JAGAN SINGH (DEAD) THROUGH LRS.
v.
DHANWANTI & ANR.
(Civil Appeal No. 2467 of 2005)

JANUARY 19, 2012

[P. SATHASIVAM AND H.L. GOKHALE, JJ.]

U.P. Zamindari Abolition and Land Reforms Act, 1951 – s. 169 – Bequest by a bhumidhar – Bhumidhar with transferable rights imposing a restriction on the rights of a legatee by limiting the bequest to the life time of legatee – Permissibility of, u/s. 169(1) – Held: Sub-section (1) of Section 169 permits a bhumidhar to bequeath his holding or any part thereof by making a Will - Under the Will, he can create a restricted interest in favour of legatee and the same is permissible u/s. 169 (1).

Hindu Succession Act, 1956 – s. 14 – Property of a female Hindu to be her absolute property – Bhumidhar bequeathing his land by way of Will u/s. 169(1) of the 1951 Act in favour of female hindu and creating a restricted estate – Permissibility of, in view of s. 14(2) – Held: Bequest made u/s. 169 (1) in favour of a female Hindu, if it is a restricted one, shall remain a restricted one un

der sub-section (2) of s. 14, since the same would be governed by the terms of the Will – On facts, bhumidhar bequeathed his land by way of Will in favour of female hindu (his wife), creating a restricted estate – Wife planning to sell the land – Suit filed seeking permanent injunction against the female hindu from selling the land – Courts below held that the bequest by bhumidhar in favour of female hindu was not a restricted one and dismissed the suit – Judgment passed by civil judge and as upheld by the Additional District Judge and the High Court bad in law and set aside – Declaration

passed that the female hindu had no right to sell the disputed parcel of land – Suit decreed to the said extent – U.P. Zamindari Abolition and Land Reforms Act, 1951 – s. 169.

Transfer of Property Act, 1882 – s. 52 – Doctrine of 'lis pendens' – Held: Pendency of a suit or a proceeding shall be deemed to continue until the suit or a proceeding is disposed of by final decree or order, and complete satisfaction or discharge of such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force – On facts, appellant sought permanent injunction against respondent No. 1 from selling the land either to respondent No. 2 or otherwise – Suit dismissed by the civil judge, Additional District Judge as also High Court – Execution of sale at a time when the second appeal had not been filed but which came to be filed afterwards within the period of limitation – Thus, the case would be covered u/s. 52 – That sale had not taken place – Declaration passed that respondent No. 1 had no right to sell the disputed parcel of land – As regards the claim of the applicant that the said parcel of land was sold to her by the first respondent subsequently before filing of the Second Appeal, the appellant filed second suit seeking setting aside of the sale in favour of the applicant and the same was dismissed for default – Legal representatives of the appellant directed to apply to that court for appropriate orders – Subsequent developments.

'US' was the owner of certain parcels of bhumidhari lands covered under the provisions of the U.P. Zamindari Abolition and Land Reforms Act, 1951. "US' by way of a registered Will, bequeathed his entire property in favour of appellant as an exclusive owner. However, as regards plot 'A' he created a restricted estate in favour of his wife-respondent No. 1. It is alleged that respondent No. 1 planned to dispose of property 'A'. The appellant filed a

suit for permanent injunction to restrain respondent No. 1 from disposing of the property. The civil judge dismissed the suit holding that the right of respondent No. 1 was not restricted under Section 14(2) of the Hindu Succession Act, 1956. Both the Additional District Judge and the High Court upheld the order passed by the civil judge. Therefore, the appellant filed the instant appeal.

The question which arose for consideration in this appeal were whether Section 169 of the U.P. Zamindari Abolition and Land Reforms Act, 1951, prohibits a bhumidhar with transferable rights from imposing a restriction on the rights of a legatee by limiting the bequest to the life time of legatee; whether such a restricted bequest is permissible in view of Section 14(2) of the Hindu Succession Act, 1956; and as regards to the application of doctrine of 'lis pendens' in the facts of the instant case.

Disposing of the appeal and the interim applications, the Court

HELD: 1.1. It is very clear that Sub-section (1) of Section 169 of the U.P. Zamindari Abolition and Land Reforms Act, 1951 permits a bhumidhar to bequeath his holding or any part thereof by making a Will. Sub-section (3) however, requires that this has to be done in writing, and the Will has to be attested by two persons and it has to be registered. In the instant case 'ÚS' was owner of the concerned land. He made a Will, it was duly attested by two persons, and it was registered as required by Section 169 (3) of the U.P. Act. Under that Will he created a restricted interest in favour of respondent No.1 in plot 'A'. This cannot be said to be impermissible under Section 169 (1) of the U.P. Act. [Paras 9 and 10.1]

1.2. Section 14 of the Hindu Succession Act, 1956 undoubtedly declares in Sub-section (1) thereof that a

property of a female Hindu is her absolute property, but it creates an exception in Sub-section (2) which provides that Sub-section (1) would not apply to any property which is given away by instruments such as by way of a gift or under a Will. In the instant case, 'US' made a Will, and under that he had created a restricted estate in favour of respondent No.1 which was permissible under Section 14 (2). [Para 10]

Navneet Lal vs. Gokul and Ors. **1976 (1) SCC 630: 1976 (2) SCR 924;** *Amar Singh vs. Assistant Director of Consolidation* **1988 (4) SCC 143: 1988 (2) Suppl. SCR 524;** *Ramji Dixit vs. Bhirgunath* **AIR 1968 SC 1058;** *Mst. Karmi vs. Amru* **AIR 1971 SC 745 – referred to.**

1.3. The purport behind sub-section (2) of Section 169 is to prohibit a bhumidhar entitled to any holding in the right of a female Hindu from bequeathing such holding by a Will. The Single Judge of the High Court clearly erred in reading this sub-section (2), and the effect of its deletion. It was ignored that the instant case was one falling under sub-section (1) of Section 169 and not under sub-section (2) since in the instant matter the appellant was asserting his right with respect to the land which he received by way of the Will of 'US'. Respondent No.1 was entitled to a share in the land on account of that Will only, and not on the basis of her own independent right. The Will giving her a share had restricted it to her life time which 'US' was entitled to do under Section 169 (1) of the U.P. Act, and the same would remain restricted in view of Section 14 (2) of Hindu Succession Act, 1956. The Single Judge had relied on Section 152 (1) of the U.P. Act, but that Section also cannot be read to take away the right of a bhumidhar to bequeath his holding by a Will. [Para 13]

1.4. The instant case is one of a bhumidhar bequeathing his land by a will, and the same was clearly

permissible. The bequest made under Section 169 (1) in favour of a female Hindu, if it is a restricted one, shall remain a restricted one under sub-section (2) of Section 14 of Hindu Succession Act, since the same would be governed by the terms of the Will. The Single Judge of the High Court thus, clearly erred in holding that the bequest in favour of respondent No. 1 was not a restricted one. The courts below erred in dismissing the suit filed by the appellant. In the circumstances and on facts, the judgments rendered by the High Court as well as by the Additional District Judge and by the civil judge are clearly erroneous in law and on facts. [Para 13]

2.1. There are some subsequent developments. 'PR' filed Interim Applications Nos. 3 and 4 of 2010 in the instant civil appeal. In I.A No. 3 she has applied for being impleaded as respondent, and in I.A No. 4 she sought exemption from filing the official translation of the annexures to I.A No. 3 of 2010. The facts which have come on the record through I.A. No.3 and 4 of 2010 and the reply thereto disclose that the respondent No. 1 had entered into the agreement of sale of the land in dispute with applicant 'PR' when suit filed before the civil judge and the appeal filed before the Additional District Judge by the appellant had already been dismissed. However, the sale was within the period of limitation when the second appeal could have been filed. The appellant however, chose first to file the second suit on 8.10.2004 for cancellation of the sale deed, wherein he joined 'PR' as respondent No. 2. (In the meanwhile he obtained the certified copy of the judgment and order in the first appeal on 5.8.2004.) Thereafter, he filed the Second Appeal which was filed within the period of limitation. This appeal was dismissed on 18.11.2004 at the admission stage, though after hearing both the parties. The appellant then filed the instant Special Leave Petition. Special Leave was granted in the present matter, and an

order of status quo came to be passed on the SLP on 4.4.2005. The original appellant however, did not disclose either in the Second Appeal or in the SLP that he had filed the second suit for setting aside the sale deed. Consequently, it did not come on record at that stage that the applicant claims to have purchased the land even before filing of the Second Appeal at a time when there was no order of stay in favour of the appellant. Thereafter, the appellant had applied on 12.5.2005 for stay of his own second suit by pointing out about the pendency of the present proceedings and the order of status quo having been passed therein. The second suit came to be dismissed for non-prosecution on 27.1.2010. It is contended by the legal representatives of the appellant in their reply to I.A No. 3/2010, that they were not aware about the second suit filed by their predecessor in title, and that is how, according to them the suit came to be dismissed for default. [Paras 14 and 17]

2.3. The broad principle underlying Section 52 of the Transfer of Property Act, 1882 is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. Even after the dismissal of a suit, a purchaser is subject to *lis pendens*, if an appeal is afterwards filed. If such a view is not taken, it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail. The explanation to Section lays down that the pendency of a suit or a proceeding shall be deemed to continue until the suit or a proceeding is disposed of by final decree or order, and complete satisfaction or discharge of such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force. In the instant case, it was contended on behalf of the respondent and the applicant that the

sale has taken place in favour of the applicant at a time when there was no stay operating against such sale, and in fact when the second appeal had not been filed. The instant situation would be covered under the principle of *lis-pendens* since the sale was executed at a time when the second appeal had not been filed but which came to be filed afterwards within the period of limitation. The doctrine of *lis-pendens* is founded in public policy and equity, and if it has to be read meaningfully such a sale as in the instant case until the period of limitation for second appeal is over will have to be held as covered under section 52 of the T.P. Act. [Paras 19 and 21]

Krishanaji Pandharinath vs. Anusayabai **AIR (1959) Bom 475 – approved.**

Moti Chand Vs. British India Corporation **AIR (1932) Allahabad 210;** *Gobind Chunder Roy v. Guru Chur Kurmokar* **1888 15 Cal. 94 – referred to.**

2.4. The impugned judgment and order passed by the civil judge, Junior Division and those arising in the appeals therefrom rendered by the Additional District Judge, Bijnaur and the High Court are bad in law and are set aside. The appellant had sought a permanent injunction against the respondent No. 1 from selling the concerned parcel of land either to the respondent No. 2 or otherwise. That sale had not taken place. A declaration is passed in favour of the appellant that the respondent No. 1 had no right to sell the disputed parcel of land. The suit filed by the appellant in the court of civil judge, Junior Division is decreed to the said extent. [Para 23]

2.5. The applicant 'PR' claimed that the said parcel of land was sold to her by the first respondent subsequently on 27.9.2004. The second suit filed by the appellant in the court of civil judge, Senior Division sought to set-aside the sale in favour of the applicant was

dismissed for default though the legal representatives of the appellant contended that it was so dismissed since they were not aware about that suit. It would be for the legal representatives of the appellant to apply to that court for appropriate orders, and it would be for that court to decide their application in accordance with law after hearing all the parties including the applicant. [Para 22]

Case Law Reference:

1976 (2) SCR 924	**Referred to.**	**Para 11**
1988 (2) Suppl. SCR 524	**Referred to.**	**Para 11**
AIR 1968 SC 1058	**Referred to.**	**Para 12**
AIR 1971 SC 745	**Referred to.**	**Para 12**
AIR (1959) Bom 475	**Referred to.**	**Para 19**
AIR (1932) Allahabad 210	**Referred to.**	**Para 20**
1888 15 Cal. 94	**Referred to.**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2467 of 2005.

From the Judgment & Order dated 18.11.2004 of the High Court of Judicature at Allahabad in Second Appeal No. 682 of 2004.

