan were on their way back from the house of one Arjunsha Ghanava on 23rd January, 2000 at about 9.10 p.m., when they were attacked by the respondents Mohan Lal, Nathu, Suraj Mal, Laxman, Kalu and Balu Ram, also residents of village Sewana. The accused were, according to the prosecution, armed with lathis, and dhariyas (Scythes) which they used freely to cause injuries to the deceased and Shambu Lal (PW-1). The prosecution case is that Piru (PW-7) somehow managed to escape from the clutches of the respondents and rushed to the Police Station to lodge an oral report at about 11.30 p.m., on the basis whereof the police registered a case for offences punishable under Sections 147, 148, 149, 307, 323 and 341 of the IPC, and hurried to the place of occurrence to take the injured Shambhu and Lalu to Pratapgarh Hospital where Lalu succumbed to his injuries on 24th January, 2000 at about 6.30 a.m.

A charge under Section 302 IPC was accordingly added by the police who completed the investigation and filed a challan before the jurisdictional Judicial Magistrate. The respondents were committed to face trial to the Sessions Judge at Pratapgarh who made over the case to Additional Sessions Judge (Fast Track) before whom the respondents pleaded not guilty and claimed a trial.

In support of its case, the prosecution examined as many as 17 witnesses including the Doctor who conducted the post-mortem examination of the deceased. The accused examined Vajeram in defence apart from getting Exh.D-1 to D-6 marked at the trial.

3. The Trial Court eventually came to the conclusion that the prosecution had succeeded in proving its case. All the accused-respondents were sentenced to undergo life imprisonment for offences of murder of deceased Lalu. In addition they were also sentenced to undergo imprisonment that ranged between one year to three years for offences punishable under Sections 323, 324 ad 325 of the IPC. A fine of Rs.1500/ - in total and a sentence in default was also imposed upon them.

4. Aggrieved by the Judgment and order passed by the Sessions Judge, the appellants preferred Criminal Appeal

No.509 of 2001 before the High Court which has been partly allowed by the judgment and order impugned in this appeal. The High Court upon a fresh appraisal of the evidence adduced by the prosecution and the defence came to the conclusion that the former had failed to establish the charge under Section 302 read with Section 149 of the IPC framed against the respondents. The High Court observed:

> "In the instant case from the deposition of Dr.Mathur, it is more than clear that all the injuries found on the persons of the deceased were simple in nature. Three injuries were found by pointed object and other were abrasions. It is not in dispute that the three injuries found on the person of Piru were all simple in nature and by blunt object. The injured Shambhu Lal received two grievous injuries on left wrist and right leg by blunt object and one simple injury on left little finger by sharp object."

5. The High Court has on the above basis acquitted the respondents of the charge of murder but upheld their conviction for the remaining offences. On the question of sentence, the High Court found that the respondents have been in custody with effect from 24th January, 2000 and accordingly sentenced them to the period already undergone. The High Court observed:

> "Consequently, the appeal is allowed in part. The appellants are acquitted of the charge punishable under Section 302/149 of the I.P.C. Regarding other offences the findings of guilt arrived at by the learned trial Court is maintained. So far as the question of sentence is concerned, the Appellants are in custody w.e.f. 24.1.2000. In the totality of circumstances, we are of the view that in the circumstances of the case a sentence of imprisonment already undergone would meet the ends of justice. Consequently, the sentence awarded to the appellants is modified to the extent that they are awarded the sentence already undergone by them. The judgment of the learned Court shall stand modified accordingly. The appeal is disposed of in the manner indicated above. The appellants shall be released forthwith, if not needed in connection with any other case."

6. We have heard learned counsel for the parties at some length and perused the record. The High Court was, in our opinion, justified in holding that the prosecution had not been able to establish the charge of murder beyond a reasonable doubt. The High Court has correctly observed that the deposition of Dr. Narendra Swarup Mathur (PW-13) had clearly established that the injuries sustained by the deceased were all simple in nature inflicted upon non-vital parts of the body. The doctor had also clearly admitted in cross-examination that no finding was recorded in the post- mortem report Exh.P-21 that the injuries in question were sufficient in the ordinary course of nature to cause death. There was, in that view of the matter and in the absence of any other evidence to support the charge levelled against the respondents, no reason to find them guilty of murder.

7. It is noteworthy that the Trial court had placed heavy reliance upon the presence of blood clots below the scalp and inside the middle portion of the skull of the deceased to come to the conclusion that the death may have been caused by the injuries on the head which is a vital part of the body. The Trial Court obviously failed to note that there was no external injury reported by the doctor on any part of the head. If the respondents really intended to commit the murder of the deceased and if they were armed with weapons like Lathis and Dhariyas of which the latter is a sharp-edged weapon, it is difficult to appreciate why they would not have attacked any vital part of his body. The absence of any injury on any vital part and particularly the absence of external injury on the skull clearly show that the accused had not intended to cause the death of the deceased nor caused any bodily injury as was likely to

cause death.

8. It is also difficult to attribute any knowledge to the respondents that the injuries inflicted by them were likely to cause death, the same being simple in nature. Even the doctor who conducted the post-mortem did not certify the injuries to be sufficient to cause death in the ordinary course. Such being the state of evidence, the High Court was, in our view, justified in allowing the appeal of the respondents in part and acquitting them of the charge of the murder while maintaining their conviction for the remaining offences with which they were charged. Even on the question of sentence, we do not see any compelling reason to interfere. The incident in question is more than 12 years old. The respondents have already suffered incarceration for four years which should suffice having regard to the totality of the circumstances in which the incident in question appears to have taken place.

9. In the result, this appeal fails and is hereby dismissed.

K.K.T. Appeal allowed.

UNION OF INDIA AND ORS.
v.
BRIGADIER P.S. GILL
(Criminal Appeal No. 564 of 2012 etc.)

MARCH 23, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Armed Forces Tribunal Act, 2007 - ss. 30(1) and 31 - Appeal against final decision/order of the Armed Forces Tribunal - Whether can be made directly to Supreme Court or is subject to s.31 - Held: There is no vested right of appeal aginst final decision/ order of the Tribunal to Supreme Court except those falling u/s. 30(2) of the Act - Appeal under Section 30(1) is subject to s. 31 - Aggrieved party also cannot approach Supreme Court directly under Section 31(1) r/w s. 31(2).

Interpration of Statutes:

Each word used in an enactment, howsoever significant or insignificant, must be allowed to play its role in achieving the legislative intent and promoting legislative object.

Every clause of a statute should be construed with respect to the context and the other clauses of the Act.

The question for consideration in the present appeals was whether an aggrieved party can file an appeal u/s. 30 of Armed Forces Tribunal Act, 2007 against final decision/order of the Armed Forces Tribunal, without taking resort to the procedure prescribed u/s. 31 of the Act.

Dismissing the appeals, the Court

HELD: 1.1. A conjoint reading of Sections 30 and 31 of Armed Forces Tribunal Act, 2007 can lead to only one conclusion viz. there is no vested right of appeal against a final order or decision of the Tribunal to Supreme Court other than those falling u/s. 30(2) of the Act. The only mode to bring up the matter to Supreme Court in appeal is either by way of certificate obtained from the Tribunal that decided the matter or by obtaining leave of Supreme Court u/s. 31 for filing an appeal depending upon whether Supreme Court considers the point involved in the case to be one that ought to be considered by Supreme Court. [Para 6]

1.2 A plain reading of Section 30 would show that the same starts with the expression "subject to the provision of Section 31". Given their ordinary meaning there is no gainsaying that an appeal shall lie to this Court only in accordance with the provisions of Section 31. It is also

evident from a plain reading of sub-section (2) of Section 30 that unlike other final orders and decisions of the Tribunal, those passed in exercise of the Tribunal's jurisdiction to punish for contempt are appealable as of right. The Parliament has made a clear distinction between cases where an appeal lies as a matter of right and others where it lies subject to the provisions of Section 31. The orders passed by the Tribunal and assailed in these appeals are orders that will be appealable u/s. 30(1) but only subject to the provisions of Section 31. [Para 3]

1.3. Section 30 of the Act is by reason of the use of the words "subject to the provisions of Section 31" made subordinate to the provisions of Section 31. The question whether an appeal would lie and if so in what circumstances cannot, therefore, be answered without looking into Section 31 and giving it primacy over the provisions of Section 30. That is precisely the object which the expression "subject to the provisions of Section 31" appearing in Section 30(1) intends to achieve. Therefore, it cannot be said that the expression "subject to the provisions of Section 31" are either ornamental or inconsequential. The right of appeal under Section 30 can be exercised only in the manner and to the extent it is provided for in Section 31 to which the said right is made subject. [Para 11]

1.4. The contention that Section 30 granted an independent right to file an appeal against the final decision or order of the Tribunal and that Section 31 was only providing an additional mode for approaching Supreme Court with the leave of the Tribunal would have the effect of not only re-writing Section 30 which specifically uses the words "subject to the provisions of Section 31" but would make Section 31 wholly redundant and meaningless. The expression "subject to the provisions of Section 31" cannot be rendered a surplusage for one of the salutary rules of interpretation is that the legislature does not waste words. Each word used in the enactment must be allowed to play its role howsoever significant or insignificant the same may be in achieving the legislative intent and promoting legislative object. [Para 8]

K.R.C.S. Balakrishna Chetty & Sons & Co. v. State of Madras **(1961) 2 SCR 736;** *South India Corporation (P) Ltd. v. The Secretary, Board of Revenue* **(1964) 4 SCR 280;** *State of Bihar v.Bal Mukund Sah* **(2000) 4 SCC 640: 2000 (2) SCR 299;** *B.S. Vadera v. Union of India* **(1968) 3 SCR 575;** *Chandavarkar S.R. Rao v. Ashalata S. Guram* **(1986) 4 SCC 447: 1986 (3) SCR 866 - relied on**

1.5 The question whether an appeal lies to the Supreme Court and, if so, in what circumstances and against which orders and on what conditions is a matter that would have to be seen in the light of the provisions of each such enactment having regard to the context and the other clauses appearing in the Act. It is one of the settled canons of interpretation of statutes that every clause of a statute should be construed with respect to the context and the other clauses of the Act, so far as possible to make a consistent enactment of the whole statute or series relating to the subject. [Para 15]

M. Pentiah v. Muddala Veeramallapa **(1961) 2 SCR 295;** *Gammon India Ltd. v. Union of India* **(1974) 1 SCC 596: 1974 (3) SCR 665;** *V. Tulasamma v. Sesha Reddy* **(1977) 3 SCC 99: 1977 (3) SCR 261 -relied on.**

2. Aggrieved party cannot approach Supreme Court directly for grant of leave to file an appeal under Section 31(1) read with Section 31(2) of the Act. The scheme of Section 31 being that an application for grant of a certificate must first be moved before the Tribunal, before

the aggrieved party can approach Supreme Court for the grant of leave to file an appeal. The purpose underlying the provision appears to be that if the Tribunal itself grants a certificate of fitness for filing an appeal, it would be unnecessary for the aggrieved party to approach Supreme Court for a leave to file such an appeal. An appeal by certificate would then be maintainable as a matter of right in view of Section 30 which uses the expression "an appeal shall lie to the Supreme Court". That appears to be the true legal position on a plain reading of the provisions of Sections 30 and 31. [Para 7]

3. The answer to the apprehension - that in case urgent orders are required to be issued in which event an application for grant of certificate before the Tribunal might prevent the aggrieved party from seeking such orders from Supreme Court - lies in Section 31(3) according to which an appeal is presumed to be pending until an application for leave to appeal is disposed of and if the leave is granted until the appeal is disposed of. An application for leave to appeal is deemed to have been disposed of at the expiration of the time within which it may have been made but is not made within that time. That apart an application for grant of certificate before the Tribunal can be made even orally and in case the Tribunal is not inclined to grant the certificate prayed for, the request can be rejected straightaway in which event the aggrieved arty can approach Supreme Court for grant of leave to file an a peal under the second part of Section 31(1). Once such an application is filed, the appeal is treated as pending till such time the same is disposed of. [Para 17]

Case Law Reference:

(1961) 2 SCR 736	**Relied on**	**Para 9**
(1964) 4 SCR 280	**Relied on**	**Para 9**
2000 (2) SCR 299	**Relied on**	**Para 9**
(1968) 3 SCR 575	**Relied on**	**Para 9**
1986 (3) SCR 866	**Relied on**	**Para 10**
(1961) 2 SCR 295	**Relied on**	**Para 15**
1974 (3) SCR 665	**Relied on**	**Para 15**
1977 (3) SCR 261	**Relied on**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 564 of 2012 etc.

From the Judgment & Order dated 24.05.2011 of the Armed Forces Tribunal, Principal Bench, New Delhi in O.A. No. 147 of 2010.

AND

C.A. No. 3046 of 2012.

Vivek Tankha, Siddharth Dave, Aseem Chandra, Vaibhav Shreevastava, Harsh Parashar, D. Kumanan, BV Balaram Das, Anil Katiyar for the Appellants.

PP Rao, Major K. Ramesh, Utsav Sidhu, Abhimanyu Tewari, Archana Ramesh, Dr. Kailash Chand for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. A common question of law as to the maintainability of an appeal before this Court against a final decision and/or order of the Armed Forces Tribunal arises for consideration in these two appeals that purport to have been filed under Section 30 of the Armed Forces Tribunal Act, 2007.

2. The question precisely is whether an aggrieved party can file an appeal against any such final decision or order of the Tribunal under Section 30 of the Act aforementioned before

this Court without taking resort to the procedure prescribed under Section 31 thereof. The appellant's case is that since the orders under challenge in these appeals are final orders of the Tribunal, an appeal against the same lies to this Court as a matter of right, no matter the right to file such an appeal under Section 30 of the Act is subject to the provisions of Section 31 thereof. The respondents, on the other hand, contended that a conjoint reading of Sections 30 and 31 of the Act leaves no manner of doubt that an appeal under Section 30 is maintainable only in accordance with and subject to the provisions of Section 31. In as much as Section 31 provides for an appeal to this Court either with the leave of the Tribunal or with the leave of this Court, no absolute right of appeal against even a final order or decision is available to the aggrieved party except in cases where the order passed by the Tribunal is in exercise of its jurisdiction to punish for contempt. What is the true legal position would necessarily require a careful reading of the two provisions that may be extracted at this stage:

"30. **Appeal to Supreme Court**: (1) Subject to the provisions of Section 31, an appeal shall lie to the Supreme Court against the final decision or order of the Tribunal (other than an order passed under Section 19):

Provided that such appeal is preferred within a period of ninety days of the said decision or order:

Provided further that there shall be no appeal against an interlocutory order of the Tribunal.

(2) An appeal shall lie to the Supreme Court as of right from any order or decision of the Tribunal in the exercise of its jurisdiction to punish for contempt:

Provided that an appeal under this sub-section shall be filed in the Supreme Court within sixty days from the date of the order appealed against.

(3) Pending any appeal under sub-section (2), the Supreme Court may order that –

(a) the execution of the punishment or the order appealed against be suspended;

(b) if the appellant is in confinement, he be released on bail:

Provided that where an appellant satisfies the Tribunal that he intends to prefer an appeal, the Tribunal may also exercise any of the powers conferred under clause (a) or clause (b), as the case may be.

31. **Leave to appeal:** (1) An appeal to the Supreme Court shall lie with the leave of the Tribunal; and such leave shall not be granted unless it is certified by the Tribunal that a point of law of general public importance is involved in the decision, or it appears to the Supreme Court that the point is one which ought to be considered by that Court.

(2) An application to the Tribunal for leave to appeal to the Supreme Court shall be made within a period of thirty days beginning with the date of the decision of the Tribunal and an application to the Supreme Court for leave shall be made within a period of thirty days beginning with the date on which the application for leave is refused by the Tribunal.

(3) An appeal shall be treated as pending until any application for leave to appeal is disposed of and if leave to appeal is granted, until the appeal is disposed of; and an application for leave to appeal shall be treated as disposed of at the expiration of the time within which it might have been made, but it is not made within that time."

3. A plain reading of Section 30 would show that the same starts with the expression "subject to the provision of Section

31". Given their ordinary meaning there is no gainsaying that an appeal shall lie to this Court only in accordance with the provisions of Section 31. It is also evident from a plain reading of sub-section (2) of Section 30 (supra) that unlike other final orders and decisions of the Tribunal, those passed in exercise of the Tribunal's jurisdiction to punish for contempt are appealable as of right. The Parliament has made a clear distinction between cases where an appeal lies as a matter of right and others where it lies subject to the provisions of Section 31. We are not, in the present case, dealing with an appeal filed under Section 30 sub-section (2) of the Act, for the Tribunal has not passed the orders under challenge in exercise of its jurisdiction to punish for contempt. The orders passed by the Tribunal and assailed in these appeals are orders that will be appealable under Section 30(1) but only subject to the provisions of Section 31.

4. Section 31 of the Act extracted above specifically provides for an appeal to the Supreme Court but stipulates two distinct routes for such an appeal. The first route to this Court is sanctioned by the Tribunal granting leave to file such an appeal. Section 31(1) in no uncertain terms forbids grant of leave to appeal to this Court unless the Tribunal certifies that a point of law of general public importance is involved in the decision. This implies that Section 31 does not create a vested, indefeasible or absolute right of filing an appeal to this Court against a final order or decision of the Tribunal to this Court. Such an appeal must be preceded by the leave of the Tribunal and such leave must in turn be preceded by a certificate by the Tribunal that a point of law of general public importance is involved in the appeal.

5. The second and the only other route to access this Court is also found in Section 31(1) itself. The expression "or it appears to the Supreme Court that the point is one which ought to be considered by that Court" empowers this Court to permit the filing of an appeal against any such final decision or order of the Tribunal.

6. A conjoint reading of Sections 30 and 31 can lead to only one conclusion viz. there is no vested right of appeal against a final order or decision of the Tribunal to this Court other than those falling under Section 30(2) of the Act. The only mode to bring up the matter to this Court in appeal is either by way of certificate obtained from the Tribunal that decided the matter or by obtaining leave of this Court under Section 31 for filing an appeal depending upon whether this Court considers the point involved in the case to be one that ought to be considered by this Court.

7. An incidental question that arises is whether an application for permission to file an appeal under Section 31 can be moved directly before the Supreme Court without first approaching the Tribunal for a certificate in terms of the first part of Section 31(1) of the Act. In the ordinary course the aggrieved party could perhaps adopt one of the two routes to bring up the matter to this Court but that does not appear to be the legislative intent evident from Section 31(2) (supra). A careful reading of the section shows that it not only stipulates the period for making an application to the Tribunal for grant of leave to appeal to this Court but also stipulates the period for making an application to this Court for leave of this Court to file an appeal against the said order sought to be challenged. It is significant that the period stipulated for filing application to this Court starts running from the date beginning from the date the application made to the Tribunal for grant of certificate is refused by the Tribunal. This implies that the aggrieved party cannot approach this Court directly for grant of leave to file an appeal under Section 31(1) read with Section 31(2) of the Act. The scheme of Section 31 being that an application for grant of a certificate must first be moved before the Tribunal, before the aggrieved party can approach this Court for the grant of leave to file an appeal. The purpose underlying the provision appears to be that if the Tribunal itself grants a certificate of

fitness for filing an appeal, it would be unnecessary for the aggrieved party to approach this Court for a leave to file such an appeal. An appeal by certificate would then be maintainable as a matter of right in view of Section 30 which uses the expression "an appeal shall lie to the Supreme Court". That appears to us to be the true legal position on a plain reading of the provisions of Sections 30 and 31.

8. Mr. Vivek Tankha, Additional Solicitor General, however, contended that Section 30 granted an independent right to file an appeal against the final decision or order of the Tribunal and that Section 31 was only providing an additional mode for approaching this Court with the leave of the Tribunal. We regret to say that we have not been able to appreciate that argument. If Section 30 of the Act confers a vested right of appeal upon any person aggrieved of a final decision or order of the Tribunal and if such appeal can be filed before this Court without much ado, there is no reason why the Act would provide for an appeal being filed on the basis of a certificate issued by the Tribunal nor would it make any sense for a party to seek leave of this Court to prefer an appeal where such an appeal was otherwise maintainable as a matter of right. The interpretation suggested by Mr. Tankha shall, therefore, have the effect of not only re-writing Section 30 which specifically uses the words "subject to the provisions of Section 31" but would make Section 31 wholly redundant and meaningless. The expression "subject to the provisions of Section 31" cannot be rendered a surplusage for one of the salutary rules of interpretation is that the legislature does not waste words. Each word used in the enactment must be allowed to play its role howsoever significant or insignificant the same may be in achieving the legislative intent and promoting legislative object. Although it is unnecessary to refer to any decisions on the subject, we may briefly re-count some of the pronouncements of this Court in which the expression "subject to" has been interpreted.