H.L. Aggarwal, J.P. Sharma, Piyush Sharma, Mithilesh Kumar Singh, Tarun Verma and Kumud Lata Das for the appearing parties.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. This appeal under Article 136 of the Constitution of India raises the question as to whether a bhumidhar having a right to transfer his land under U.P. Zamindari Abolition and Land Reforms Act, 1951 (the U.P. Act

for short), while bequeathing his bhumidhari right in favour of a beneficiary can impose a restriction on the right of the legatee to make it a life estate, and if he does so whether the interest of the holder of a life estate shall continue to remain so restricted, or whether such a legatee can claim his interest to be unrestricted to affect the bequest in favour of other beneficiaries. The second question is with respect to the application of doctrine of 'lis pendens' in the facts of the present case. These questions have arisen in the present appeal which seeks to challenge the judgment and order dated 18.11.2004 passed by a learned Single Judge of Allahabad High Court dismissing the Second Appeal No.982 of 2004 filed by the appellant herein (original plaintiff). By dismissing this Second Appeal, the learned Single Judge has confirmed the judgment and order dated 28.7.2004 passed by the Additional District Judge, Bijnaur in Civil Appeal No.97 of 2002 whereby the learned Additional District Judge has dismissed the said appeal of the appellant herein against the judgment and order dated 13.2.2002 passed by the Civil Judge, Junior Division, Najibabad which dismissed the Original Suit No.121 of 1994 filed by the appellant.

Facts leading to this present appeal are as follows:-

2. One Umrao Singh S/o Jiraj Singh, R/o village Sarkara Khed in Tehsil Najibabad, District Bijnaur, U.P. owned certain parcels of bhumidhari lands which are covered under the provisions of the above U.P. Act. He executed a will on 30.12.1985 concerning these lands. He stated in the will that he had no issues, and had a younger brother by name Jagan Singh (the appellant herein) who was looking after him. The will further stated that during the testator's life the testator will remain owner in possession of the said property with all the rights. However after his death, barring a plot bearing No.140-8-10-19, Jagan Singh will become the exclusive owner of all his movable and immovable properties. As far as this plot No. 140-8-10-19 is concerned, Umrao Singh stated in his will as follows:-

> "My wife Dhanwanti R/o village Sarkara Khera will be the owner of my share of plot No. 140-8-10-19 but the restriction would be that she would not have any right to transfer the said property that would pass on to her, but this restriction will not apply to Jagan Singh."

3. It is the case of the appellant that he has been cultivating this plot No. 140-8-10-19, and further that he and the above referred Dhanwanti (the first respondent herein) each took half share of the crop therefrom. It was also his case that Dhanwanti was not the lawfully married wife of Umrao Singh, and after the death of Umrao Singh she had planned to dispose of the above plot of land in favour of one Ghasita Ram S/o Ram Chander Singh (the respondent No.2 herein). According to the appellant, she did not have such right, and therefore he filed the above suit for permanent injunction to restrain her from disposing of this particular parcel of land either to this Ghasita Ram or otherwise.

4. The respondent No.1 defended the suit, and contended that she was a lawfully married wife of Umrao Singh. She submitted that the will was a forged one, and that the defendant No.2 had no connection with this parcel of land. The defendant No.2 contended in his written statement that he had been wrongfully joined in the suit, and that the respondent No.1 herself continued in possession of the land.

5. The learned Civil Judge who tried the suit, framed the issue as to whether the appellant was entitled to prohibit the respondent No.1 from selling half share of the disputed land as claimed by him. The learned Judge held that the will was a duly executed one, and also noted that it had been registered. He however held that the respondent No.1 will have the benefit of the provision of Section 14 (1) of the Hindu Succession Act, 1956, and in view thereof the property possessed by the respondent No.1 will have to be held as her wholly owned property, and that she was not a restricted owner. The learned Judge declined to accept the submission on behalf of the

appellant that the right of the respondent No.1 in the land was only on account of the will made by deceased Umrao Singh. He declined to accept that her right was restricted under Section 14 (2) of the Hindu Succession Act, 1956, and dismissed the suit.

6. The appellant carried the matter in appeal, but the learned Additional District Judge also dismissed the appeal. Thereafter, when the appellant filed the Second Appeal to the High Court, the High Court dismissed the same by holding that no substantial question of law arose in the matter. The learned Judge held that under section 152 of the U.P. Act a bhumidhar had a right to transfer his property, and such right was subject only to the restrictions contained in the Act as provided in section 152 (1) itself. The learned High Court Judge referred to Section 169 (2) of the U.P. Act, and observed that the said Sub-section which restricted the right of a female bhumidhar to bequeath her holding by will has now been deleted. The learned Judge went on to hold that the right to transfer cannot be restricted either by contract or by a will of a tenure holder, and that the restriction contained in the will that the legatee would not have a right to transfer the property was repugnant to the incidents of a bhumidhari tenure under the U.P. Act.

7. The present appeal raises principally two questions of law. Firstly, whether section 169 of the U.P. Act prohibits a bhumidhar with transferable rights from imposing a restriction on the rights of a legatee by limiting the bequest to the life time of the legatee. Secondly, whether such a restricted bequest is permissible in view of section 14 (2) of the Hindu Succession Act, 1956. This Court while admitting this Civil Appeal on 4.4.2005 passed the following order:-

"*Leave granted.*

Until further orders, status quo as it exists today shall be maintained.

Let the original record be requisitioned."

Consideration of the rival submission

8. The learned counsel for the appellant submitted that the Courts below had completely misdirected themselves. He pointed out that the present bequest by Umrao Singh would be clearly covered under Sub-section (1) of Section 169 of the U.P. Act, read with Section 14 (2) of Hindu Succession Act, 1956, and that the right of a bhumidhar to deal with his own property had not been taken away in any way. Besides, this provision had already been interpreted in the judgments of this Court. The counsel for the respondents on the other hand submitted that all the courts below had taken a consistent view in this matter, and this Court should not interfere therein.

Whether the bequest in favour of respondent No.1 created a restricted estate?

9. For deciding the issue raised in this appeal, we may refer to Section 169 of the U.P. Act which reads as follows:-

"169. Bequest by a bhumidhar – (1) A [bhumidhar with transferable rights] may by will bequeath his holding or any part thereof, except as provided in [sub-section(2-A)].

(2) [***]

[(2-A) In relation to a [bhumidhar with transferable rights] belonging to a Scheduled Caste or Scheduled Tribe, the provisions of [sections 157-A and 157-B] shall apply to the making of bequests as they apply to transfer during lifetime.]

(3) Every Will made under provision of sub-section (1) shall, notwithstanding anything contained in any law, custom or usage, [be in writing, attested by two persons and registered].

(*** deleted by U.P. Act 30 of 1975.)

If we read this Section, it is very clear that Sub-section (1) permits a bhumidhar to bequeath his holding or any part thereof by making a will. Sub-section (3) however requires that this has to be done in writing, and the will has to be attested by two persons and it has to be registered. The only restrictions on this right are those provided under Sub-section (2), which in turn refers to sections 157-A and 157-B of the said Act. Section 157-A provides that in relation to a bhumidhar belonging to a Scheduled Caste, such land cannot be transferred to a person not belonging to a Scheduled Caste except with the prior approval of the collector. The other restriction is under section 157-B viz. that the land belonging to a Scheduled Tribe cannot be transferred except to a person belonging to a Scheduled Tribe.

10. (i) In the present case the facts are very clear. Umrao Singh was owner of the concerned land. He made a will, it was duly attested by two persons, and it was registered as required by section 169 (3) of the U.P. Act. Under that will he created a restricted interest in favour of respondent No.1 in plot No. 140-8-10-19. This cannot be said to be impermissible under section 169 (1) of the U.P. Act. It is nobody's case that section 169 (2) thereof applied to the present case.

(ii) Section 14 of the Hindu Succession Act, 1956 undoubtedly declares in Sub-section (1) thereof that a property of a female hindu is her absolute property, but it creates an exception in Sub-section (2) which provides that Sub-section (1) will not apply to any property which is given away by instruments such as by way of a gift or under a will. In the present case Umrao Singh had made a will, and under that he had created a restricted estate in favour of respondent No.1 which was permissible under this section 14 (2).

Section 14 of the Hindu Succession Act, 1956 reads as follows:-

> *"14. Property of a female Hindu to be her absolute property.-* (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.
>
> Explanation – In this sub-section, 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance of arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act."
>
> (2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

11. The issue raised in this Civil Appeal is no-longer res-intigra. In *Navneet Lal Vs Gokul and others* reported in 1976 (1) SCC 630, a bench of three judges of this court was concerned with an almost identical situation, wherein a life estate was created by the testator in favour of his wife. After going through the will, this Court held that it was permissible for the testator to create a limited estate in favour of his wife by making a will. Later, in *Amar Singh Vs. Assistant Director of Consolidation* reported in 1988 (4) SCC 143, this Court in terms held in paragraph 5 as follows:-

"The right of a bhumidhar with transferable rights to bequeath his holding or any part thereof by a will is

expressly recognised by Section 169 (1) of the Act".

12. In Amar Singh (supra) this Court explained an earlier judgment *Ramji Dixit Vs. Bhirgunath* reported in AIR 1968 SC 1058. In that matter after the death of the owner, the land had devolved upon his wife as a Hindu widow's estate. A dispute arose about the alienations effected by her, and it was held that undoubtedly she had the right to alienate. But as can be seen, in that matter the estate had devolved by inheritance, and not by will. That is why in para 8 of Amar Singh (Supra) this Court specifically observed that the facts in **Ramji Dixit** were quite distinguishable. Besides, as held by this Court in *Mst. Karmi Vs. Amru* reported in AIR 1971 SC 745, a widow who succeeds to the property of her deceased husband on the strength of his will, cannot claim any right other than those conferred by the will. Thus life estate given to her under a will cannot become an absolute estate under the provisions of Section 14 (2) of the Hindu Succession Act, 1956.

13. The learned Single Judge of the High Court held the transfer by respondent No.1 was not invalid since sub-section (2) of Section 169 of the U.P. Act had been deleted, which has been so done by U.P. Act No. 30 of 1975. This erstwhile sub-section (2) read as follows:-

> "(2) No bhumidhar entitled to any holding or part in the right of a [widow, widow of a male lineal descendant in the male line of descent, mother, daughter, father's mother, son's daughter, sister or half-sister being the daughter of the same father as the deceased], may bequeath by will such holding or part."

As can be seen, the purport behind this sub-section is to prohibit a bhumidhar entitled to any holding in the right of a female Hindu from bequeathing such holding by a will. The learned Judge clearly erred in reading this sub-section (2), and the effect of its deletion. He ignored that the present case was one falling under sub-section (1) of Section 169 and not under

sub-section (2) since in the present matter the appellant was asserting his right with respect to the land which he received by way of the will of Umrao Singh. Respondent No.1 was entitled to a share in the land on account of that will only, and not on the basis of her own independent right. The will giving her a share had restricted it to her life time which Umrao Singh was entitled to do under Section 169 (1) of the U.P. Act, and the same would remain restricted in view of Section 14 (2) of Hindu Succession Act, 1956. . The learned Judge had relied on section 152 (1) of the U.P. Act, but that section also cannot be read to take away the right of a bhumidhar to bequeath his holding by a will because section 152 (1) states as follows:-

> *"152. Bhumidhari interest when transferable*- (1) The interest of a bhumidhar with transferable rights shall subject to the conditions hereinafter contained, be transferable."

The present case is one of a bhumidhar bequeathing his land by a will, and as held in Amar Singh (supra) the same was clearly permissible. The bequest made under section 169 (1) in favour of a female Hindu, if it is a restricted one, shall remain a restricted one under sub-section (2) of section 14 of Hindu Succession Act, since the same will be governed by the terms of the will. The learned Single Judge of the High Court thus clearly erred in holding that the bequest in favour of Respondent No. 1 was not a restricted one. In view of what is stated above, the Courts below erred in dismissing the suit filed by the appellant. In the circumstances, the judgments rendered by the High Court as well as by the Additional District Judge and by the Civil Judge are clearly erroneous in law and on facts.

The question of applicability of doctrine of 'lis pendes'

14. However, there are some subsequent developments which we must note. On 15.02.2010, one Smt. Poonam Rajput filed Interim Applications Nos. 3 and 4 of 2010 in this Civil Appeal. In I.A No. 3 she has applied for being impleaded as

respondent, and in I.A No. 4 she sought exemption from filing the official translation of the annexures to I.A No. 3 of 2010. By its order dated 10.8.2010, this Court directed that both these I.A. Nos. 3 & 4 to be listed alongwith the main appeal. We have heard the learned senior counsel for the applicant in support of the I.A.s and the counsel for the appellant in reply thereto. In I.A No. 3 the applicant has claimed that the respondent No. 1 Dhanwanti has executed a registered sale deed in her favour on 27.9.2004, and her name had been directed to be mutated in the revenue records vide order dated 4.11.2004, and recorded in the Khatauni on 13.5.2005. She has submitted that this sale had taken place at a time when the suit No. 121/1994 and the First Appeal No. 97/2002 filed by the appellant herein had been dismissed on 28.7.2004. She claims to be a bonafide purchaser of the land in dispute for a good price of Rs. 3,35,000/-.