9. In *K.R.C.S. Balakrishna Chetty & Sons & Co. v. State of Madras* (1961) 2 SCR 736 this Court was interpreting Section 5 of the Madras General Sales Tax Act, 1939 in which the words "subject to" were used by the legislature. This Court held that the use of words "subject to" had reference to effectuating the intention of law and the correct meaning of the expression was "conditional upon". To the same effect is the decision of this Court in *South India Corporation (P) Ltd. v. The Secretary, Board of Revenue* (1964) 4 SCR 280 where this Court held that the expression "subject to" conveyed the idea of a provision yielding place to another provision or other provisions to which it is made subject. In *State of Bihar v. Bal Mukund Sah* (2000) 4 SCC 640 this Court once again reiterated that the words "subject to the provisions of this Constitution" used in Article 309, necessarily means that if in the Constitution there is any other provision specifically dealing with the topics mentioned in the said Article 309, then Article 309 will be subject to those provisions of the Constitution. In *B.S. Vadera v. Union of India* (1968) 3 SCR 575, this Court interpreted the words "subject to the provisions of any Act", appearing in proviso to Article 309 and observed:

> "It is also significant to note the proviso to art. 309, clearly lays down that 'any rules so made shall have effect, subject to the provisions of any such Act'. The clear and unambiguous expression, used in the Constitution, must be given their full and unrestricted meaning, unless hedged-in, by any limitations. The rules, which have to be 'subject to the provisions of the Constitution', shall have effect, 'subject to the provisions of any such Act'. That is, if the appropriate Legislature has passed an Act, under Art. 309, the rules, framed under the Proviso, will have effect, subject to that Act; but, in the absence of any Act, of the appropriate Legislature, on the matter, in our opinion, the rules, made by the President, or by such person as he may direct, are to have full effect, both prospectively and, retrospectively."

10. In *Chandavarkar S.R. Rao v. Ashalata S. Guram* (1986) 4 SCC 447, this Court declared that the words "notwithstanding" is in contradistinction to the phrase 'subject to' the latter conveying the idea of a provision yielding place to another provision or other provisions to which it is made subject.

11. There is in the light of the above decisions no gainsaying that Section 30 of the Act is by reason of the use of the words "subject to the provisions of Section 31" made subordinate to the provisions of Section 31. The question whether an appeal would lie and if so in what circumstances cannot, therefore, be answered without looking into Section 31 and giving it primacy over the provisions of Section 30. That is precisely the object which the expression "subject to the provisions of Section 31" appearing in Section 30(1) intends to achieve. We have, therefore, no hesitation in rejecting the submission of Mr. Tankha that the expression "subject to the provisions of Section 31" are either ornamental or inconsequential nor do we have any hesitation in holding that right of appeal under Section 30 can be exercised only in the manner and to the extent it is provided for in Section 31 to which the said right is made subject.

12. Mr. P.P. Rao, learned senior counsel appearing for the respondent in Criminal Appeal D. No. 38094 of 2011 also drew our attention to several other statutes in which an appeal is provided to the Supreme Court but where such provision is differently worded. For instance, Section 116-A of the Representation of the People Act, 1951 provides for an appeal to this Court and reads as under:

> "116-A. **Appeals to Supreme Court** – (1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie to the Supreme Court on any question (whether of law or fact) from every order made by a High Court under Section 98 or Section 99."

13. So also the Consumer Protection Act, 1986 provides for an appeal to this Court under Section 23 thereof which reads as under:

> "23. Appeal - Any person, aggrieved by an order made by the National Consumer in exercise of its powers by sub-clause (i) of clause (a) of Section 21, may prefer an appeal against such order to the Supreme Court within a period of thirty days from the date of the order."

14. Even the Terrorists Affected Areas (Special Courts) Act, 1984 providing for an appeal to the Supreme Court under Section 14, starts with a *non obstante* clause and creates an indefeasible right of appeal against any judgment, sentence or order passed by such Court both on facts and law. Similar was the case with Terrorist and Disruptive Activities (Prevention) Act, 1987 which provided an appeal to the Supreme Court against any judgment, sentence or order not being an interlocutory order of a Designated Court both on facts and law. Section 55 of the Monopolies and Restrictive Trade Practices Act, 1969 also provided an appeal to this Court on one of the grounds specified in Section 100 of the Code of Civil Procedure, 1908. The Advocates Act, 1961, The Customs Act, 1962 and the Central Excise Act, 1944 provide that an appeal shall lie to this Court using words different from those that have been used in Sections 30 and 31 of the Armed Forces Tribunal Act.

15. It follows that the question whether an appeal lies to the Supreme Court and, if so, in what circumstances and against which orders and on what conditions is a matter that would have to be seen in the light of the provisions of each such enactment having regard to the context and the other clauses appearing in the Act. It is one of the settled canons of interpretation of statutes that every clause of a statute should be construed with respect to the context and the other clauses of the Act, so far as possible to make a consistent enactment

of the whole statute or series relating to the subject. Reference to the decisions of this Court in *M. Pentiah v. Muddala Veeramallapa* (1961) 2 SCR 295 and *Gammon India Ltd. v. Union of India* (1974) 1 SCC 596 should in this regard suffice. In *Gammon India Ltd.* (supra) this Court observed:

> "Every clause of a statute is to be construed with reference to the context and other provisions of the Act to make a consistent and harmonious meaning of the statute relating to the subject-matter. The interpretation of the words will be by looking at the context, the collocation of the words and the object of the words relating to the mattes."

16. We may also gainfully extract the following passage from *V. Tulasamma v. Sesha Reddy* (1977) 3 SCC 99 where this Court observed:

> "It is an elementary rule of construction that no provision of a statute should be construed in isolation but it should be construed with reference to the context and in the light of other provisions of the Statute so as, as far as possible, to make a consistent enactment of the whole staute…"

17. Mr. Tankha, Additional Solicitor General and Ms. Rachana Joshi Issar, counsel appearing for the appellants in the connected matters lastly argued that there may be circumstances in which urgent orders may be required to be issued in which event an application for grant of certificate before the Tribunal may prevent the aggrieved party from seeking such orders from this Court. The answer to that question lies in Section 31(3) according to which an appeal is presumed to be pending until an application for leave to appeal is disposed of and if the leave is granted until the appeal is disposed of. An application for leave to appeal is deemed to have been disposed of at the expiration of the time within which it may have been made but is not made within that time. That apart an application for grant of certificate before the Tribunal can be made even orally and in case the Tribunal is not inclined to grant the certificate prayed for, the request can be rejected straightaway in which event the aggrieved party can approach this Court for grant of leave to file an appeal under the second part of Section 31(1). Once such an application is filed, the appeal is treated as pending till such time the same is disposed of.

18. In the result these appeals are dismissed reserving liberty to the appellants to take recourse to Section 31 of the Act. To effectuate that remedy we direct that the period of limitation for making an application for leave to appeal to this Court by certificate shall start from the date of this order. We make it clear that we have not heard learned counsel for the parties on merits of the controversy nor have we expressed any opinion on any one of the contentions that may be available to them in law or on facts. No costs.

K.K.T. Appeals dismissed.

MULCHAND KHANUMAL KHATRI

v.

STATE OF GUJARAT & ORS.

(Civil Appeal No. 4990 of 2003)

MARCH 27, 2012

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

Land Acquisition Act, 1894 - s.11A [as inserted by Land Acquisition (Amendment) Act, 1984] - Limitation period - For passing award u/s.11 - Computation of - Held : The period prescribed u/s. 11A is mandatory - The period of two years commences from the date of publication of declaration and where declaration is published before Amendment Act, it is from the date of commencement of Amendment Act - The only period excludable is the period during which proceedings remained stayed under the order of a court and no other - s.11A being a special provision, provisions of Limitation Act

and particularly s.12 thereof cannot be read into it - Hence the time taken in obtaining the certified copy of judgment and bringing it to the notice of the authority before passing of award u/s.11, will not be excluded - On facts, award having not been made within period prescribed u/s. 11A, the entire acquisition proceedings lapsed - Limitation Act, 1963 - s.12.

Appellant-the land-owner had challenged the land-acquisition proceedings before High Court. He was granted interim relief. In the meantime, the Land Acquisition Act was amended by Land Acquisition (Amendment) Act, 1984 whereby s.11A was inserted prescribing the limitation period within which award could be passed. Thereafter, the High Court dismissed the application of the appellant by order dated 11.1.1996. The award u/s. 11 was passed on 31.8.1998.

The appellant challenged the passing of the award u/s.11, on the ground that the same was passed beyond two years from the date of the publication of the declaration u/s. 6. The High Court held that the award could not be said to have been passed beyond two years because the time taken in obtaining the certified copy of the judgment of High Court and the period from the date, the certified copy was obtained and it was brought to the notice of the authority, has to be excluded.

In appeal to this Court, the question for consideration was whether s.11A permits exclusion of time taken in obtaining the certified copy of the judgment of High Court and bringing it to the notice of the authority.

Allowing the appeal, the Court

HELD: 1. The period prescribed in Section 11A of Land Acquisition Act, 1894 is mandatory. The consequence of breach is provided in the provision itself viz., the entire acquisition proceedings get lapsed. Insofar as computation of the period is concerned, the period of two years commences from the date of the publication of the declaration. Where the declaration has been published before the Land Acquisition (Amendment) Act, 1984, then the period commences from the commencement of the Amendment Act. The only period that is excludable is the period during which the action or proceedings to be taken pursuant to the said declaration remains stayed under the order of a court and no other. Section 11A is a special provision for the purposes of the Act and the legislative intent being clear from the bare language of the explanation appended thereto, there is no justification to read the provisions of the Limitation Act, 1963 and particularly Section 12 thereof into it. [para 12]

Ravi Khullar and Anr. Vs. Union of India and Ors. **(2007) 5 SCC 231: 2007(4) SCR 598 - relied on.**

2. In the present case, the award having not been made within the period prescribed in Section 11A of he Act, the entire proceedings for the acquisition of the appel ant's land has lapsed. The High Court

was c early in error

n excluding the period from January 1

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996 to September 5, 1997 (i.e. time taken in

obtaining certified copy of the order o

High Court an

the time taken in placing the same

efore the authority). This period cannot be excluded under explanation appended to Section 11A of the Act. [para 13]

Case Law Reference:

2007(4) SCR 598 Relied on Para 11

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4990 of 2003.

From the Judgment & Order dated 26.12.2002 of the High Court of Gujarat at Ahmedabad Special Civil Application No. 7738 of 1998.

Subrat Birla, S.C. Birla for the Appellant.

Hemantika Wahi, Jesal, Rojalin Pradhan for the Respondents.

The Judgment of the Court was delivered by

R.M. Lodha, J. 1. The judgment and order dated December 26, 2002 passed by the Gujarat High Court is under challenge in this Appeal by special leave.

2. The appellant claims to be joint owner of the land being Survey No. 11430 admeasuring 34 sq. mtr. at Palanpur, Gujarat. On April 1, 1980, a notification was issued under Section 4 of the Land Acquisition Act, 1894 (for short, 'the Act') that proposed acquisition of the appellant's land and some other land for the public purpose, namely, construction of Palanpur City and taluka Police Station. The said notification was published in the Government Gazette on January 8, 1981. Later on, Section 4 notification was revised and published in the Official Gazette on September 22, 1983. The declaration under Section 6 was published on January 5, 1984. The appellant challenged the acquisition of his land through the above notifications in a Special Civil Application before the Gujarat High Court. An interim relief in the above matter was granted on April 18, 1984.

3. The Act was amended on September 24, 1984 by the Land Acquisition (Amendment) Act, 1984 (for short, 'the Amendment Act') whereby Section 11A was brought in the statute book.

4. The Special Civil Application filed by the appellant was dismissed on January 11, 1996. The Dy. Collector made the award on August 31, 1998.

5. Before the High Court, *inter alia*, the argument was canvassed on behalf of the appellant that the award having been passed beyond two years from the date of the publication of the declaration under Section 6, by virtue of Section 11A of the Act, the entire acquisition proceedings had lapsed. The High Court, however, repelled the above argument and held as follows :

> "The submission of the learned Counsel for the petitioner was that their earlier petitions were dismissed and the stay granted earlier stood vacated by the Division Bench of this Court on 11.1.96. Therefore, the Authority was supposed to declare the Award within a period of 2 years from that day i.e. 11.1.96. The said period would expire on January 10, 1998 whereas Award u/s 11 came to be passed only in August, 1998 which is admittedly after a period of 2 years. It is no doubt true that the Division Bench of this Court earlier dismissed their writ petitions on 11.1.96 and vacated the interim relief, but the vacation of interim relief granted in favour of the petitioners must be brought to the notice of the concerned Authority. Merely because they were represented through their counsel before the court would not be sufficient. Unless and until certified copy of the said judgment and order passed by the court is brought to the notice of the Authority, the Authority is not supposed to act. The period of 2 years would start only from the date

of the notice. In reply affidavit it has been clearly stated that the copy of the judgment and order passed by this Court on 11.1.96 was received by them only 5.9.97.

In that view of the matter, admittedly the Award dt. 31.8.98 passed u/s 11 of the Act was within a period of 2 years."

6. From the above discussion, it is apparent that the High Court was of the view that unless and until certified copy of the judgment and order passed by the court was brought to the notice of the authority, the authority was not supposed to act and the period of two years under Section 11A of the Act would start only from the date of such notice and as the copy of the judgment and order passed by the High Court on January 11, 1996 was received by the competent authority on September 5, 1997, the respondents were entitled to the benefit of the entire period from January 11, 1996 to September 5, 1997.

7. We are unable to accept the view of the High Court.

8. Section 11A of the Act reads as under :-

11A. Period within which an award shall be made.-

(1) The Collector shall make an award under section 11 within a period of two years from the date of the publication of the declaration and if no award is made within that period, the entire proceedings for the acquisition of the land shall lapse:

Provided that in a case where the said declaration has been published before the commencement of the Land Acquisition (Amendment) Act, 1984, the award shall be made within a period of two years from such commencement.

Explanation.- In computing the period of two years referred to in this section, the period during which any action or proceeding to be taken in pursuance of the said declaration is stayed by an order of a Court shall be excluded.

9. Section 11A mandates that an award shall be made by the Collector under Section 11 of the Act within a period of two years from the date of the publication of the declaration. The non-adherence to this period results in entire acquisition proceedings being lapsed. The proviso that follows sub-section (1) states that where the declaration under Section 6 has been published before the commencement of the Amendment Act the award shall be made within a period of two years from such commencement. The Explanation appended to Section 11A clarifies that the period during which any action or proceeding relating to acquisition taken pursuant to such declaration remains stayed by an order of the court, such period shall be excluded.

10. Insofar as present case is concerned, there is no dispute that the proviso that follows sub-section (1) of Section 11A is attracted because the declaration under Section 6 was published before the commencement of the Amendment Act and the award was made after coming into force of Section 11A. The period of two years shall thus commence from September 24, 1984 when the amendment to the Act was notified. It is also not in issue that in computing the period of two years, the period during which the interim relief granted by the Gujarat High Court remained operative shall have to be excluded. The stay order of the High Court remained operative for the period September 24, 1984 to January 11, 1996. The question is, whether Section 11A of the Act permits exclusion of time that was taken in obtaining the certified copy of the judgment and order passed by the High Court and the period from the date the certified copy was obtained and it was brought to the notice of the authority.

11. The question with which we are concerned came up for consideration in *Ravi Khullar and Another Vs. Union of*

India and Others, (2007) 5 SCC 231. In paras 54, 55 and 56 of the report, this Court stated as follows:

> "54. In the matter of computing the period of limitation three situations may be visualized, namely, (a) where the Limitation Act applies by its own force; (b) where the provisions of the Limitation Act with or without modifications are made applicable to a special statute; and (c) where the special statue itself prescribes the period of limitation and provides for extension of time and/or condonation of delay. The instant case is not one which is governed by the provisions of the Limitation Act. The Land Acquisition Collector in making an award does not act as a court within the meaning of the Limitation Act. It is also clear from the provisions of the Land Acquisition Act that the provisions of the Limitation Act have not been made applicable to proceedings under the Land Acquisition Act in the matter of making an award under Section 11-A of the Act. However, Section 11-A of the Act does provide a period of limitation within which the Collector shall make his award. The Explanation thereto also provides for exclusion of the period during which any action or proceeding to be taken in pursuance of the declaration is stayed by an order of a court. Such being the provision, there is no scope for importing into Section 11-A of the Land Acquisition Act the provisions of Section 12 of the Limitation Act. The application of Section 12 of the Limitation Act is also confined to matters enumerated therein. The time taken for obtaining a certified copy of the judgment is excluded because a certified copy is required to be filed while preferring an appeal/revision/review etc. challenging the impugned order. Thus a court is not permitted to read into Section 11-A of the Act a provision for exclusion of time taken to obtain a certified copy of the judgment and order. The Court has, therefore, no option but to compute the period of limitation for making an award in accordance with the provisions of Section 11-A of the Act after excluding such period as can be excluded under the Explanation to Section 11-A of the Act.
>
> 55. Our conclusion finds support from the scheme of the Land Acquisition Act itself. Section 11-A of the Act was inserted by Act 68 of 1984 with effect from 24-9-1984. Similarly, Section 28-A was also inserted by the Amendment Act of 1984 with effect from the same date. In Section 28-A the Act provides for a period of limitation within which an application should be made to the Collector for redetermination of the amount of compensation on the basis of the award of the Court. The proviso to sub-section (1) of Section 28-A reads as follows:-
>
> > "Provided that in computing the period of three months within which an application to the Collector shall be made under this sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded."
>
> 56. It will thus be seen that the legislature wherever it considered necessary incorporated by express words the rule incorporated in Section 12 of the Limitation Act. It has done so expressly in Section 28-A of the Act while it has consciously not incorporated this rule in Section 11-A even while providing for exclusion of time under the Explanation. The intendment of the legislature is therefore unambiguous and does not permit the court to read words into Section 11-A of the Act so as to enable it to read Section 12 of the Limitation Act into Section 11-A of the Land Acquisition Act."

12. We are in respectful agreement with the above legal position. The period prescribed in Section 11A is mandatory. The consequence of breach is provided in the provision itself viz., the entire acquisition proceedings get lapsed. Insofar as

computation of the period is concerned, the period of two years commences from the date of the publication of the declaration. Where the declaration has been published before the Amendment Act, then the period commences from the commencement of the Amendment Act. The only period that is excludable is the period during which the action or proceedings to be taken pursuant to the said declaration remains stayed under the order of a court and no other. Section 11A is a special provision for the purposes of the Act and the legislative intent being clear from the bare language of the explanation appended thereto, we find no justification to read the provisions of the Limitation Act, 1963 and particularly Section 12 thereof into it.

13. In view of the above legal position and the facts noticed above, we hold as we must, that the award having not been made within the period prescribed in Section 11A of the Act, the entire proceedings for the acquisition of the appellant's land has lapsed. The High Court was clearly in error in excluding the period from January 11, 1996 to September 5, 1997. This period cannot be excluded under explanation appended to Section 11A of the Act.

14. In view of the above, Civil Appeal is allowed and the impugned judgment and order is set aside. The entire proceedings for the acquisition concerning the appellant's land is declared to have lapsed. No costs.

K.K.T Appeal allowed.

M/S. PUSHPA SAHAKARI AVAS SAMITI LTD.

v.

M/S. GANGOTRI SAHAKARI AVAS S. LTD. AND ORS.

(Civil Appeal No(s.) 8297-8298 of 2004)

MARCH 30, 2012

[DEEPAK VERMA AND DIPAK MISRA, JJ.]

Code of Civil Procedure, 1908 - s.47 and Or. XXI - Execution of decree - Questions to be determined - Compromise decree - Stipulating condition of payment of sum within a particular time - Objections rejected by executing court and order for execution of decree - High Court in civil revision holding that execution application having been filed before the stipulated time, was premature and hence liable to be rejected - Other objections not dealt with - On appeal, held: Premature filing of execution application does not entail its rejection - The decree did not lose its potentiality of executability having been filed on a premature date - Matter remitted to High Court to deal with the objections which were not dealt with by High Court.

In a suit for injunction filed by the appellant/plaintiff against first respondent/defendant, a compromise decree was passed. As per the compromise, defendant was required to pay a sum to the plaintiff within six months from the date of the compromise. Since the defendant did not honour the terms of the decree, appellant/ decree-holder filed application for execution of the decree. The respondent/judgment-debtor objected to the application. Executing court rejected all the objections and directed for execution of the decree. Single judge of the High Court allowed the civil revision holding that the execution application was premature and thus was liable to be rejected. High Court did not entertain other objections. Hence the present appeals.

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

HELD: 1. On a perusal of the various provisions relating to execution as enshrined under Order XXI CPC, there is nothing which lays down that premature filing of an execution would entail its rejection. It is not correct to say that the executing court could not have entertained

the execution proceeding solely because it was instituted before the expiry of the period stipulated in the compromise decree despite the factum that by the time the court adverted to the petition, the said period was over. It is also not correct that the decree had lost its potentiality of executability having been filed on a premature date. [paras 10, 15 and 16]

2. The executing court did not commit any error by entertaining the execution petition. The Single Judge in civil revision has annulled the said order without any justification. While so doing, he had not dealt with other objections raised by the Judgment-debtor on the ground that they are raised for the first time. The matter is remitted to the High Court to deal with the objections on merits. [para 19]

Vithalbhai (P) Ltd. v. Union Bank of India **2005 (2) SCR 680 : (2005) 4 SCC 315;** *Martin & Harris Ltd. v. VIth Additional Distt. Judge and Ors.* **1997 (6) Suppl. SCR 380 : (1998) 1 SCC 732;** *Hindusthan Commercial Bank Ltd. v. Punnu Sahu (Dead) Through Legal Representatives* **(1971) 3 SCC 124;** *Dhurandhar Prasad Singh v. Jai Prakash University and Ors.* **2001 (3) SCR 1129 : (2001) 6 SCC 534- relied on.**

Lal Ram v. Hari Ram **1970 (2) SCR 898 : AIR 1970 SC 1093;** *Jai Narain Ram Lundia v. Kedar Nath Khetan* **1956 SCR 62 : AIR 1956 SC 359;** *Chen Shen Ling v. Nand Kishore Jhajharia* **AIR 1972 SC 726 - distinguished.**

Anandilal Bhanwarlal v. Kasturi Devi Ganeriwala **(1985) 1 SCC 442;** *Lakshmiratan Engineering Works Ltd. v. Asst. Comm., Sales Tax, Kanpur* **1968 SCR 505 : AIR 1968 SC 488;** *State of Haryana v. Maruti Udyog Ltd. and Ors.* **(2000) 7 SCC 348 : 2000 (3) Suppl. SCR 185 - referred to.**

Case Law Reference:

2005 (2) SCR 680	**Relied on**	**Para 7**
1970 (2) SCR 898	**Distinguished**	**Para 8**
1956 SCR 62	**Distinguished**	**Para 8**
AIR 1972 SC 726	**Distinguished**	**Para 8**
1997 (6) Suppl. SCR 380	**Relied on**	**Para 12**
(1985) 1 SCC 442	**Referred to**	**Para 12**
(1971) 3 SCC 124	**Relied on**	**Para 13**
1968 SCR 505	**Referred to**	**Para 13**
2000 (3) Suppl. SCR 185	**Referred to**	**Para 14**
2001 (3) SCR 1129	**Relied on**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8297-8298 of 2004.