15. (i) The applicant further stated that in view of this sale, the appellant herein filed another suit No. 731/2004 on 8.10.2004 in the Court of Civil Judge (S.D.) Bijnaur, against respondent No. 1 herein, wherein he joined the applicant as defendant No. 2. The appellant had prayed for cancellation of the said sale deed dated 27.9.2004. He had sought a permanent injunction restraining the defendants from taking possession of the disputed land.

(ii) It is further stated that in this I.A No. 3, that respondent No. 1 and the applicant opposed the suit, and prayed for its dismissal by filing a joint written statement on 28.11.2004 wherein it was contended that the respondent No. 1 was the owner of half share of the disputed land, and she had been cultivating the same. It was also submitted that the first suit having been dismissed, a second suit for the same subject matter was not maintainable.

(iii) It is pointed out that on 12.5.2005 the appellant filed an application in this suit No. 731/2004, and placed it on record that he had filed SLP (C) No. 6131/2005 (which is numbered

as Civil Appeal No. 2467/2005 after the leave having been granted i.e. the present appeal) against the judgment of the Allahabad High Court arising out of the first suit. He placed it on record that the Civil Appeal was admitted on 4.4.2005, and that this court had directed maintenance of status quo in respect of the disputed land. The appellant had therefore prayed that the second suit filed by himself be stayed till the decision on the SLP by this Court, so that the multiplicity of the proceedings can be avoided.

(iv) It was thereafter pointed out that the respondent No. 1 and applicant had opposed that application for stay of the second suit by their reply dated 22.8.2005. Amongst other it was contended by them that certified copy of the order of this Court had not been filed.

(v) It is further stated in this I.A No. 3 of 2010 that this suit No. 731/2004 remained pending for some time, and it came to be dismissed for non-prosecution on 27.1.2010.

16. This I.A. No. 3 of 2010 has been opposed by the legal representatives of the appellant who have come on record consequent upon his death. They have stated in their reply that they had no knowledge about this second suit No. 731/2004 which was filed by the appellant, their predecessor in interest. In any case they contend that the transfer made by the respondent No. 1 in favour of the applicant was 'pendente lite', and therefore will have to be subject to the final decision of the Civil Appeal. Inasmuch as a plea based on the principle of 'lis pendens' has been raised, we may now examine the applicability thereof to the facts of the present case.

17. The facts which have come on the record through I.A. No.3 and 4 of 2010 and the reply thereto disclose that the respondent No. 1 had entered into the agreement of sale of the land in dispute with applicant Smt. Poonam Rajput on 27.9.2004 when suit No. 121/1994 and Civil Appeal No. 97/2002 filed by the appellant had already been dismissed by

orders dated 13.12.2002 and 28.7.2004 respectively. It is however necessary to note that this sale is within the period of limitation when the second appeal could have been filed. The appellant however chose first to file the second suit on 8.10.2004 for cancellation of the sale deed, wherein he joined the aforesaid Smt. Poonam Rajput as respondent No. 2. (In the meanwhile he obtained the certified copy of the judgment and order in the First Appeal on 5.8.2004.) Thereafter, he filed the Second Appeal on 1.11.2004 which was filed within the period of limitation. This appeal was dismissed on 18.11.2004 at the admission stage, though after hearing both the parties. The appellant then filed the present Special Leave Petition. Special Leave was granted in the present matter, and an order of status quo came to be passed on the SLP on 4.4.2005. The original appellant has however not disclosed either in the Second Appeal or in the SLP that he had filed the second suit for setting aside the sale deed. Consequently, it did not come on record at that stage that the applicant claims to have purchased the land even before filing of the Second Appeal at a time when there was no order of stay in favour of the appellant. It is also material to note that thereafter the appellant herein had applied on 12.5.2005 for stay of his own second suit by pointing out about the pendency of the present proceedings and the order of status quo having been passed therein. This second suit came to be dismissed for non-prosecution on 27.1.2010. It is contended by the legal representatives of the appellant in their reply to I.A No. 3/2010, that they were not aware about this second Suit No. 731/2004 filed by their predecessor in title, and that is how, according to them the suit came to be dismissed for default.

18. Section 52 of the Transfer of Property Act, 1882 (T.P. Act in short) which lays down the principle of 'lis-pendens' reads as follow:-

"52. Transfer of property pending suit relating thereto – During the pendency in any Court having authority within

the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government…. Or any suit or proceeding which is not collusive and in which any right or immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.

Explanation- For the purpose of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed off by a final decree or order and complete satisfaction or discharge or such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

19. The broad principle underlying section 52 of the T.P. Act is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. Even after the dismissal of a suit, a purchaser is subject to lis pendens, if an appeal is afterwards filed, as held in *Krishanaji Pandharinath Vs. Anusayabai* AIR (1959) Bom 475. In that matter the respondent (original plaintiff) had filed a suit for maintenance against her husband and claimed a charge on his house. The suit was dismissed on 15.7.1952 under order IX, Rule 2, of Code of Civil Procedure 1908, for non-payment of process fee. The husband sold the house immediately on 17.7.1952. The respondent applied for restoration on 29.7.1952, and the suit was restored leading to a decree for maintenance and a charge was declared on the house. The plaintiff impleaded the appellant to the darkhast as purchaser. The appellant resisted

the same by contending that the sale was affected when the suit was dismissed. Rejecting the contention the High Court held in para 4 as follows:-

> ".....In section 52 of the Transfer of Property Act, as it stood before it was amended by Act XX of 1929, the expression "active prosecution of any suit or proceeding" was used. That expression has now been omitted, and the Explanation makes it abundantly clear that the 'lis' continues so long as a final decree or order has not been obtained and complete satisfaction there of has not been rendered. At page 228 in Sir Dinshah Mulla's "Transfer of Property Act", 4th Edition, after referring to several authorities, the law is stated thus:
>
> "Even after the dismissal of a suit a purchaser is subject to 'lis pendens', if an appeal is afterwards filed."
>
> If after the dismissal of a suit and before an appeal is presented, the 'lis' continues so as to prevent the defendant from transferring the property to the prejudice of the plaintiff, I fail to see any reason for holding that between the date of dismissal of the suit under Order IX Rule 2, of the Civil Procedure Code and the date of its restoration, the 'lis' does not continue.

20. It is relevant to note that even when Section 52 of T.P. Act was not so amended, a division bench of Allahabad High Court had following to say in *Moti Chand Vs. British India Corporation* AIR (1932) Allahabad 210:-

> "The provision of law which has been relied upon by the appellants is contained in S. 52, T.P. Act. The active prosecution in this section must be deemed to continue so long as the suit is pending in appeal, since the proceedings in the appellate Court are merely continuation of those in the suit: see the case of *Gobind Chunder Roy v. Guru Chur Kurmokar* 1888 15 Cal. 94."

21. If such a view is not taken, it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail. The explanation to this section lays down that the pendency of a suit or a proceeding shall be deemed to continue until the suit or a proceeding is disposed of by final decree or order, and complete satisfaction or discharge of such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force. In the present case, it would be canvassed on behalf of the respondent and the applicant that the sale has taken place in favour of the applicant at a time when there was no stay operating against such sale, and in fact when the second appeal had not been filed. We would however, prefer to follow the dicta in Krishanaji Pandharinath (supra) to cover the present situation under the principle of lis-pendens since the sale was executed at a time when the second appeal had not been filed but which came to be filed afterwards within the period of limitation. The doctrine of lis-pendens is founded in public policy and equity, and if it has to be read meaningfully such a sale as in the present case until the period of limitation for second appeal is over will have to be held as covered under section 52 of the T.P. Act.

22. *In the circumstances, we hold as follows:-*

(i) The judgment and order dated 13.2.2002 rendered by the Civil Judge, Junior Division, Najibabad in the suit No. 121/ 1994, the judgment and order dated 28.7.2004 passed by the Additional Distt. Judge, Bijnaur in Civil Appeal No. 97 of 2002, and the one dated 18.11.2004 by a learned Single Judge of Allahabad High Court in Second Appeal No. 982 of 2004 will have to be held as not laying down the correct law and will therefore have to be set aside. The appellant had sought a permanent injunction against the respondent No. 1 from selling

the concerned parcel of land either to the respondent No. 2 or otherwise. That sale had not taken place. The relief in Suit No. 121/1994 will therefore have to be moulded to grant only a declaration that the respondent No. 1 had no right to sell the disputed parcel of land.

(ii) The applicant Smt. Poonam Rajput has claimed that the said parcel of land has been sold to her by the first respondent subsequently on 27.9.2004. The second suit filed by the appellant bearing Suit No. 731 of 2004 in the Court of Civil Judge, Senior Division, Bijnaur sought to set-aside the sale in favour of the applicant. It has come to be dismissed for default though the legal representatives of the appellant contend that it was so dismissed since they were not aware about that suit. However, although we have dealt with the applicability of the principle of lis pendens to the present matter, the order concerning the second sale passed in the second suit is not under challenge before us. It will be for the legal representatives of the appellant to apply to that court for appropriate orders, and it will be for that court to decide their application in accordance with law after hearing all the parties including the applicant.

(iii) Since, the learned senior counsel for the applicant has been heard in support of the I.A. No.3 and 4 of 2010 no separate order is necessary thereon. The same are disposed of accordingly.

23. Hence, we pass the following order:-

(a) The impugned judgment and order dated 13.2.2002 rendered by the Civil Judge, Junior Division, Najibabad, U.P. in the Suit No. 121/1994, and those arising in the appeals therefrom rendered by the Additional District Judge, Bijnaur and the High Court of Allahabad are held to be bad in law and are hereby set aside.

(b) There shall be a declaration in favour of the appellant that the respondent No. 1 had no right to sell the disputed parcel of land. Suit No. 121/1994 filed by the appellant in the Court of Civil Judge, Junior Division, Najibabad, U.P. shall stand decreed to that extent.

24. The Civil Appeal and I.A. Nos. 3 and 4 of 2010 stand disposed of as above. The parties will bear their own costs.

N.J. Matters disposed of.

D. SUDHAKAR & ORS.
v.
D.N. JEEVARAJU & ORS.
(Civil Appeal Nos. 4510-4514 of 2011)

MAY 13, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Legislature – Independent legislators extending support to Chief Minister in the formation of the Bharatiya Janata Party led Government and also joining his Council of Ministers – Status of such independent legislators – Held: It cannot be said that such independent legislators had sacrificed their independent identity.

The question which arose for consideration in these appeals is whether by extending support to 'Y'-Chief Minister in the formation of the Bharatiya Janata Party led Government, the appellants-independent legislators had sacrificed their independent identity.

Allowing the appeals, the Court

HELD: The submission that by extending support to 'Ý' in the formation of the Bharatiya Janata Party led Government the appellants had sacrificed their independent identity cannot be accepted. The fact that the said appellants also joined the Council of Ministers does not also point to such an eventuality. An independent legislator does not always have to express his intention to join a party in writing, but the mere extension of support to 'Y' and the decision to join his Cabinet, was not sufficient to indicate that the appellants had decided to join and/or had actually joined the Bharatiya Janata Party, particularly on account of the subsequent conduct in which they were treated

differently from the Members of the Bharatiya Janata Party. Therefore, the decision of the Speaker as upheld by the High Court is not sustainable. The orders passed by the Speaker and by the Full Bench of the High Court are set aside. The detailed judgment would follow. [Paras 2, 3 and 5]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4510-4514 of 2011.

From the Judgment & Order dated 14.2.2011 of the High Court of Karnataka at Bangalorein Writ Petition No. 32674-32678 of 2010 (GM-RES).

WITH

C.A. No. 4517-4521 of 2011.