From the Judgment & Order dated 10.01.2002 & 07.03.2003 of the High Court of Judicature at Allahabad in Civil Revision No. 341 of 1997 and Review Application No. 38861 of 2002.

Dinesh Dwivedi, Shalini Kumar, Neeru Vaid for the Appellant.

S.K. Dubey, Manoj Prasad, Y. Tiwari, Kushmanjali Sharma, Manoj Prasad for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The present appeals by special leave are directed against the judgment and order dated 10.01.2002 and 07.03.2003 passed by the learned Single Judge of the High Court of Judicature at Allahabad in Civil Revision No. 341 of

1997 and Review Application No. 38861 of 2002 respectively. The facts as uncurtained in the two appeals are that the appellant as plaintiff initiated a civil action forming subject matter of suit No. 501 of 1995 against the respondent and others for permanent injunction. In the suit, the parties entered into a compromise and on the basis of the compromise, a decree was drawn up on 06.09.1996. The terms and conditions of the compromise were made a part of the decree. Be it noted, the compromise between the parties stipulated certain conditions and one such condition was that within a span of six months' time, the defendant would pay a certain sum to the plaintiff. For the sake of clarity and convenience, the said clause of the compromise is reproduced hereunder:-

> "That the defendant No. 1 acknowledges and undertakes to pay Lacs Rs. 38,38000/- (Rupees Thirty Eight Lacs and Thirty Eight Thousand) only to the plaintiff within six months from the date of this compromise. The payment of the said amount by the defendant No. 1 to the plaintiff shall have the effect of settling entire claim of the plaintiff as against the defendant No. 1 in full and final"

2. In the petition for compromise which formed a part of the decree, there were other stipulations but they are not necessary to be stated for the adjudication of these appeals. As has been indicated earlier, the decree was drawn up on 06.09.1996.

3. As the first respondent did not honour the terms of the decree, the appellant filed an application for execution of the decree on 17.02.1997 and the said application was registered as Misc. Case No. 9 of 1997. The respondent No. 1 entered contest and filed an objection under Section 47 of the Code of Civil Procedure (for short, 'the Code') which was registered as Misc. Case No. 43 of 1997. Allegations, counter allegations and rejoinders were put forth before the Executing Court. One of the objections raised in the application under Section 47 of the Code was that as the decree holder had moved the executing court for execution of the decree prior to the expiry of the six months' period, the application was premature and, therefore, entire execution proceeding was vitiated being not maintainable. The learned Civil Judge who dealt with the execution case did not find any merit in any of the objections raised and rejected the same. It is worth noting that by the time the matter was taken up and the order came to be passed, the decree had become mature for execution. After rejection of the objection, the executing court took into consideration the submission of the judgment-debtor and, accordingly, directed that the entire balance money as agreed to in the compromise should be paid to the decree holder.

4. Aggrieved by the aforesaid order, the first respondent preferred Civil Revision No. 341 of 1997. The learned Single Judge noted the contentions and subsequent orders that were passed in the execution petition. The revisional court opined that no other objection could be raised for the first time in the revision and hence, no finding was warranted to be recorded on the said score.

5. As far as the premature filing of the execution petition is concerned, the learned Single Judge expressed his view as under:-

> "The question whether the execution was premature or not is to be decided with regard to the date at which the execution was filed. If a suit is found to have been filed premature, it cannot be decreed for the reason that the period has expired during the pendency of the suit. Similar principle will not apply to the execution. If the execution was premature when it was filed, it is liable to be rejected and cannot be proceeded with because it has prematured during the pendency of the case."

Being of this view, he allowed the revision and set aside

the order passed by the learned Civil Judge as a consequence of which the execution case entailed in dismissal.

6. We have heard Mr. Dinesh Dwivedi, learned senior counsel for the appellant, and Mr. S. K. Dubey, learned Senior counsel for the first respondent.

7. Criticizing the impugned order passed in Civil Revision, Mr. Dwivedi, learned senior counsel, has contended that when a suit is premature on the date of its institution and the Court can grant relief to the plaintiff if no manifest injustice or prejudice is caused to the party proceeded against, there is no reason or justification for not applying the said principle to an execution proceeding. It is urged by him that the question of a suit being premature does not go to the root of the jurisdiction of the Court, but the Court in its judicial discretion may grant a decree or refuse to do so and, therefore, in the case at hand, when the executing court had proceeded after the expiry of the stipulated period in the decree, there was no warrant on the part of the revisional court to interfere with the same, for the said order did not suffer from lack of appropriate exercise of jurisdiction or exercise of jurisdiction that the court did not possess. It is canvassed by him that if the petition filed under Section 47 of the Code is scrutinized, it will clearly reveal that objections have been raised in a routine manner to delay the execution proceeding and such dilatory tactics by a judgment-debtor should, in all circumstances, be deprecated and decried. In support of his contentions, he has placed reliance on *Vithalbhai (P) Ltd. v. Union Bank of India*[1].

8. Mr. Dubey, learned senior counsel for the first respondent, per contra, contended that the executing court could not have entertained the application as it was filed prior to the expiration of the period. In support of his stand, he has placed reliance on *Lal Ram v. Hari Ram*[2]. The next submission of Mr. Dubey is that as the execution was levied in a premature manner before the expiry of the period, the decree lost its potentiality of executability. Elaborating the said submission, it is canvassed that the compromise decree could not have been taken up for the purpose of execution and hence, the objection under Section 47 of the Code should have been accepted by the executing court, but as it failed to do so, the High Court, in exercise of the supervisory jurisdiction, has rectified the jurisdictional error.

The learned senior counsel further urged that when the compromise decree imposed mutual obligations on both sides some of which were conditional, no execution could be ordered unless the party seeking execution not only offered to perform his part but also satisfied the executing court that he was in a position to do so. In essence, the proponement of Mr. Dubey is that by levying the execution in a premature manner, the stipulations in the compromise decree have been totally overlooked and the real construction of the terms of the decree have been given an indecent burial. To bolster the said submissions, he has commended us to the decisions in *Jai Narain Ram Lundia v. Kedar Nath Khetan*[3] and *Chen Shen Ling v. Nand Kishore Jhajharia*[4].

9. At the very outset, it may be stated that it is an admitted position that the execution was levied prior to the expiration of the period stipulated in the decree. The executing court, as is evident, has addressed itself to all the objections that were raised in the application and rejected the same. The principal objection relating to the maintainability of the proceeding on the foundation that it was instituted prematurely did not find favour with it. The learned Single Judge has observed that if an execution is premature when it is filed, it is liable to be rejected. Mr. Dwivedi has drawn an analogy between a premature suit and premature execution by placing heavy reliance on the authority in *Vithalbhai (P) Ltd*. (supra). In *Vithalbhai* (supra), while dealing with the premature filing of a suit, a two-Judge Bench of this Court, after referring to a number of decisions of various High Courts and this Court, came to hold as follows:-

"The question of suit being premature does not go to the root of jurisdiction of the court; the court entertaining such a suit and passing decree therein is not acting without jurisdiction but it is in the judicial discretion of the court to grant decree or not. The court would examine whether any irreparable prejudice was caused to the defendant on account of the suit having been filed a little before the date on which the plaintiff's entitlement to relief became due and whether by granting the relief in such suit a manifest injustice would be caused to the defendant. Taking into consideration the explanation offered by the plaintiff for filing the suit before the date of maturity of cause of action, the court may deny the plaintiff his costs or may make such other order adjusting equities and satisfying the ends of justice as it may deem fit in its discretion. The conduct of the parties and unmerited advantage to the plaintiff or disadvantage amounting to prejudice to the defendant, if any, would be relevant factors."

After so stating, the Bench ruled that the plea as regards the maintainability of the suit on the ground of its being premature should be promptly raised and it will be equally the responsibility of the Court to dispose of such a plea. Thereafter, it was observed as follows:-

"However, the court shall not exercise its discretion in favour of decreeing a premature suit in the following cases: (i) *when there is a mandatory bar created by a statute which disables the plaintiff from filing the suit on or before a particular date or the occurrence of a particular event; (ii) when the institution of the suit before the lapse of a particular time or occurrence of a particular event would have the effect of defeating a public policy or public purpose; (iii) if such premature institution renders the presentation itself patently void and the invalidity is incurable such as when it goes to the root of the court's jurisdiction; and (iv) where the lis is not confined to parties alone and affects and involves persons other than those arrayed as parties, such as in an election petition which affects and involves the entire constituency.* (*See Samar Singh v. Kedar Nath 13.*) One more category of suits which may be added to the above, is: where leave of the court or some authority is mandatorily required to be obtained before the institution of the suit and was not so obtained."

[Emphasis Supplied]

10. We have referred to the aforesaid dictum in extenso as we find that the Bench has given emphasis on various aspects, namely, an issue getting into the root of the jurisdiction of the Court; causing of irreparable and manifest injustice; adjustment of equities; concept of statutory bar; presentation that invites a void action and anything that affects the rights of the other party; and obtaining of leave of the Court or authority where it is a mandatory requirement, etc. On a perusal of the various provisions relating to execution as enshrined under Order XXI of the Code, we do not find anything which lays down that premature filing of an execution would entail its rejection. The principles that have been laid down for filing of a premature suit, in our considered opinion, do throw certain light while dealing with an application for execution that is filed prematurely and we are disposed to think that the same can safely be applied to the case at hand.

11. Presently, we shall advert to the submission of Mr. Dubey that the executing court could not have entertained the application as it was filed before the expiration of the period. The learned senior counsel has relied on the decision rendered in *Lala Ram* (supra). In the said case, an order of acquittal passed -by the learned Magistrate was assailed before the High Court by seeking leave under Section 417(3) of the Code of Criminal Procedure, 1898 and the High Court granted leave as a consequence of which the appeal came to be filed eventually. The High Court accepted the appeal and convicted

the accused. It was contended before this Court that the appeal could not have been entertained by the High Court having been filed beyond the expiry of sixty days in view of the language employed under Section 417(4) of the Code. Emphasis was laid on the term "entertain". Repelling the contention, this court held as follows: -

> "The learned counsel also suggests that the word "entertain" which occurs in Section 417 (4) means "to deal with or hear" and in this connection he relies on the judgment of this Court in *Lakshmi Rattan Engineering Works v. Asst. Commr., Sales Tax,* (1968) 1 SCR 505 = (AIR 1968 SC 488). It seems to us that in this context "entertain" means "file or received by the Court" and it has no reference to the actual hearing of the application for leave to appeal; otherwise the result would be that in many cases applications for leave to appeal would be barred because the applications have not been put up for hearing before the High Court within 60 days of the order of acquittal"

On a perusal of the aforesaid passage, it is vivid that the three-Judge Bench interpreted the terms 'were entertained' in the context they were used under the old Code and did not accept the submission 'to deal with or hear'. Regard being had to the context, we have no shadow of doubt that the said decision is distinguishable and not applicable to the obtaining factual matrix.

12. In this context, we may refer with profit to the two-Judge Bench decision in *Martin & Harris Ltd. v. VIth Additional Distt. Judge and others*[5]. In the said Case, the Court was interpreting the language employed in the proviso to Section 21(1) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. The proviso stipulated that where the building was in occupation of a tenant before its purchase by the landlord, such purchase being made after the commencement of the Act, no application shall be entertained on the grounds mentioned in Clause (a) of the said Section unless three years' period had lapsed since the date of purchase. A contention was canvassed that filing of an application before the expiry of the three years' period was barred by the provision contained in the said proviso. Repelling the said submission, the Bench opined thus: -

> "It must be kept in view that the proviso nowhere lays down that no application on the grounds mentioned in clause (a) of Section 21(1) could be "instituted" within a period of three years from the date of purchase. On the contrary, the proviso lays down that such application on the said grounds cannot be "entertained" by the authority before the expiry of that period. Consequently it is not possible to agree with the extreme contention canvassed by the learned Senior Counsel for the appellant that such an application could not have been filed at all within the said period of three years."

After so stating, the Bench distinguished the decision rendered in *Anandilal Bhanwarlal v. Kasturi Devi Ganeriwala*[6] which dealt with "institution" and eventually came to hold as follows: -

> "Thus the word "entertain" mentioned in the first proviso to Section 21(1) in connection with grounds mentioned in clause (a) would necessarily mean entertaining the ground for consideration for the purpose of adjudication on merits and not at any stage prior thereto as tried to be submitted by learned Senior Counsel, Shri Rao, for the appellant. Neither at the stage at which the application is filed in the office of the authority nor at the stage when summons is issued to the tenant the question of entertaining such application by the prescribed authority would arise for consideration.

13. In this context, we may usefully refer to the decision in

Hindusthan Commercial Bank Ltd. v. Punnu Sahu (Dead) Through Legal Representatives[7]. In the said case, this Court was interpreting Rule 90 of Order XXI of the Code of Civil Procedure as amended by the Allahabad High Court. The amended proviso to Rule 90 stipulated the circumstances under which no application to set aside the sale shall be entertained. It was contended before this Court that the expression "entertain" found in the proviso referred to the initiation of the proceedings and not to the stage when the Court had taken up the application for consideration. This Court referred to the earlier decision in *Lakshmiratan Engineering Works Ltd. v. Asst. Comm., Sales Tax, Kanpur*[8] and opined that the expression "entertain" conveys the meaning "adjudicate upon" or "proceed to consider on merits".

14. In *State of Haryana v. Maruti Udyog Ltd. and Others*[9], this Court was dealing with Section 39 (5) of the Haryana General Sales Tax Act, 1973 which stipulated that no appeal shall be entertained unless it is filed within sixty days from the date of the order appealed against and the appellate authority was satisfied that the amount of tax assessed and the penalty and interest, if any, recoverable from the persons had been paid. The Bench interpreting the term "entertainment" of the appeal ruled that when the first proviso to Section 39 (5) speaks of the "entertainment of the appeal", it means that the appeal will not be admitted for consideration unless there is satisfactory proof available of the making of the deposit of admitted tax.

15. In view of the aforesaid authorities in the field, the submission of Mr. Dubey that the executing court could not have entertained the execution proceeding solely because it was instituted before the expiry of the period stipulated in the compromised decree despite the factum that by the time the Court adverted to the petition the said period was over, is absolutely unacceptable.

16. The next limb of proponement of Mr. Dubey is that the decree had lost its potentiality of executability having been filed on a premature date. On a first flush, the aforesaid submission looks quite attractive but on a deeper probe and keener scrutiny, it melts into insignificance. In *Dhurandhar Prasad Singh v. Jai Prakash University and Others*[10], while dealing with the power of the executing court under Section 47 of the Code of Civil Procedure, a two-Judge Bench has expressed thus:-

> "The exercise of powers under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus it is plain that executing court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void *ab initio* and a nullity, apart from the ground that the decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing "

17. Tested on the anvil of the aforesaid principle, it is difficult to accept the stand that the decree had become inexecutable, and, accordingly, we repel the same.

18. The learned senior counsel for the respondent has further propounded that the executing court could not have passed any order on the application for execution as it was filed prior to the expiry of the period. Pyramiding the said submission, it is urged by him that such advertence in an execution proceeding frustrates the construction of the terms of the decree. Mr. Dubey has drawn immense inspiration from the verdict in *Chen Shen Ling (supra).* On a careful perusal of the aforesaid decision, it is plain and patent that the three-Judge Bench had dealt with the consideration of the terms of the decree and eventually, placing reliance on the decision in *Jai Narain Ram Lundia* (supra), expressed the view that no

execution can be ordered unless the party seeking execution not only offered to perform his part but, also when objection was taken, satisfied the executing court that he was in a position to do so. Be it noted, in the case *Jai Narain Ram Lundia* (supra), this Court has adverted to the reciprocal application, their inter-linking and the indivisibility of the terms of the decree and opined that the executing court cannot go behind the decree and it cannot defeat the directions in the decree. In both the decisions, the issue pertained to the nature of order to be passed by the executing court or the type of direction to be issued by it. The ratio enunciated therein does not remotely deal with the filing of an execution petition in respect of a compromise decree prior to the expiry of the date as stipulated in the terms and conditions of the decree. Hence, we have no scintilla of doubt that the said authorities do not support the s and so vehemently put forth by Mr. Dubey, lea

ned senior counsel for the first respondent. 19. In vie of our aforesaid premised reaso

s, we arrive at the irresistible conclusion that the exe uting court did not commit any error by entertaining the execution petition. The learned Single Judge in civil revision has annulled the said order without any justification. While so doing, he had not dealt with other objections raised by the Judgment-debtor on the ground that they are raised for the first time. On a query being made, Mr Dwivedi, learned senior counsel for the petitioner, fairly stated that the said objections were raised in a different manner in the objection filed under Section 47 of the Code and the revisional court should have been well advised to deal with the same on merits. Regard being had to the aforesaid analysis, we set aside the order passed in civil revision and remit the matter to the High Court to deal with the objections on merits. As it is an old matter, we request the learned Chief Justice of the High Court of Allahabad to nominate a learned Judge to dispose of the civil revision within a period of six months. It is hereby made clear that the parties shall not seek unnecessary adjournment before the revisional court and should cooperate so that the revision shall be disposed of within the timeframe.

20. Consequently, the appeals are allowed to the extent indicated hereinabove leaving the parties to bear their respective costs.

K.K.T. Appeals allowed.

SHOBHAN SINGH KHANKA

v.

THE STATE OF JHARKHAND

(Criminal Appeal No. 592 of 2012)

MARCH 30, 2012

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

Code of Criminal Procedure, 1973:

s.438 - Anticipatory bail - Criminal proceedings against Chairman and Members of State Public Service Commission and Examiners regarding large scale bungling and manipulation of marks - Inquiry by Vigilance department - FIR lodged - Appellant, an Expert also arraigned as an accused - Application for anticipatory bail of appellant rejected by Special Judge and High Court - Held: Considering the limited allegation against the appellant in the FIR and other details, his academic qualifications including the fact that he does not belong to the State and has no relatives and is not a Member of the JPSC, acted as Expert only for a short period, the appellant has made out a case for anticipatory bail - Even if the prosecution has any apprehension, sub-s. (2) of s. 438 enables the court concerned to impose such conditions/ directions as it may thinks fit - Appellant, in the event of arrest, directed to be released on bail, subject to the conditions stipulated in the judgment.

s.438 - Anticipatory bail - Factors to be considered - Explained.

On an inquiry conducted by the vigilance department, it was revealed that in holding the second Jharkhand Public Service Commission Civil Services Examination - 2005, there had been large-scale bungling, manipulation, tampering of marks, irregularity in appointment of Examiners, and the Members of the Interview Board and the Chairman in connivance with the Members and also in conspiracy with the successful candidates for securing monetary gains to the officials of JPSC, by practicing corrupt method, made recommendations to the Government for appointment of various persons. It was also alleged that the Members either had not given declaration regarding their relatives appearing in the examination nor had they provided the required details. An FIR was lodged against several persons, including the Chairman and Members of the JPSC as also the appellant who was engaged as an Expert. This gave rise to Special case No. 23 of 2010 for offences under the IPC and Prevention of Corruption Act, 1988.

The appellant filed an application for anticipatory bail u/s 438 CrPC which was rejected by the Special Judge as also by the High Court.

Allowing the appeal, the Court

HELD: 1.1 It is settled law that personal liberty is a precious fundamental right. While considering the claim of pre-arrest bail, the factors to be considered are: (i) the nature and gravity of the accusation; (ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence; (iii) the possibility of the applicant to flee from justice; and (iv) whether the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested. [para 7 and 12]

1.2 It is not in dispute that the appellant is not a regular Member of the JPSC nor he belong to the State of Jharkhand. Admittedly, he is in Central Government service and he was nominated as Expert No.1 by the Board. The appellant has excellent academic career. He has been a regular expert in the Selection Committees of UGC, AICTE, ICSSR and other Universities. He has to his credit the authorship of numerous Research/Reference Books and Textbooks. Recently, he was awarded "Shiksha Rattan Puraskar" by the Governor of Arunachal Pradesh. The President of India based on the academic qualification of the appellant nominated him as her nominee for recruitment of Assistant/Associate Professors in the Faculty of Commerce and Management in the Indira Gandhi National Tribal University, Amar Kantak, Madhya Pradesh. [para 8]

1.3 The perusal of the FIR also shows that the appellant was not acquainted with or related to any of the candidates interviewed by the panel of which he was a Member. In view of the assertion that the appellant does not belong to the State of Jharkhand and has no relatives, friends or kinsmen in the State of Jharkhand, there is no prima facie case to include him in the alleged conspiracy. Considering his academic qualifications and experience and taking note of his claim that of an impeccable career as academician and of the fact that he has no interest in the State of Jharkhand, this Court holds that the ppellant has made out a case for anticipatory

bai u/s 438 of the Code of Criminal Procedure, 19 3. Even if the prosecution has a

yap rehension, sub-s. (2) of s. 438 enables the court conce

ned to impose such conditions/direction as it may thinks fit. [para 11-12]

1.4 The order passed by the Special Judge as well as the High Court dismissing the petition of the appellant for anticipatory bail are set aside. Accordingly, it is directed that in the event of arrest, the appellant shall be released on bail subject to the conditions laid down in the judgment. [para 13]

CRIMINAL APPELLATE JURISDICTION : From the Judgment & Order dated 21.09.2011 of the High Court of Jharkhand at Ranchi A.B.A. No. 3230 of 2011.