P.P. Rao, K.K. Venugopal, Satpal Jain, P.S. Narsimha, Dinesh Dwivedi, Jaideep Gupta, Soli J. Sorabji, Prashant Kumar Mahalakshmi Pavani, Bimola Devi, Triveni Potekar, Ustav Sidhu, Apeksha Sharan, Filza Moonis, Amarjit Singh, Bedi, Prashant Kumar, Pooja Dhar, Gopal, Chandra Bhushan Prasad, Bhupender Yadav, Ruchi Kohli, Saurabh Shamsherty, Anish Kumar Gupta, M.B. Nargan, Deep Shikha Bharati, P.V. Yogeshwaran, Vikramjeet Banerjee, M.B. Nargund, Prasanna Deshmukh, Rajeev Kr. Singh, Vikramjeet, Pritish Kapoor, Jyotika Kalra for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. We are unable to accept the submission made on behalf of the respondents that by extending support to Shri Yeddyurappa in the formation of the Bharatiya Janata Party led Government the appellants had sacrificed their independent identity. The fact that the said appellants also joined the Council of Ministers does not also point to such an eventuality. It is no

doubt true that an independent legislator does not always have to express his intention to join a party in writing, but the mere extension of support to Shri Yeddyurappa and the decision to join his Cabinet, in our view, was not sufficient to indicate that the appellants had decided to join and/or had actually joined the Bharatiya Janata Party, particularly on account of the subsequent conduct in which they were treated differently from the Members of the Bharatiya Janata Party.

3. We are, therefore, unable to sustain the decision of the Speaker as affirmed by the High Court and we, accordingly, allow the appeals and set aside the orders passed by the Speaker on 11.10.2010 and by the Full Bench of the High Court on 14.2.2011.

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

5. Detailed judgment will follow.

N.J. Appeals allowed.

D. SUDHAKAR & ORS.
v.
D.N. JEEVARAJU & ORS.
(Civil Appeal Nos.4510-4514 of 2011)

JANUARY 25, 2012

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

KARNATAKA LEGISLATIVE ASSEMBLY (DISQUALIFICATION OF MEMBERS ON GROUND OF DEFECTION) RULES, 1986:

rr.6 and 7 – Extension of support by appellants-Independents to BJP led Government and joining Government as Cabinet Ministers – Withdrawal of support by appellants – Speaker of Legislative Assembly disqualifying them on the ground that they had joined BJP after their elections as independent candidates – Held: Extension of support by Independents to or joining the government as Minister by independents would not by itself mean that the independents have joined the political party which formed the government – There was no evidence to show that the appellants were accepted and treated as members of the BJP – The appellants while participating in the meetings of the BJP Legislature Party were treated differently from members of BJP and were considered to be only lending support to the Government led by 'Y' without losing their independent status – Mere participation in the rallies or public meetings organised by the BJP would not mean that the appellants had joined the BJP – Even in the Registers maintained by the Speaker under rr.3 and 4, the appellants were shown as Independents – Thus, by extending support to 'Y' in the formation of the BJP led government, the appellants cannot be said to have sacrificed their independent identities – In view of finding that the appellants had not joined any political party, the order of disqualification passed by the Speaker was

against the Constitutional mandate in paragraph 2(2) of the Tenth Schedule of the Constitution – Constitution of India, 1950 – Tenth Schedule.

rr.6 and 7 – Disqualification application against appellants on the ground that having joined BJP led government after their elections as independent candidates they violated para 2(2) of the Tenth Schedule of the Constitution – Show-Cause Notices issued by Speaker – Validity of – Held: Evidence on record that Show-Cause Notices issued to appellants were not in conformity with the provisions of rr.6 and 7 as the appellants were not given 7 days' time to reply to Show-Cause Notices as contemplated u/r.7(3) of Rules – The Speaker wrongly relied upon the affidavit filed by the State President of the BJP, although there was nothing on record to support the allegations which were made therein – In fact, the said affidavit was not served on the appellants – Thus failure of the Speaker to cause service of copies of the affidavit affirmed by the State President of the BJP amounted to denial of natural justice to the appellants, besides revealing a partisan attitude in the Speaker's approach in disposing of the Disqualification Application – Speaker's order being in violation of rr.6 and 7 and rules of natural justice , such violation resulted in prejudice to appellants – Even if rr.6 and 7 were only directory and not mandatory, violation of rr.6 and 7 resulting in violation of rules of natural justice vitiated the order of the Speaker and held liable to be set aside

CONSTITUTION OF INDIA, 1950: Tenth Schedule – Paragraph 2 – Held: The expression of finality in paragraph 2 of the Tenth Schedule to the Constitution did not bar the jurisdiction of the superior Courts under Articles 32, 226 and 136 of the Constitution to judicially review the order of the Speaker – Under paragraph 2 of the Tenth Schedule to the Constitution, the Speaker discharges quasi-judicial functions, which makes an order passed by him in such capacity, subject to judicial review.

The appellants were elected to the 13th Karnataka Legislative Assembly as independent candidates in the elections held in May 2008. The appellants declared their support to 'Y' who was elected as the leader of the Bharatiya Janata Party (B.J.P.) Legislature Party. On 30th May, 2008, 'Y' was sworn in as Chief Minister of Karnataka along with the appellants as Cabinet Ministers and on 4.6.2008, he proved his majority in the House.

On 6th October, 2010, the appellants submitted separate letters to the Governor of Karnataka expressing their lack of confidence in the Government headed by 'Y' and withdrawal of their support. The Governor on the very same day wrote a letter to the Chief Minister regarding the withdrawal of support of the appellants (5 independent MLAs) and 13 B.J.P. MLAs and requesting him to prove his majority on the Floor of the House on or before 12th October, 2010 by 5.00 p.m. On the very same day, 'Y' as the leader of the B.J.P. in the Legislative Assembly, filed an application before the Speaker under Rule 6 of the Karnataka Legislative Assembly (Disqualification of Members on Ground of Defection) Rules, 1986, for a declaration that all the 13 MLAs elected on B.J.P. tickets along with two other independent MLAs, had incurred disqualification under the Tenth Schedule to the Constitution. Immediately thereafter, on 7th and 8th October, 2010, the Speaker issued Show-Cause Notices to the concerned MLAs and the appellants informing them of the Disqualification Application filed by 'Y' and also informing them that by withdrawing support to the Government led by 'Y', they were disqualified from continuing as Members of the House. They and the B.J.P. MLAs to whom show-cause notices were issued were given time till 5.00 p.m. on 10th October, 2010, to submit their objection, if any, to the said application. Another disqualification application was filed by the voters from the constituencies represented by the appellants. After

concluding the hearing on 10th October, 2010 by 5.00 p.m., the Speaker passed detailed orders holding that the appellants and the other MLAs stood disqualified as Members of the House. The Full Bench of the High Court upheld the said order of disqualification.

The question which arose for consideration in the instant appeals was whether by extending support to 'Y' in the formation of the BJP led government, the appellants sacrificed their independent identities.

Allowing the appeals, the Court

HELD: 1.1. There was no evidence to show that the appellants had at any time joined the B.J.P. Even as independents, the appellants could extend support to a government formed by a political party and could become a Minister in such government. There is no legal bar against such extension of support or joining the government. Hence, such extension of support or joining the government as Minister by an independent would not by itself mean that the appellants have joined the political party which formed the government. There was also no evidence to show that the appellants were accepted and treated as members of the B.J.P. by that political party. The complainants before the Speaker had no grievance about the appellants supporting the B.J.P. Government and becoming Ministers in the government for more than two years. Only when the appellants withdrew support to the government led by 'Y' and a Confidence Vote was scheduled to be held, the issue of alleged disqualification was raked up by the complainants. The appellants, even while participating in the meetings of the B.J.P. Legislature Party, were shown separately in a category different from the other participants in such meetings, which clearly indicated that the appellants, though Ministers in the Government led by 'Y' were treated differently from members of B.J.P. and were considered

to be only lending support to the Government led by 'Y' without losing their independent status. Mere participation in the rallies or public meetings organised by the B.J.P. would not mean that the appellants had joined the B.J.P. The appellants who had been elected as Independents declared their support to 'Y' as Chief Minister on 26th May, 2008. In the Notification dated 27th May, 2008 constituting the Legislative Assembly, the appellants were shown as Independents. In the statement submitted by the Leader of the B.J.P. Legislature Party, the names of appellants were not included in the list of B.J.P. members. In the Registers maintained by the Speaker under Rules 3 and 4 of the Disqualification Rules, the appellants were shown as Independents and at any time after they were sworn in as Ministers on 30th May, 2008, no change was effected in the Registers. No information was furnished either by the appellants or by the B.J.P. Legislature Party to include the appellants among B.J.P. members. Thus, as per the Records of the Legislative Assembly, the appellants were not members of B.J.P. when the order of disqualification was passed by the Speaker. [Paras 46-47]

1.2. By extending support to 'Y' in the formation of the B.J.P. led government, the appellants cannot be said to have sacrificed their independent identities. The fact that the said appellants also joined the Council of Ministers would also not point to such an eventuality. It is no doubt true that an independent legislator does not always have to express his intention to join a party in writing, but the mere extension of support to 'Y' and the decision to join his Cabinet were not sufficient to conclude that the appellants had decided to join and/or had actually joined the B.J.P. particularly on account of the subsequent conduct in which they were treated differently from the Members of the B.J.P. In view of finding that the appellants had not joined any political

party as alleged, the order of disqualification passed by the Speaker was against the Constitutional mandate in para 2(2) of the Tenth Schedule of the Constitution. [Para 48]

2. The Show-Cause Notices issued to the appellants were not in conformity with the provisions of Rules 6 and 7 of the Karnataka Legislative Assembly (Disqualification of Members on Ground of Defection) Rules, 1986, inasmuch as, the appellants were not given 7 days' time to reply to the Show-Cause Notices as contemplated under Rule 7(3) of the said Rules. Without replying to the said objection raised, the Speaker avoided the issue by stating that it was sufficient for attracting the provisions of paragraph 2(2) of the Tenth Schedule to the Constitution that the appellants had admitted that they had withdrawn support to the Government led by 'Y'. The Speaker further recorded that the appellants had been represented by counsel who had justified the withdrawal of support to the Government led by 'Y'. Without giving further details, the Speaker observed that the Disqualification Rules have been held to be directory and not mandatory. The Speaker wrongly relied upon the affidavit filed by the State President of the B.J.P., although there was nothing on record to support the allegations which had been made therein. In fact, the said affidavit had not been served on the appellants. Since the State President of the B.J.P. was not a party to the proceedings, the Speaker should have caused service of copies of the same on the appellants to meet the allegations made therein. Coupled with the fact that the Speaker had violated the provisions of Rule 7(3) of the Disqualification Rules in giving the appellants less than 7 days' time to reply to the Show-Cause Notices issued to them, failure of the Speaker to cause service of copies of the affidavit affirmed by the State President of the B.J.P. amounted to denial of natural justice to the appellants,

besides revealing a partisan attitude in the Speaker's approach in disposing of the Disqualification Application filed by 'Y'. If the Speaker had wanted to rely on the statements made in the said affidavit, he should have given the appellants an opportunity of questioning the deponent as to the truth of the statements made in his affidavit. This conduct on the part of the Speaker also indicated the hot haste with which he disposed of the Disqualification Application, raising doubts as to the *bona fides* of the action taken by him. The explanation given by the Speaker as to why the notices to show cause had been issued to the appellants under Rule 7 of the Disqualification Rules, giving the appellants only 3 days' time to respond to the same is not very convincing. There was no compulsion on the Speaker to decide the Disqualification Applications in such a great hurry, within the time specified by the Governor for the holding of a Vote of Confidence in the government headed by 'Y'. Such a course of action was adopted by the Speaker on 10th October, 2010, since the Vote of Confidence on the Floor of the House was to be held on 12th October, 2010. The Speaker's order was in violation of Rules 6 and 7 of the Disqualification Rules and the rules of natural justice and that such violation resulted in prejudice to the appellants. Therefore, even if Rules 6 and 7 are only directory and not mandatory, the violation of Rules 6 and 7 resulting in violation of the rules of natural justice has vitiated the order of the Speaker and it is liable to be set aside. [Para 50]