Uday U. Lalit, Nitin Sangra, Satyajeet Saha, V.D. Khanna for the Appellant.

Sunil Kumar, Chhaya Kumari, Anil K. Jha for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 21.09.2011 passed by the High Court of Jharkhand at Ranchi in A.B.A. No. 3230 of 2011 whereby the High Court rejected the application for anticipatory bail filed by the appellant herein.

3. Brief facts:

(a) The appellant herein, who acted as one of the Expert in the Interview Board to the Jharkhand Public Service Commission (in short "the JPSC"), filed a petition before the Special Judge (Vigilance), for anticipatory bail under Section 438 of the Code of Criminal Procedure, 1973 (in short "the Code") in connection with Special Case No. 23 of 2010 arising out of Vigilance PS No. 23 of 2010 under Sections 420, 423, 424, 467, 468, 469, 471, 477A, 120-B, 109 and 201 of the Indian Penal Code, 1908 (in short "the IPC") and Section 13(2) read with Section 13(1) (c) (d) of the Prevention of Corruption Act, 1988.

(b) According to the appellant, he was intimated that he had been nominated as Expert No1 in the Interview Board for holding interview from 28.01.2008 to 01.02.2008. He was selected by the Members of the Expert Committee including the Chairman of the JPSC.

(c) The allegations against the appellant, Chairman and other Members of the JPSC are that they provided highest marks to the candidates whom they desire to be selected or appointed by giving undue favour. The appellant is also responsible for conspiracy with the Chairman, Members of the JPSC and the candidates who were given highest marks by the Interview Board. It is also alleged that the appellant is responsible for cutting, manipulation, interpolation in the marks sheet of the Interview Board in order to provide benefit to the candidates for selection and appointment.

(d) The prosecution case in a nutshell is that an enquiry was conducted by the vigilance department regarding the irregularity committed by the Chairman, Members and officers of the JPSC in conducting Second JPSC Civil Services Examination pursuant to advertisement No. 7 of 2005 dated 12.11.2005. It is alleged by the prosecution that the examination was not held in accordance with the guidelines. The Members either have not given declaration regarding their relation appearing in the examination and those who have given declaration have not provided the required details. The further allegation of the prosecution is that there has been manipulation in the numbers awarded to the students. The prosecution examined 22 copies and it has been alleged that they have found manipulation in the answer sheets. It is the further case of the prosecution that there has been large-scale

bungling, manipulation, tampering of marks, irregularity in the appointment of Examiners and Members of the Interview Board and the Chairman in connivance with the Members and also in conspiracy with the successful candidates for securing monetary gains to the officials of JPSC in utter disregard to the rules and by practicing corrupt method recommendations for appointment of various persons were made to the Government. Accordingly, a First Information Report (in short "FIR") was lodged against several persons including the appellant.

(e) By order dated 01.08.2011, the Special Judge (Vigilance) Ranchi, on consideration of the materials refused to enlarge the appellant on anticipatory bail and rejected his petition. Against the order of the Special Judge, the appellant preferred A.B.A. No. 3230 of 2001 before the High Court of Jharkhand at Ranchi. By impugned order dated 21.09.2011, the High Court confirmed the order of the Special Judge and dismissed his petition for anticipatory bail.

4. Heard Mr. Uday U. Lalit, learned senior counsel for the appellant and Mr. Sunil Kumar, learned senior counsel for the respondent-State of Jharkhand.

5. After taking us through all the materials including the FIR and the allegations pertaining to the present appellant, Mr. Lalit, learned senior counsel submitted that in the FIR except for stating that the appellant was one of the Expert, there is nothing which can even remotely connect the appellant with any offence much less the offences alleged therein. He also submitted that the appellant who hails from District Pithoragarh, Uttarakhand, presently posted at Faridabad, Haryana has no relatives, friends or kinsmen in the State of Jharkhand and, therefore, had no reason or motive to favour anybody and in that event be a part of any conspiracy to commit the alleged crime. He further pointed out the role of the appellant as Expert Member was only to award marks to each candidate on a separate sheet and had nothing to do beyond it. He also pointed out that the observation of the High Court in the impugned order rejecting his anticipatory bail application on the ground that the appellant stands on a similar footing as that of other accused is factually incorrect inasmuch as the appellant cannot be equated with the case of other Experts who belong to the State of Jharkhand and are alleged to be related or known to candidates and, therefore, had no reason or motive to commit the alleged crime. On the other hand, learned counsel for the State submitted that considering the serious nature of the crime and of the fact that the appellant's initial selection as expert is itself contrary to the rules and several manipulations have been done by all the persons concerned in the selection panel, it is not a fit case in which the anticipatory bail is to be granted.

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

7. Inasmuch as we are concerned about the eligibility or otherwise relating to grant of anticipatory bail, there is no need to go into all the factual details and arrive a finding one way or the other which will affect the ultimate trial of the case. We have already referred to the offences alleged in the FIR. It is settled law that personal liberty is a precious fundamental right. With this background, we have to see that whether a case has been made out for grant of anticipatory bail.

8. It is not in dispute that he is not a regular Member of the JPSC. Admittedly, he is in Central Government service and he was nominated as Expert No.1 by the Board. Thought it is pointed out that his nomination itself is bad, that is not a relevant issue at this moment. Mr. Lalit, learned senior counsel for the appellant pointed out his higher academic qualifications. All those details are available in Annexure-P1 which shows that the appellant possesses qualifications of M.Com., (Gold Medallist) and holder of 5 Ph.Ds. He is a Professor and Coordinator in Fellow Programme and Management in National Institute of Financial Management of the Central Government

and he has an experience of 16 years as Professor since 21.10.1994. He has 13 years administrative experience as Head of the Department of Business Administration and 13 years experience as Dean in the School of Management Studies. The appellant has specialization in Human Resources Management, Organisational behaviour and Entrepreneurship Development and besides that, he has experience on International Exposure of visiting Professor in other foreign countries. It is also pointed out that the appellant has been a regular expert in the Selection Committees of UGC, AICTE, ICSSR and other Universities. He has to his credit the authorship of numerous Research/Reference Books and Textbooks. Recently on 26.05.2011, the appellant was awarded "Shiksha Rattan Puraskar" by H.E. the Governor of Arunachal Pradesh. It is also brought to our notice that in July, 2011, Hon'ble the President of India based on the academic qualification of the appellant nominated him as her nominee for recruitment of Assistant/Associate Professors in the Faculty of Commerce and Management in the Indira Gandhi National Tribal University, Amar Kantak, Madhya Pradesh. The above details show that the appellant has excellent academic career.

9. In the FIR, the appellant has been named as accused No.7. Though it is pointed out that the appellant has given highest marks to the candidates who were given only 10 marks by the Chairman of the Interview Board, it is not in dispute that he is not a Member of the JPSC Board nor belongs to Jharkhand State. As stated earlier, he was selected as specialized member for a short period only. Mr. Lalit has also taken us through the chart showing marks given by experts including the present appellant - Expert No.1, Expert No.2 and the Chairman Shanti Devi. Interestingly, the Chairman has allotted 10 marks to each of the candidate irrespective of his/her performance. We are not here to assess and give a finding whether the marks awarded by the appellant (Expert No.1) is excessive or unreasonable. All those things have to be analyzed only at the time of trial by way of evidence.

10. Though the High Court has concluded that on the ground of parity and on the similar footing that the other co-accused declined to grant anticipatory bail, we are of the view that inasmuch as all other Members of the Board including the Chairman belong to Jharkhand and some of their relatives participated in the selection and considering the fact that the present appellant has no connection with the JPSC and hails from a different State, namely, Uttarakhand, the said observation/conclusion is not acceptable.

11. The perusal of the FIR also shows that the appellant was not acquainted with or related to any of the candidates interviewed by the panel of which he was a Member. In view of the assertion that the appellant does not belong to the State of Jharkhand and has no relatives, friends or kinsmen in the State of Jharkhand, there is no prima facie case to include him in the alleged conspiracy. Considering his academic qualifications and experience and taking note of his claim that of an impeccable career as academician and of the fact that he has no interest in the State of Jharkhand, we hold that the appellant has made out a case for anticipatory bail under Section 438 of the Code.

12. While considering the claim of pre-arrest bail, the following factors have to be considered:

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by

having him so arrested.

Considering the limited allegation in the FIR and other details, his academic qualifications including the fact that he does not belong to the State of Jharkhand and has no relatives and is not a Member of the JPSC, acted as Expert No.1 only for a short period, the appellant has made out a case for anticipatory bail. Even if the prosecution has any apprehension, sub-section (2) of Section 438 enables the court concerned to impose such conditions/directions as it may thinks fit.

13. Under these circumstances, the order passed by the Special Judge as well as the High Court dismissing his petition for anticipatory bail are set aside. Accordingly, we direct that in the event of arrest, the appellant shall be released on bail in connection with PS case No. 23 of 2010 corresponding to Special Case No. 23 of 2010, Vigilance PS, Ranchi, Jharkhand subject to the following conditions:-

(i) the appellant shall make himself available for interrogation as and when required;

(ii) the appellant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) the appellant shall not leave India without the previous permission of the special court.

14. It is made clear that the conclusion reached by us is limited to the disposal of the application for anticipatory bail and the Special Judge is free to decide the charges in the ultimate trial in accordance with law uninfluenced by any of the observation/conclusion made herein.

15. The appeal is allowed on the above terms.

R.P. Appeal allowed.

STATE OF KERALA & ANR.

v.

P.V. MATHEW (DEAD) BY L.RS.

(Civil Appeal No. 3337 of 2012)

APRIL 2, 2012

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

KERALA FOREST ACT, 1961:

s.52 read with s.2(f) (as amended by Amendment Act 23 of 1974), s,61 A(as inserted by Amendment Act 28 of 1975 and s.69 - Confiscation of vehicle used in committing a forest offence - Vehicle confiscated on the allegation that the same was used by the offenders to go to the forest to kill an elephant and to transport the tusks therein - Held: It is significant to note that the definition of "forest produce" in s. 2(f) does not include any part of living or dead wild animals which is being taken care of by the Wild Life (Protection) Act, 1972 - Consequent to the amendment of expression "forest produce" in s. 2(f) of the Act, the claim of the State that even in the absence of "ivory" in the definition "forest produce", in view of s. 61A of the Act, the authorities are entitled to confiscate the vehicle cannot be sustained - The definition of "forest produce" in the Act u/s 2(f) doesn't take ivory in its purview - The presumption under Sec.69 of the Act applies only to the "Forest Produce" so even if s.61A of the Act takes in its fold 'ivory' as one of the items liable to be confiscated the presumption u/s 69 of the Act will not be available to the Government as it is not a "forest produce".