3. <u>Manner in which the Disqualification Applications were proceeded with and disposed of by the Speaker.</u> Apart from the fact that the appellants were not given 7 days' time to file their reply to the Show-Cause Notices, the High Court did not give serious consideration to the fact that even service of the Show-Cause Notices on the appellants and the 13 MLAs belonging to the B.J.P. had

not been properly effected. Furthermore, the MLAs who were sought to be disqualified were also not served with copies of the Affidavit filed by State President of the B.J.P., although the Speaker relied heavily on the contents thereof in arriving at the conclusion that they stood disqualified under paragraph 2(1)(a)/2(2) of the Tenth Schedule to the Constitution. It is obvious from the procedure adopted by the Speaker that he was trying to meet the time schedule set by the Governor for the trial of strength in the Assembly and to ensure that the appellants and the 13 B.J.P. MLAs stood disqualified prior to the date on which the Floor test was to be held. Having concluded the hearing on 10th October, 2010 by 5.00 p.m., the Speaker passed detailed orders holding that the appellants and the other MLAs stood disqualified as Members of the House. The Vote of Confidence took place on 11th October, 2010, in which the disqualified Members could not participate, and in their absence 'Y' was able to prove his majority in the House. Unless it was to ensure that the Trust Vote did not go against the Chief Minister, there was hardly any reason for the Speaker to have taken up the Disqualification Applications in such a great haste. [Para 51-53]

4. On the question of justiciability of the Speaker's order on account of the expression of finality in paragraph 2 of the Tenth Schedule to the Constitution, it is now well-settled that such finality did not bar the jurisdiction of the superior Courts under Articles 32, 226 and 136 of the Constitution to judicially review the order of the Speaker. Under paragraph 2 of the Tenth Schedule to the Constitution, the Speaker discharges quasi-judicial functions, which makes an order passed by him in such capacity, subject to judicial review. [para 56]

Rajendra Singh Rana & Ors. v. Swami Prasad Maurya & Ors. **(2007) 4 SCC 270: 2007 (2) SCR 591;** *Dr. Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council & Ors.* **(2004) 8 SCC 747: 2004 (5) Suppl. SCR 692;** *Jagjit Singh v. State of Haryana* **(2006) 11 SCC 1: 2006 (10) Suppl. SCR 521;** *G. Vishwanath V. Speaker* **(1996) 3 SCC 353;** *Kihoto Hollohan v. Zachillhu* **(1992) Supp.2 SCC 651: 1992 (1) SCR 686;** *Ravi S. Naik v. Union of India* **(1994) Suppl.2 SCC 641: 1994 (1) SCR 754;** *Mayawati v. Markandeya Chand* **(1998) 7 SCC 517: 1998 (2) Suppl. SCR 204;** *Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad* **(2005) 11 SCC 314: 2005 (1) SCR 624;** *E.P. Royappa v. State of Tamil Nadu* **(1974) 4 SCC 3: 1974 (2) SCR 348 – referred to.**

Case Law Reference:

2007 (2) SCR 591	**referred to**	**Para 11,20**
2004 (5) Suppl. SCR 692	**referred to**	**Para 11,29,32**
2006 (10) Suppl. SCR 521	**referred to**	**Para 11,29,35**
(1996) 3 SCC 353	**referred to**	**Para 11,37**
1992 (1) SCR 686	**referred to**	**Para 15, 20,31, 36,37**
1994 (1) SCR 754	**referred to**	**Para 20,32,35**
1998 (2) Suppl. SCR 204	**referred to**	**Para 20**
2005 (1) SCR 624	**referred to**	**Para 33**
1974 (2) SCR 348	**referred to**	**Para 33**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4510-4514 of 2011.

From the Judgment & Order dated 14.2.2011 of the High Court of Karnataka at Bangalorein Writ Petition No. 32674-32678 of 2010 (GM-RES).

WITH

C.A. No. 4517-4521 of 2011.

P.P. Rao, K.K. Venugopal, Satpal Jain, P.S. Narsimha, Dinesh Dwivedi, Jaideep Gupta, Soli J. Sorabji, Prashant Kumar Mahalakshmi Pavani, Bimola Devi, Triveni Potekar, Ustav Sidhu, Apeksha Sharan, Filza Moonis, Amarjit Singh, Bedi, Prashant Kumar, Pooja Dhar, Gopal, Chandra Bhushan Prasad, Bhupender Yadav, Ruchi Kohli, Saurabh Shamsherty, Anish Kumar Gupta, M.B. Nargan, Deep Shikha Bharati, P.V. Yogeshwaran, Vikramjeet Banerjee, M.B. Nargund, Prasanna Deshmukh, Rajeev Kr. Singh, Vikramjeet, Pritish Kapoor, Jyotika Kalra for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. The operative portion of this judgment was pronounced on 13th May, 2011. The full text of the judgment is now being pronounced.

2. Civil Appeal Nos. 4510-4514 of 2011 arising out of SLP(C) Nos. 5966-5970 of 2011 are filed by five Independent Members of the Karnataka Legislative Assembly against a judgment of the Full Bench of the Karnataka High Court upholding an order passed by the Speaker of the Karnataka Legislative Assembly disqualifying them under Paragraph 2(2) of Tenth Schedule of the Constitution of India on the ground that they had joined the Bharatiya Janata Party (BJP) after their election to the Legislative Assembly as Independent candidates. The said order of disqualification was passed by the Speaker on Disqualification Application No.2 of 2010 filed by Shri D.N. Jeevaraju, Chief Whip, BJP, Karnataka Legislative Assembly and Shri C.T. Revi, Member of the Karnataka Legislative Assembly. Civil Appeal Nos. 4517-4521 of 2011 arising out of SLP(C) Nos. 5995-5999 of 2011 are filed by the very same five Independent Members of the Karnataka Legislative Assembly challenging the very same judgment of the Full Bench of the Karnataka High Court upholding the order

passed by the Speaker of the Karnataka Legislative Assembly disqualifying them under Paragraph 2(2) of Tenth Schedule of the Constitution of India. The said order was passed by the Speaker on Disqualification Application Nos. 3 to 7 of 2010 filed by the voters from the constituencies represented by the five MLAs. Since the Speaker of the Karnataka Legislative Assembly had passed a Common Order dated 10th October, 2010 on Disqualification Application Nos. 2 to 7 of 2010, the impugned judgment of the Full Bench of the High Court also was a Common Order passed in Writ Petition Nos. 32674-32678/2010 and Writ Petition Nos. 33998-34002/2010. Therefore the basic dispute in these Civil Appeals relates to the validity of the order of disqualification passed by the Speaker of the Karnataka Legislative Assembly against the Appellants on Disqualification Application Nos. 2 to 7 of 2010.

3. The Appellants herein were elected to the Thirteenth Karnataka Legislative Assembly as independent candidates in the elections held in May, 2008. On 30th May, 2008, they were sworn in as Ministers in the Cabinet of the government headed by Shri B.S. Yeddyurappa, who was elected as the leader of the B.J.P. Legislature Party and was sworn in as the Chief Minister of the State of Karnataka. On 6th October, 2010, the Appellants submitted separate letters to the Governor of Karnataka stating that having become disillusioned with the functioning of the Government headed by Shri B.S. Yeddyurappa, in which there was widespread corruption and nepotism, a situation had arisen where the governance of the State could not be carried on in accordance with the provisions of the Constitution of India. The Appellants also indicated that Shri B.S. Yeddyurappa had, therefore, forfeited his right to continue as Chief Minister having lost the confidence of the people and in the interest of the State and the people of Karnataka, they were expressing their lack of confidence in the Government headed by Shri B.S. Yeddyurappa and as such they were withdrawing support to the Government headed by him as the Chief Minister. The Governor was also requested

to intervene and institute the constitutional process as constitutional head of the State. On the same day, on the basis of the letters written by the Appellants and others, the Governor of Karnataka asked the Chief Minister to prove his majority on the Floor of the House by 12th October, 2010.

4. On the very next day i.e. on 7th October, 2010, the Respondent Nos.1 and 3, namely, Shri D.N. Jeevaraju and Shri C.T. Ravi, the Chief Whip and the General Secretary of the Bharatiya Janata Party, respectively, filed Complaint No.2 of 2010 dated 6th October, 2010 with the Speaker of the Karnataka Legislative Assembly under Rule 6 of the Karnataka Legislative Assembly (Disqualification of Members on Ground of Defection) Rules, 1986, hereinafter referred to as the "Disqualification Rules", to declare that the Appellants had incurred disqualification on the ground of defection as contained in the Tenth Schedule to the Constitution. On the basis of the said Disqualification Application, on 8th October, 2010 the Speaker issued Show-Cause Notices to the Appellants informing them of the Disqualification Application filed by the Chief Whip of the Bharatiya Janata Party and the General Secretary thereof, indicating that despite having got elected as independent candidates, they became members of the B.J.P. Legislature Party and also became Ministers and thereby they violated Paragraph 2(2) of the Tenth Schedule to the Constitution. The Appellants were informed that they had acted in violation of paragraph 2(2) of the Tenth Schedule of the Constitution of India and it disqualified them from continuing as Members of the Legislature. The Appellants were given time till 5.00 p.m. on 10th October, 2010, to submit their objections, if any, to the Disqualification Application either in writing or presenting themselves in person, failing which it would be presumed that they had no explanation to offer and further action would thereafter be taken ex-parte in accordance with law. In the meanwhile on 9th October, 2010, Disqualification Application Nos.3 to 7 were filed by some voters against the Appellants and show-cause notices were issued by the Speaker on the same day requiring the Appellants to submit their explanation before 5.00 p.m. on 10th October, 2010.

5. Having come to know about the show-cause notices from the media, the Appellants through an Advocate submitted a letter to the Speaker on 9th October, 2010, indicating that they had come to learn from the media that the show-cause notices had been issued to them as per the orders of the Speaker. In the said letter it was categorically stated that the procedural requirements of Rule 7 of the Disqualification Rules had not been complied with as copies of the Petition and annexures were not supplied to the Appellants and a period of 7 days to submit the reply was not given to them. A specific request was made to the Speaker to supply the said documents and to grant a period of 7 days to submit the reply. Though the documents were not supplied, the Appellants though their Advocate submitted an interim reply on 10th October, 2010, during the proceedings before the Speaker. It was specifically stated in the reply that it was submitted as an interim reply without prejudice to and by way of abundant caution and reserving the right of the Appellants to submit exhaustive reply.

6.The Appellants further submitted in the interim reply that the notice was in clear violation of the Disqualification Rules, 1986, and especially Rules 6 and 7 thereof. It was mentioned that Rule 7(3) requires copies of the petition and annexures thereto to be forwarded along with the show-cause notice. The notice which was pasted on the doors of the MLA quarters in the MLA hostels at Bangalore, which were locked and used by the legislators only when the House was in session, called upon the Appellants to reply to the notice by 5.00 p.m. on 10th October, 2010, which was in complete violation of Rule 7 of the above-mentioned Rules which laid down a mandatory procedure for dealing with the petition seeking disqualification under the Rules. In fact, even the time to reply to the notices was reduced to the severe prejudice to the Appellants. It was pointed out that Rule 7 requires that the Appellants should have been given 7 days' time to reply or within such further period as the Speaker may for sufficient cause allow. It was contended

that under the said Rule the Speaker could only extend the time by a further period of 7 days, but could not curtail the same from 7 days to 3 days. It was the categorical case of the Appellants that the minimum notice period of 7 days was a mandatory requirement of the basic principles of natural justice in order to enable a MLA to effectively reply to the Show-Cause Notice issued to him seeking his disqualification from the Legislative Assembly. It was mentioned in the reply to the Show-Cause Notice that issuance of such Show-Cause Notice within a truncated period was an abuse and misuse of the constitutional provisions for the purpose of achieving the unconstitutional object of disqualifying sufficient number of Members of the Assembly from the membership of the House in order to prevent them from participating in the Vote of Trust scheduled to be taken by Shri B.S. Yeddiyurappa on the Floor of the House at 11 a.m. on 11th October, 2010. It was contended that the Show-Cause Notice was ex-facie unconstitutional and illegal, besides being motivated and malafide and devoid of jurisdiction.

7. In addition to the above, it was also sought to be explained that it was not the intention of the Appellants to withdraw support to the government formed by the B.J.P., but only to the Government headed by Shri Yeddiyurappa. It was contended that withdrawal of support from the Government headed by Shri B.S. Yeddiyurappa as the Chief Minister of Karnataka, did not fall within the scope and purview of the Tenth Schedule to the Constitution of India. In the reply, the Appellants categorically denied the allegation that they had joined the Bharatiya Janata Party. It was asserted that they remained independents and they had not joined any political party including Bharatiya Janata Party. It was claimed that they were always treated as independents only. It was urged that the conduct of the Appellants did not fall within the meaning of "defection" or within the scope of para 2(2) of the Tenth Schedule of Constitution of India or the Scheme and object thereof. However, on 10th October, 2010 itself, the Speaker

passed an order "disqualifying the Appellants from the post of MLA for violation of Para 2 of the Tenth Schedule of the Constitution of India with immediate effect." The said disqualification is the subject matter of this litigation.