In a case registered on the allegation of illicit killing of a wild elephant in 1990, one of the accused stated on 1.4.1991 that the vehicle of the original respondent was used by the accused to go to the forest and again to

transport of the tusks. After the investigation by order dated20.12.1996 the vehicle was confiscated. The appeal of the original respondent was allowed by the District Judge. The High Court declined to interfere.

In the instant appeal filed by the State, it was contended for the respondent that after the amendment of definition of "forest produce" in s.2(f) of the Kerala Forest Act, 1961, the forest authorities wee not empowered to confiscate the vehicle unless it was established that a forest offence was committed in terms of the Act.

Dismissing the appeal, the Court

HELD: 1.1 Clause (iii) of the unamended s. 2(f) has been deleted by Act 23 of 1974 and the present definition of "forest produce" does not include "ivory". Section 52 of the Act which deals with seizure of property liable to confiscation, clearly contemplates that the power of confiscation is confined to only those vehicles used in committing any forest offence in respect of any timber or other forest produce. Though a reading of s. 61A of the Act as inserted by Amendment Act, 28 of 1975 shows that ivory is also included in respect of any forest offence under the Act and under sub-s. (2) thereof, the vehicle used for committing such offence is also liable to confiscation by the Authorised Officer. However, consequent to the amendment of expression "forest produce" in s. 2(f) of the Act, the claim of the State that even in the absence of "ivory" in the definition "forest produce", in view of s. 61A of the Act, the authorities are entitled to confiscate the vehicle cannot be sustained. It is significant to note that the definition of "forest produce" in s. 2(f) does not include any part of living or dead wild animals which is being taken care of by the Wild Life (Protection) Act, 1972. [para 7]

1.2 Inasmuch as "ivory" being not a "forest produce" as defined in s. 2(f) after the Amendment Act 23 of 1974, no forest offence as defined in s. 2(e) of the Act can be said to have been done in respect of the "ivory" as alleged in the instant case and, therefore, the action taken u/s 61A of the Act cannot be supported. [para 6]

1.3 Further, since seizure of ivory is not justified even u/s 52 of the Act, the power of confiscation u/s 61A commences only when a valid seizure of the property is effected under the Act and the report is made to the Authorised Officer. Therefore, the District Court has rightly held that "the fact that offences punishable under other analogous statutes have been committed in respect of ivory which is the property of the Government cannot expose the appellant's vehicle to the consequence of confiscation u/s 61A of the Act". [para 8]

1.4 In the instant case, neither any property was seized from the car nor had any seizure taken effect as provided under sub-s. (1) of s. 52. Inasmuch as seizure u/s 52 of the Act has not taken place and no forest offence in respect of a "forest produce" is shown to have been committed or established in the case, there is absolutely no justification for the seizure and the order of confiscation of the aforesaid car as the same is beyond the jurisdiction of the authorized officer. These aspects have been rightly considered by the District Court as well as the High Court. [para 8]

1.5 Inasmuch as the provisions of the Wild Life (Protection) Act, 1972 take care of wild animals skins, tusks, horns, bones, honey, wax and other parts or produce of animals, in the absence of specific charge under the said Act, the Authorized Officer was not justified in ordering confiscation of the vehicle. [para 8]

1.6 The definition of "forest produce" in the Act u/s

2(f) doesn't take ivory in its purview. The presumption under Sec.69 of the Act applies only to the "Forest Produce" so even if s.61A of the Act takes in its fold 'ivory' as one of the items liable to be confiscated the presumption u/s 69 of the Act will not be available to the Government as it is not a "forest produce". [para 9]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3337 of 2012.

From the Judgment & Order dated 02.12.2005 of the High Court of Kerala at Ernakulam in C.R.P. No. 1587 of 1999.

Bina Madhavan, Praseena E. Joseph for the Appellants.

S. Gopakumaran Nair, K.N. Madhusoodhanan, T.G.Narayanan Nair for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 02.12.2005 passed by the High Court of Kerala at Ernakulam in C.R.P. No. 1587 of 1999 whereby the High Court while affirming the order dated 04.12.1998 of the District Judge, Thrissur in C.M.A. No. 16 of 1997 dismissed the revision petition filed by the State of Kerala, the appellant herein.

3. **Brief facts:**

(a) According to the prosecution, a case was registered as C.R. No. 5 of 1990 in Vazhachal Range in Vazhachal Forest Division of Kerala on the allegation of illicit killing of a wild elephant. During the course of investigation, three persons, viz., Nelladan George, Madhura Johny and Chirayath Jose were taken into custody and questioned. On 01.04.1991, Nelladan George and Madhura Johny gave statements before the Divisional Forest Officer, Chalakudy and Chirayath Jose had given statement before the Range Officer, Flying Squad, Thrissur. While questioning, they admitted having gone to Vazhikadavu and shot dead wild tuskers about six months back. In the statement given by Madhura Johny, he admitted that about seven months back he along with four others, namely, Nelladan George, Parambal Chandran, Kaitharam Paulachan, Kottatti Jose had gone to Vazhikadavu area in a car bearing Registration No. KL 8 6755 for shooting elephants with two unlicensed guns. After reaching there, they sent back the car and went to the forest. After two or three days, Madhura Johny shot dead two tuskers, one big elephant and another small one. They collected the tusks and kept it in a cave and returned to Thrissur by bus. Again they went to Vazhikadavu in the same car and collected the tusks hided in the cave. They brought the tusks to Thrissur and sold it to Chirayath Jose for Rs.72,000/- . They paid Rs.3,500/- to the driver of the car for two trips and the balance amount they divided among them.

(b) After recording the statement, on 09.04.1991, Range Officer, Thrissur Flying Squad and his party seized the car. On the same day, the car was produced before the Divisional Forest Officer, Chalakudy and thereafter he entrusted the car to the Range Officer, Pariyaram for safe custody and asked him to conduct a detailed enquiry.

(c) The owner of the vehicle - the respondent herein - filed O.P. No. 4554 of 1991 before the High Court praying for release of the vehicle. The High Court, by order dated 30.04.1991, directed to release the vehicle for interim custody to the respondent herein on furnishing security of immovable property to the extent of Rs.50,000/-. Accordingly, the car was released to the respondent herein on his furnishing the security.

(d) After investigation, the Forest Range Officer, Pariyaram submitted a report on 02.10.1996. On 30.10.1996, the Investigating Officer issued a show cause notice to the original

respondent i.e. P.V. Mathew as to why the car should not be confiscated to Government under Section 61A of Kerala Forest Act, 1961 (hereinafter referred to as "the Act") and called upon him to appear in person on 26.11.1996. After hearing him and after perusing the final report of the Investigating Officer, the Divisional Forest Officer, Chalakudy passed an order dated 20.12.1996 for confiscation of the car.

(e) Aggrieved by the said order of confiscation, the original respondent preferred an appeal being C.M.A. No. 16 of 1997 before the District Judge, Thrissur. By order dated 04.12.1998, the District Judge allowed the appeal.

(f) Against the order passed by the District Judge, the State preferred a revision petition being C.R.P. No. 1587 of 1999 before the High Court. The High Court, by the impugned judgment dated 02.12.2005, dismissed the revision filed by the State.

(g) Aggrieved by the said judgment, the State has preferred this appeal by way of special leave before this Court. During the pendency of the appeal, sole respondent died and his LRs were brought on record as R(i) to (viii).

4. Heard Ms. Bina Madhavan, learned counsel for the appellant-State and Mr. S. Gopakumaran Nair, learned senior counsel for the respondent.

5. By the impugned judgment, the High Court found that the vehicle of the respondents which was used for illegally transporting ivory collected from the forest cannot be confiscated invoking power under Section 61A of the Act because ivory is not a "forest produce" coming under Section 2(b) of the Act and no forest offence can be said to have been committed in respect of ivory. Ms. Bina Madhavan, learned counsel appearing for the appellant-State, after taking us through the relevant provisions from the Act including Section 61A, submitted that the Divisional Forest Officer was fully justified in confiscating the vehicle which transported ivory and the District Court as well as the High Court committed an error in setting aside the same. On the other hand, Mr. Gopakumaran Nair, learned senior counsel for the respondents submitted that after the amendment in respect of the definition "forest produce" in Section 2(f) of the Act, the forest authorities are not empowered to confiscate unless it is established that forest offence has been committed in terms of the Act. He also submitted that the District Court and the High Court were fully justified in setting aside the order of the Divisional Forest Officer based on the amended provisions.

6. Among the various provisions of the Act, we are concerned about the following provisions:

2 (e) **"forest offence"** means an offence punishable under this Act or any rule made thereunder.

2 (f) **"forest produce"** includes-

(i) the following whether found in or brought from, a forest or not, that is to say-

timber, charcoal, wood oil, gum, resin, natural varnish, bark lac, fibres and roots of sandalwood and rosewood; and

(ii) the following when found in, or brought from, a forest, that is to say,-

(a) trees and leaves, flowers and fruits, and all other parts or produce not herein before mentioned, of trees;

(b) plants not being trees (including grass, creepers, reeds and moss) and all parts or produce of such plants; and

(c) silk cocoons, honey and wax;

(d) peat, surface oil, rock and minerals (including limestone, laterite), mineral oils and all products of mines or quarries;

52. Seizure of property liable to confiscation.- (1) When there is reason to believe that a forest offence has been committed in respect of any timber or other forest produce, such timber, or produce, together with all tools, ropers, chain, boats, vehicles and cattle used in committing any such offence may be seized by any Forest Officer or Police Officer.

Explanation:- The terms 'boats' and 'vehicles' in this section, 9section 53, section 55, section 61A and section 61B) shall include all the articles and machinery kept in it whether fixed to the same or not.

(2) Every officer seizing any property under sub-section (1) shall place on such property or the receptacle, if any, in which, it is contained a mark indicating that the same has been so seized and shall, as soon as may be make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made:

Provided that, when the timber or forest produce with respect to which such offence is believed to have been committed is the property of the Government and the offender is unknown, it shall be sufficient if the Forest Officer makes, as soon as may be, a report of the circumstances to his official superior.

61A. Confiscation by Forest Officers in certain cases.- (1) Notwithstanding anything contained in the foregoing provisions of this chapter, where a forest offence is believed to have been committed in respect of timber, charcoal, firewood or ivory which is the property of the Government, the officer seizing the property under sub-section (1) of Section 52 shall, without any unreasonable