8. At this juncture, it is necessary to take note of the fact that 13 MLAs, belonging to the Bharatiya Janata Party, had also withdrawn their support to the Government led by Shri B.S. Yeddyurappa and had made the same request to the Governor, as had been made by the Appellants herein, for initiating the constitutional process in the wake of their withdrawal of support to the Government led by Shri B.S. Yeddyurappa. This had resulted in the filing of Disqualification Application No.1 by Shri Yeddyurappa against the said MLAs and ultimately in their disqualification from the membership of the House. The Civil Appeals challenging their disqualification has been heard by this Court and judgment has been reserved. Learned counsel for the Appellants submits that the same issues as were involved in the earlier cases are also involved in the present case, except that while in the case involving the 13 B.J.P. MLAs, the allegation made against them was that they had voluntarily left the Bharatiya Janata Party, in the present case the allegation against the Appellants is that having got elected as independent candidates they had joined the Bharatiya Janata Party by extending support to Shri B.S. Yeddyurappa and by joining his Ministry as Cabinet Ministers. The same grievances as were raised by the 11 B.J.P. MLAs who were disqualified have been raised by the Appellants herein. It has been reiterated on behalf of the Appellants that the very basic requirements of natural justice and administrative fair play had been denied to them. On the other hand, not only were they not served with notice of the disqualification proceedings, but they were not even given sufficient time to deal with the allegations made against them. According to the Appellants, the proceedings before the Speaker, who had acted in hot haste in disqualifying the Appellants before the Vote of Confidence was to be taken by Shri B.S. Yeddyurappa, had been vitiated

as a result of such conduct on the part of the Speaker.

9. Appearing in support of the Civil Appeals arising out of SLP(C) Nos.5966-5970 of 2011, Mr. P.P. Rao, learned Senior Advocate, contended that by not allowing the Appellants sufficient time to even reply to the Show-Cause Notices issued to them, in violation of Rule 7 of the Karnataka Legislative Assembly (Disqualification of Members on Ground of Defection) Rules, 1986, the Appellants had been deprived of a valuable opportunity to meet the allegations, although their membership of the House depended on a decision on the said allegations and their response thereto. Mr. Rao also submitted that apart from being denied a proper hearing in terms of the statutory rules, the High Court had erroneously interpreted the provisions of paragraph 2(2) of the Tenth Schedule to the Constitution of India in holding that the Appellants had joined the Bharatiya Janata Party, as alleged by the complainants. Mr. Rao submitted that it had been alleged that the Appellants had joined the Bharatiya Janata Party either when prior to the formation of the Ministry they had given individual letters of support to Shri Yeddyurappa as the leader of the B.J.P. Legislature Party, or when they had joined the Cabinet as Ministers in the B.J.P. Government led by Shri B.S. Yeddyurappa.

10. Mr. Rao then urged that the High Court had also misconstrued the concept of whips being issued to ensure compliance by Members of a particular political party, who were also Members of the Legislature Party of the said political party. Mr. Rao urged that such whip had been issued to the Appellants, who as Members of the Government may have acted in terms thereof, but that did not mean that the Appellants had formally joined the Bharatiya Janata Party, as had been concluded by the Speaker.

11. Mr. Rao contended that neither the Speaker nor the High Court had addressed these issues correctly in relation to the evidence available before him, as had been observed by

the Constitution Bench in *Rajendra Singh Rana & Ors. Vs. Swami Prasad Maurya & Ors.* [(2007) 4 SCC 270]. Mr. Rao submitted that events subsequent to the date on which an independent Member joins a political party is not material for a decision as to whether the particular Member had, in fact, joined the political party or not. Mr. Rao also urged that neither the decision in the case of *Dr. Mahachandra Prasad Singh Vs. Chairman, Bihar Legislative Council & Ors.* [(2004) 8 SCC 747], nor the decision in the case of *Jagjit Singh Vs. State of Haryana* [(2006) 11 SCC 1], had any application to the facts of this case, since in the said cases what was sought to be explained by this Court is that the Speaker could not give a finding regarding disqualification on the basis of conduct subsequent to the date on which a M.L.A. becomes disqualified from being a Member of the House. It was also observed that when the view taken by the Tribunal is a reasonable one, the Court would be slow to strike down the view regarding disqualification on the ground that another view was better. Mr. Rao urged that in the instant case, reliance by the Speaker on the decision of this Court in the case of *G. Vishwanath Vs. Speaker* [(1996) 3 SCC 353], is not of much assistance to the Respondents, because even from the conduct of the Appellants, it could not be said that they had joined the B.J.P. Legislature Party. Mr. Rao urged that the fact that the Appellants had attended meetings of the B.J.P. Legislature Party was of little help to the Respondents since in the Attendance Register of the meetings they had been shown as independent Members and a separate group under the heading "Independent Co-Members".

12. Mr. Rao urged that the Appellants had always been treated as a separate group from the B.J.P. Legislature Party and it is only in connection with this case that the Respondents had attempted to show that the Appellants had joined the Bharatiya Janata Party and by withdrawing support from the B.J.P. Government led by Shri B.S. Yeddyurappa, they had incurred disqualification under paragraph 2(2) of the Tenth Schedule to the Constitution.

13. Mr. Rao also contended that the Whip issued by the Chief Whip of the B.J.P. Legislature Party did not form part of the documents produced before the Speaker, and, in any event, no Whip was served on the Appellants nor had they signed such a Whip. Therefore, the allegation that they had acted in accordance with such Whip did not and could not arise and the finding of the Speaker to the contrary, was perverse. Mr. Rao added that the Whips which have been subsequently brought on record in W.P.(C)Nos.32674-32678 of 2010, reveal that when the Whips were addressed to the ruling party Members, including the Ministers, they were addressed as Members of the Party, whereas the remaining five Whips were addressed to the Appellants as Hon'ble Ministers.

14. Mr. Rao also submitted that in the Whips issued to the Appellants nowhere had it been indicated that they had joined the Bharatiya Janata Party. Mr. Rao urged that the positive case made out by the Respondents in the application for disqualification was that the Appellants had joined the B.J.P. before they were sworn in as Ministers of Cabinet rank on 30th May, 2008, and not that they joined the B.J.P. later before the issuance of Whips on 29th December, 2009. Mr. Rao repeated his earlier contention that the question before the Speaker for consideration was whether the Appellants had joined the B.J.P. before their being sworn in on 30th May, 2008, or not. It was submitted that it was beyond the Speaker's jurisdiction to decide any matter other than what had been indicated in the Disqualification Application.

15. On the question of scope of judicial review of the Speaker's order, Mr. Rao submitted that although reliance had been placed on paragraph 109 of the decision of this Court in *Kihoto Hollohan Vs. Zachillhu* [(1992) Supp.2 SCC 651], wherein, it was held that judicial review of the order of the Speaker should be confined to jurisdictional errors only, the observations contained in paragraph 103 of the judgment had not been noticed. Mr. Rao submitted that in the said paragraph, it had been clarified that the finality clause in paragraph 6 of

the Tenth Schedule to the Constitution does not completely exclude the jurisdiction of the Courts under Articles 136, 226 and 227 of the Constitution, though, it does have the effect of limiting the scope of the Courts' jurisdiction under the said provision. It was further observed that the principle applied by the courts is that inspite of a finality clause it is always open to the High Court or the Supreme Court to examine whether the action of the authority is ultra vires the powers conferred on it or whether the power so exercised was in contravention of a mandatory provision of law. Mr. Rao urged that the judgment in *Kihoto Hollohan's* case (supra) could not be read piecemeal, but would have to be read as a whole.

16. Mr. Rao submitted that in the instant case, the Speaker's order had been made in violation of paragraph 2(2) of the Tenth Schedule by erroneously equating the expression "Political Party" with the Government of the State. Mr. Rao also submitted that the order of the Speaker had been passed in disregard of the relevant statutory Rules, namely, the Karnataka Disqualification Rules and without reconsidering the materials available with the Speaker under the aforesaid Rules.

17. Mr. Rao then urged that the Speaker has also erred in entertaining the applications of voters in violation of Rule 6 of the aforesaid Rules and also Rule 7(3) which require the Speaker to give a minimum of 7 days' time to reply to the show-cause notice issued by him. Mr. Rao submitted that the order was also liable to be quashed on the ground of violation of the principles of natural justice by not giving the Appellants a reasonable opportunity to present their case effectively.

18. Mr. Rao lastly submitted that the order of the Speaker was perverse and was tailored to suit the Government led by Shri B.S. Yeddyurappa in the Vote of Confidence that was to follow the day after the decision had been pronounced by the Speaker. Mr. Rao also repeated his earlier submissions that the Speaker had proceeded in the matter in great haste to meet the aforesaid deadline.

19. Mr. Rao submitted that the Speaker had acted in a mala fide manner in order to bail out the Chief Minister and to save his own Chair by not referring the case to the Committee of Privileges having regard to the allegations of bias made by the Appellants in their replies to the Show-Cause Notices and deciding the case himself, while continuing to be a Member of the Bharatiya Janata Party while occupying the Chair of the Speaker.

20. On the question as to whether the Disqualification Rules were mandatory or directory, Mr. Rao submitted that the decision in *Ravi S. Naik Vs. Union of India* [(1994) Suppl.2 SCC 641] was per incuriam as it had not adverted to the decision of the Constitution Bench in Kihoto Hollohan's case (supra), wherein it had been held that the Speaker's decision while exercising power under paragraph 6(1) of the Tenth Schedule to the Constitution did not enjoy the immunity under Articles 122 and 212 from judicial scrutiny as had also been pointed out by *K.T. Thomas, J. in Mayawati Vs. Markandeya Chand* [(1998) 7 SCC 517]. Mr. Rao urged that in any event, the view expressed in *Ravi S. Naik's* case (supra) was no longer good law after the subsequent Constitution Bench decision in *Rajendra Singh Rana's* case (supra), wherein it has been laid down that the Speaker was expected to follow the Rules framed under the Tenth Schedule which had been approved by the Legislative Assembly. Mr. Rao urged that the Speaker had all throughout treated the Appellants as independent Members as would be evident from the debates of the Assembly.

21. Mr. Rao then submitted that the circumstances leading to the disqualification of the Appellants was quite obviously stage-managed in order to help the Chief Minister to survive the Confidence Vote on 11th October, 2010, by any means and the same will be evident from the affidavits filed later by the voters who had filed Disqualification Petitions, which exposed the involvement of the Speaker and his Office as well as the Political Advisor to the Chief Minister in inducing them to sign such

applications. Mr. Rao submitted that the decision of the Speaker having been taken in violation of paragraph 2(2) of the Tenth Schedule, Rules 3, 4, 5, 6 and 7(3) of the Karnataka Legislative Assembly (Disqualification of Members on Ground of Defection) Rules, 1986, and the principles of natural justice, was perverse and mala fide and was not sustainable either on facts or law.

22. Appearing for the Appellants in the Civil Appeals arising out of SLP (C) Nos.5995-5999 of 2011, Mr. K.K. Venugopal, learned Senior Advocate, reiterated the submissions made by Mr. P.P. Rao in the other set of appeals. Mr. Venugopal submitted that merely because the Appellants had joined the Council of Ministers in the Yeddyurappa Government, it could not be contended that they had joined the Bharatiya Janata Party. Mr. Venugopal submitted that in the past there had been several instances where Members elected as independents to the Lok Sabha had served in the Governments formed by Political Parties but had retained their status as independent Members of the House. Mr. Venugopal referred to the two instances when Mrs. Maneka Gandhi was elected to the Lok Sabha as an independent Member from Pilibhit in Uttar Pradesh and had served as Minister at the Centre in the Governments led by the Bharatiya Janata Party. Similarly, Shri Biswanath Das, Shri S.F. Khonglam and Shri Madhu Koda, who were all independent legislators, became Chief Ministers of the States of Orissa, Meghalaya and Jharkhand.

23. Mr. Venugopal submitted that if by joining the Yeddyurappa Ministry, the Appellants had shed their independent status and had become Members of the Bharatiya Janata Party, then they stood disqualified from the membership of the House at that stage itself. Such a stand had not, however, been taken by the complainants or even the opposition parties, till the Governor directed a Vote of Confidence to be held on 12.10.2010. Mr. Venugopal submitted that the said position would make it very clear that the Appellants continued to enjoy

an independent status, although, they had extended their support to the B.J.P. Government led by Shri Yeddyurappa and had also joined the Ministry as Cabinet Ministers.

24. Mr. Venugopal also repeated Mr. Rao's submissions that even at the B.J.P. Legislature Party meetings the independent status of the Appellants had been duly recognized and in the said meetings they had been shown not as a part of the Bharatiya Janata Party, but as a separate entity with separate serial numbers. It was further urged that it could not also be presumed that by joining the rallies of the Bharatiya Janata Party, the Appellants had joined the Party and had, therefore, laid themselves open to disqualification as Members of the House under the provisions of the paragraph 2(2) of the Tenth Schedule to the Constitution.

25. Mr. Venugopal lastly submitted that the Appellants had denied receipt of the Whips said to have been issued to them by the Chief Whip of the B.J.P. Legislature Party or having acted in accordance therewith. Mr. Venugopal submitted that by no stretch of imagination could it be assumed that the Appellants by their aforesaid acts had joined the Bharatiya Janata Party or had even intended to do so. Mr. Venugopal submitted that the impugned order of the Speaker was motivated and made with the sole intention of disqualifying them from participating in the Vote of Confidence which was to be held on 11th October, 2010.

26. Appearing for the Respondent No.1 Shri D.N. Jeevaraju and others in the Civil Appeals arising out of the Special Leave Petitions filed by Shri D. Sudhakar and others, Mr. Satpal Jain, learned Senior Advocate, submitted that one single incident cannot always be a factor to determine as to whether an independent Member had joined a Political Party or not and that there was no bar in taking cognizance of subsequent events in order to arrive at such a conclusion. It was submitted that even if it be held that the Appellants had joined the Bharatiya Janata Party by joining the Ministry, the Speaker

was always entitled to consider the subsequent conduct of the Appellants for purposes of corroboration of the earlier facts. Mr. Jain submitted that paragraph 2(2) of the Tenth Schedule to the Constitution makes it absolutely clear that on the joining of a Political Party an independent stands disqualified, but a declaration to that effect could be made at a later stage.

27. Mr. Jain reiterated the stand which had been taken on behalf of the Respondent No.1 before the Speaker that the Whip which had been issued by the Chief Whip was also meant for the Appellants and had been served on them and they had also acted according to the said Whip. It was urged that this was not a case of support being rendered to the B.J.P. Government led by Shri Yeddyurappa, either from inside or from the outside, but this was a case where the Appellants had wilfully shed their independent status and had become Members of the ruling Bharatiya Janata Party and by such conduct they stood disqualified as Members of the House by virtue of paragraph 2(2) of the Tenth Schedule to the Constitution.

28. On the allegation with regard to the mala fides, Mr. Jain submitted that the same would have to be considered in the light of the circumstances in which the order of the Speaker came to be passed. It was submitted that once the question of disqualification of the Appellants was brought to his notice before the Vote of Confidence was to take place, it became the constitutional duty of the Speaker to decide the same before the Vote of Confidence was taken in order to ensure that persons who were not eligible to vote, did not participate in the Vote of Confidence to be taken on 11th October, 2010.

29. Mr. Jain referred to and relied on the decisions of this Court in *Dr. Mahachandra Prasad Singh's* case (supra)and *Jagjit Singh's* case (supra) in support of his contention that in order to incur disqualification under paragraph 2(2) of the Tenth Schedule to the Constitution, it was not always necessary that a written communication would have to be made to the Party in that regard.

30. Mr. Jain also contended that in the translated copy of the Whip which had been issued by the Chief Whip of the B.J.P. Legislature Party, the very vital words describing the Appellants as Legislators of the Ruling Party had been omitted. Mr. Jain submitted that this fact had not been noticed by the High Court, particularly, since the Whip was a single-line Whip. Mr. Jain submitted that the Whip had been issued to all Members of the Bharatiya Janata Party and its Ministers in the same fashion as it had been issued to the Appellants. Mr. Jain submitted that the order of the Speaker disqualifying the Appellants from the Membership of the House did not call for any interference and the Appeals were liable to be dismissed.

31. While dealing with the submissions of Mr. P.P. Rao and Mr. Venugopal, Mr. Soli J. Sorabjee, learned Senior advocate, who appeared for Shri C.T. Ravi, the Respondent No.3 in the Civil Appeals arising out of the Special Leave Petitions filed by Shri D. Sudhakar and others, submitted that the provisions of paragraph 6 of the Tenth Schedule to the Constitution made it quite clear that the decision relating to disqualification on ground of defection was final and, accordingly, the scope of judicial review available against the order of the Speaker in exercise of powers under the Tenth Schedule to the Constitution was extremely limited, as had been indicated in *Kihoto Hollohan's* case (supra), and was confined and limited to infirmities based on (a) violation of constitutional mandate; (b) mala fides; (c) non-compliance with the rules of natural justice; and (d) perversity. Mr. Sorabjee submitted that the Speaker's order impugned in the Appeals did not suffer from any of the above-mentioned infirmities and hence no judicial review was available to the Appellants in the present case.

32. Mr. Sorabjee also relied heavily on the decision of this Court in *Ravi S. Naik's* case (supra) and also in *Dr. Mahachandra Prasad Singh's* case (supra), where the Disqualification Rules framed by the Speaker in exercise of the power conferred under paragraph 8 of the Tenth Schedule to the Constitution, was held to enjoy a status which was

subordinate to the Constitution and could not be equated with the provisions of the Constitution. They could not, therefore, be regarded as constitutional mandates and any violation of the Disqualification Rules did not also afford a ground for judicial review. Mr. Sorabjee submitted that the aforesaid questions were no longer res integra and had been authoritatively settled by the aforesaid decision of this Court.

33. On the question of mala fides, Mr. Sorabjee submitted that as had been observed by this Court in *Sangramsinh P. Gaekwad Vs. Shantadevi P. Gaekwad* [(2005) 11 SCC 314], a series of repetitive and almost abusive allegations against the Speaker was not sufficient to support a charge of mala fides, especially when it is leveled against a high functionary such as the Speaker. Mr. Sorabjee submitted that the law, as was also stated by this Court in *E.P. Royappa Vs. State of Tamil Nadu* [(1974) 4 SCC 3], is clear that the burden of establishing mala fides is very heavily on the person who alleges it, since the allegations of mala fides are often more easily made than proved. Mr. Sorabjee submitted that the Court could not and should not uphold a plea of mala fides on the basis of mere probabilities.

34. On the question of undue haste, which was one of the pillars of the submissions relating to mala fides, Mr. Sorabjee submitted that the Speaker was bound to a schedule which had been set by the Governor for holding the Vote of Confidence and he, therefore, had no option but to reduce the time for the Appellants to show cause as to why they should not be disqualified from the membership of the House to a period which was less than 7 days, as was stipulated under Rule 7 of the Disqualification Rules.

35. On the question of natural justice, Mr. Sorabjee once again referred to the observations made by this Court in *Ravi S. Naik's* case (supra), wherein it was observed that the rules of natural justice were not immutable but flexible. Mr. Sorabjee submitted that the same view had been reiterated in *Jagjit*

Singh's case (supra) also. Mr. Sorabjee contended that even if a different view was possible from the view which had been taken by the Speaker, unless the decision of the Speaker was shown to be wholly perverse or contrary to the provisions of the Constitution, the same ought not to be discarded and substituted for a different view which this Court may also consider to be possible.

36. Mr. Sorabjee concluded on the note that the essence of being an independent lies in his acting according to the dictates of his independent conscience, untrammeled by the dictates of the Whip of any political party. Accordingly, an independent could support a proposal of the Government or oppose it, but that would be according to his independent conscience and if such an independent member joins as a Minister in the Government formed by a political party, his independence is compromised and as indicated in *Kihoto Hollohan's* case (supra), it was for him to resign his membership of the House and go back to the Electorate for a fresh mandate.

37. While adopting Mr. Satpal Jain's and Mr. Sorabjee's submissions, Mr. Jaideep Gupta, learned Senior Advocate, who appeared for the Respondent Nos.4 and 5 in the Civil Appeals arising out of the Special Leave Petitions filed by Sri Shivraj S. Thangadgi and others, submitted that the said Respondents as voters of the Constituency which had elected the Appellants as independents were aggrieved by the fact that the Appellants had acted in a manner which was contradictory to the object underlining the provisions in the Tenth Schedule to the Constitution, namely, to curb the evil of political defections motivated by lure of office or other similar considerations which endanger the foundation of our democracy. Mr. Gupta also relied on the decisions of this Court in *Kihoto Hollohan's* case (supra) and *G. Vishwanath's* case (supra). Although, the locus standi of the Respondent Nos.4 and 5 to maintain a complaint under the Disqualification Rules was strongly disputed in the absence of any mention of a voter having a right to file a

complaint, Mr. Gupta submitted that even if no rules had been framed by the Speaker under paragraph 8 of the Tenth Schedule to the Constitution, the Speaker was still vested with the authority to take action against an independent member on information received by him. Mr. Gupta also relied on the decisions cited by Mr. Satpal Jain and Mr. Soli J. Sorabjee in support of his aforesaid contention and submitted that the order of the Speaker impugned in these appeals did not call for any interference and the Appeals were, therefore, liable to be dismissed.

38. Appearing for Shri B.S. Yeddyurappa in these appeals, Mr. P.S. Narsimha, learned Senior Advocate, urged that the allegations made against Shri Yeddyurappa of colluding with the Speaker to obtain an order of disqualification of the Appellants before the date scheduled for the Vote of Confidence in the House, was wholly unjustified and uncalled for. Mr. Narsimha submitted that Shri Yeddyurappa was duty bound to inform the Speaker of any incident or incidents that may have occurred after the Members had been elected to the House, which would disqualify them from the membership thereof and Shri Yeddyurappa had, therefore, acted as part of the duties of his office in informing the Speaker by way of the Disqualification Application regarding the conduct of the Appellants as well as some of the other MLAs belonging to the Bharatiya Janata Party.

39. Referring to the concept of collective responsibility of the Council of Ministers as envisaged in Article 75 of the Constitution, Mr. Narsimha submitted that as had been commented upon in M.P. Jain's "Indian Constitutional Law", (Sixth Edition), "a notable principle underlying the working of Parliamentary Government is the principle of collective responsibility which represents ministerial accountability to the legislature" and that Article 75(3) lays down that the Council of Ministers shall be collectively responsible to the Lok Sabha. Mr. Narsimha urged that the principle of collective responsibility ensured the unity of the Members of the Government and also

made sure that each individual Minister took responsibility in regard to Cabinet decisions and to take action to implement the same.

40. Mr. Narsimha submitted that as soon as the Appellants joined the Ministry led by Shri Yeddyurappa as Ministers, they divested themselves of their independent character and became collectively responsible to the other Members of the Cabinet and the Members of the State Assembly for governance of the State.

41. Most of the grounds taken in the present set of appeals were also taken in the Civil Appeals arising out of Special Leave Petition Nos.33123-33155 of 2010 and other connected appeals filed by Balachandra L. Jarkiholi and others. As indicated hereinbefore the only point of difference between the two sets of appeals is that while in the earlier set of appeals the issue involved was whether the Appellants had voluntarily given up their membership of the Bharatiya Janata Party so as to attract the disqualification provisions contained in paragraph 2(a) of the Tenth Schedule to the Constitution, in the present set of appeals the question is whether the Appellants having been elected as independent members of the Karnataka Assembly had incurred disqualification from the membership of the House in terms of paragraph 2(2) of the Tenth Schedule of the Constitution by joining the Bharatiya Janata Party through their acts of extending support to a government led by Shri B.S. Yeddyurappa and becoming Ministers in the said government.

42. From the facts as disclosed during the hearing and the materials on record, it is the admitted case of both the parties that the Appellants had been elected to the 13th Karnataka Legislative Assembly as independent candidates in the elections held in May 2008. It is also not disputed that immediately after the declaration of the results of the Assembly Elections on 25.5.2008, Shri B. S. Yeddyurappa secured letters of support from the Appellants herein on 26th May, 2008, and on the same day he addressed a letter to the Governor claiming majority support of the House which included the support of the

Appellants herein, with a request to the Governor to appoint him as Chief Minister of the State. It is also undisputed that on 30.5.2008 Shri Yeddyurappa was sworn in as Chief Minister of Karnataka along with the Appellants as Cabinet Ministers and on 4.6.2008, he proved his majority in the House.

43. The question with which we are concerned is whether by their said acts, or acts subsequent thereto, the Appellants could be said to have joined the Bharatiya Janata Party.

44. After having been sworn in as Ministers in the Government led by Shri Yeddyurappa, the Appellants undisputedly attended meetings of the B.J.P. Legislature Party and had also participated in rallies and public meetings which had been conducted by the said party. The Speaker, as well as the Full Bench of the High Court, came to the conclusion that by offering letters of support to Shri Yeddyurappa and joining his Council of Ministers, the Appellants had shed their independent status and had joined the Bharatiya Janata Party, and the same was subsequently corroborated by their further action in attending the meetings of the B.J.P. Legislature Party and participating in its programmes. Both the Speaker and the High Court, therefore, held that the Appellants had become disqualified from the Membership of the House under paragraph 2(2) of the Tenth Schedule of the Constitution.

45. In the absence of any written and/or documentary proof of the Appellants having joined the Bharatiya Janata Party, both the Speaker and the High Court relied on the decision of this Court in *Ravi Naik's* case (supra), which was subsequently followed in *Dr. Mahachandra Prasad Singh's* case (supra) and *Jagjit Singh's* case (supra), in which it was held that in order to incur disqualification under paragraph 2(2) of the Tenth Schedule to the Constitution it was not always necessary that a written communication would have to be made to the political party in that regard. As far as issuance of Whip by the Chief Whip of the Bharatiya Janata Party is concerned, such an act would not ipso facto be taken as conclusive proof that the

Appellants had joined Bharatiya Janata Party. Furthermore, in the face of denial by the Appellants of having been served with the Whip, there is nothing on record to prove that they were actually received by the Appellants.

46. The decisions referred to hereinabove have settled certain principles of law relating to interpretation of the provisions of the Tenth Schedule to the Constitution, but the said principles have to be applied in each case in its own set of facts. In the facts of this case, there is no material or evidence to show that the Appellants had at any time joined the B.J.P. Even as independents, the Appellants could extend support to a government formed by a political party and could become a Minister in such government. There is no legal bar against such extension of support or joining the government. Hence, such extension of support or joining the government as Minister by an independent does not by itself mean that he has joined the political party which formed the government. There is also no evidence to show that the Appellants were accepted and treated as members of the B.J.P. by that political party. It is to be noted that the Petitioners before the Speaker had no grievance about the Appellants supporting the B.J.P. Government and becoming Ministers in the government, for more than two years. Only when the Appellants withdrew support to the government led by Shri Yeddyurappa and a Confidence Vote was scheduled to be held, the Petitioners raked up the issue of alleged disqualification. The Appellants, even while participating in the meetings of the B.J.P. Legislature Party, were shown separately in a category different from the other participants in such meetings, which clearly indicates that the Appellants, though Ministers in the Government led by Shri Yeddyurappa, were treated differently from members of B.J.P. and were considered to be only lending support to the Government led by Shri Yeddyurappa, without losing their independent status. Mere participation in the rallies or public meetings organised by the B.J.P. cannot lead to the conclusion that the Appellants had joined the B.J.P.

47. The results of the election were declared on 25th May, 2008. Sri B.S. Yeddyurappa was elected as Leader of the B.J.P. Legislature Party on 26th May, 2008. The Appellants who had been elected as Independents declared their support to Sri Yeddyurappa as Chief Minister on 26th May, 2008. In the Notification dated 27th May, 2008 constituting the Legislative Assembly, the Appellants were shown as Independents. In the statement submitted by the Leader of the B.J.P. Legislature Party, the names of Appellants were not included in the list of B.J.P. members. In the Registers maintained by the Speaker under Rules 3 & 4 of the Disqualification Rules, the Appellants were shown as Independents and at any time after they were sworn in as Ministers on 30th May, 2008, no change was effected in the Registers. No information was furnished either by the Appellants or by the B.J.P. Legislature Party to include the Appellants among B.J.P. members. Thus, as per the Records of the Legislative Assembly, the Appellants were not members of B.J.P. when the order of disqualification was passed by the Speaker.

48. We are unable to accept the submission made on behalf of the Respondents that by extending support to Shri Yeddyurappa in the formation of the Bharatiya Janata Party led government, the Appellants had sacrificed their independent identities. The fact that the said Appellants also joined the Council of Ministers does not also point to such an eventuality. It is no doubt true that an independent legislator does not always have to express his intention to join a party in writing, but the mere extension of support to Shri Yeddyurappa and the decision to join his Cabinet, in our view, were not sufficient to conclude that the Appellants had decided to join and/or had actually joined the Bharatiya Janata Party, particularly on account of the subsequent conduct in which they were treated differently from the Members of the Bharatiya Janata Party. In view of our finding that the Appellants had not joined any political party as alleged, the order of disqualification passed by the Speaker was against the Constitutional mandate in para 2(2) of the Tenth Schedule of the Constitution.

49. This leaves us with the other question as to whether the Speaker acted in contravention of the provisions of Rule 7(3) of the Disqualification Rules under which a Member of the House, to whom a Show-Cause Notice is issued, has to be given 7 days' time or more to reply to the Show-Cause Notice. The question which immediately follows is whether the Speaker acted in hot haste in disposing of the Disqualification Application against the Appellants for their disqualification from the House. Yet another question which arises is with regard to the scope of judicial review of an order passed by the Speaker under paragraph 2(2) of the Tenth Schedule to the Constitution, having regard to the provisions of Article 212 thereof.

50. There is no denying the fact that the Show-Cause Notices issued to the Appellants were not in conformity with the provisions of Rules 6 and 7 of the Karnataka Legislative Assembly (Disqualification of Members on Ground of Defection) Rules, 1986, inasmuch as, the Appellants were not given 7 days' time to reply to the Show-Cause Notices as contemplated under Rule 7(3) of the aforesaid Rules. Without replying to the said objection raised, the Speaker avoided the issue by stating that it was sufficient for attracting the provisions of paragraph 2(2) of the Tenth Schedule to the Constitution that the Appellants herein had admitted that they had withdrawn support to the Government led by Shri B.S. Yeddyurappa. The Speaker further recorded that the Appellants had been represented by counsel who had justified the withdrawal of support to the Government led by Shri Yeddyurappa. Without giving further details, the Speaker observed that the Disqualification Rules had been held by this Court to be directory and not mandatory, as they were to be followed for the sake of convenience. The provisions of Rule 7(3) of the Disqualification Rules were held by the High Court to be directory in nature and that deviation from the said Rules could not and did not vitiate the procedure contemplated under the Rules, unless the violation of the procedure is shown to have resulted in prejudice to the Appellants. The Speaker wrongly

relied upon the affidavit filed by Shri K.S. Eswarappa, State President of the B.J.P., although there was nothing on record to support the allegations which had been made therein. In fact, the said affidavit had not been served on the Appellants. Since Shri K.S. Eswarappa was not a party to the proceedings, the Speaker should have caused service of copies of the same on the Appellants to meet the allegations made therein. Coupled with the fact that the Speaker had violated the provisions of Rule 7(3) of the Disqualification Rules in giving the Appellants less than 7 days' time to reply to the Show-Cause Notices issued to them, failure of the Speaker to cause service of copies of the affidavit affirmed by Shri K.S. Eswarappa amounted to denial of natural justice to the Appellants, besides revealing a partisan attitude in the Speaker's approach in disposing of the Disqualification Application filed by Shri B.S. Yeddyurappa. If the Speaker had wanted to rely on the statements made in the aforesaid affidavit, he should have given the Appellants an opportunity of questioning the deponent as to the truth of the statements made in his affidavit. This conduct on the part of the Speaker also indicates the hot haste with which the Speaker disposed of the Disqualification Application, raising doubts as to the bona fides of the action taken by him. The explanation given by the Speaker as to why the notices to show cause had been issued to the Appellants under Rule 7 of the Disqualification Rules, giving the Appellants only 3 days' time to respond to the same, is not very convincing. There was no compulsion on the Speaker to decide the Disqualification Applications in such a great hurry, within the time specified by the Governor for the holding of a Vote of Confidence in the government headed by Shri B.S. Yeddyurappa. It would appear that such a course of action was adopted by the Speaker on 10th October, 2010, since the Vote of Confidence on the Floor of the House was to be held on 12th October, 2010. We have no hesitation to hold that the Speaker's order was in violation of Rules 6 & 7 of the Disqualification Rules and the rules of natural justice and that such violation resulted in prejudice to the Appellants. Therefore, we hold that even if Rules 6 & 7 are

only directory and not mandatory, the violation of Rules 6 & 7 resulting in violation of the rules of natural justice has vitiated the order of the Speaker and it is liable to be set aside.

51. We are next faced with the question as to the manner in which the Disqualification Applications were proceeded with and disposed of by the Speaker. On 6th October, 2010, on receipt of identical letters from the Appellants withdrawing support to the B.J.P. Government led by Shri B.S. Yeddyurappa, the Governor on the very same day wrote a letter to the Chief Minister informing him of the developments regarding the withdrawal of support of the 5 independent MLAs and 13 B.J.P. MLAs and requesting him to prove his majority on the Floor of the House on or before 12th October, 2010 by 5.00 p.m. The Speaker was also requested to take steps accordingly. On the very same day, Shri B.S. Yeddyurappa, as the leader of the B.J.P. in the Legislative Assembly, filed an application before the Speaker under Rule 6 of the Disqualification Rules, 1986, for a declaration that all the 13 MLAs elected on B.J.P. tickets along with two other independent MLAs, had incurred disqualification under the Tenth Schedule to the Constitution. Immediately thereafter, on 7th October, 2010, the Speaker issued Show-Cause Notices to the concerned MLAs informing them of the Disqualification Application filed by Shri B.S. Yeddyurappa and also informing them that by withdrawing support to the Government led by Shri B.S. Yeddyurappa, they were disqualified from continuing as Members of the House in view of paragraph 2(1)(a) of the Tenth Schedule to the Constitution. On 7th October, 2010 itself, Petitions were filed against the Appellants by the Respondents and the Speaker on 8th October, 2010 issued show-cause notices to the Appellants. The Appellants and the B.J.P. MLAs to whom show-cause notices were issued were given time till 5.00 p.m. on 10th October, 2010, to submit their objection, if any, to the said application. Apart from the fact that the Appellants were not given 7 days' time to file their reply to the Show-Cause Notices, the High Court did not give serious

consideration to the fact that even service of the Show-Cause Notices on the Appellants and the 13 MLAs belonging to the Bharatiya Janata Party had not been properly effected. Furthermore, the MLAs who were sought to be disqualified were also not served with copies of the Affidavit filed by Shri K.S. Eswarappa, although the Speaker relied heavily on the contents thereof in arriving at the conclusion that they stood disqualified under paragraph 2(1)(a)/2(2) of the Tenth Schedule to the Constitution. The MLAs were not supplied with copies of the affidavits filed by Sri M.P. Renukacharya and Shri Narasimha Nayak, whereby they had retracted the statements which they had made in their letters submitted to the Governor on 6th October, 2010. What is even more glaring is the fact that the Speaker not only relied upon the contents of the said affidavits, but also dismissed the Disqualification Application against them on the basis of such retraction, after having held in the case of 13 MLAs belonging to the Bharatiya Janata Party that they had violated the provisions of paragraph 2(1)(a) of the Tenth Schedule to the Constitution immediately upon their intention to withdraw their support to the Government led by Shri B.S. Yeddyurappa was communicated to the Governor.

52. It is obvious from the procedure adopted by the Speaker that he was trying to meet the time schedule set by the Governor for the trial of strength in the Assembly and to ensure that the Appellants and the 13 B.J.P. MLAs stood disqualified prior to the date on which the Floor test was to be held. Having concluded the hearing on 10th October, 2010 by 5.00 p.m., the Speaker passed detailed orders, in which various judgments, both of Indian Courts and foreign Courts, and principles of law from various authorities were referred to, on the same day, holding that the Appellants and the other MLAs stood disqualified as Members of the House. The Vote of Confidence took place on 11th October, 2010, in which the disqualified Members could not participate, and in their absence Shri B.S. Yeddyurappa was able to prove his majority in the House.

53. Unless it was to ensure that the Trust Vote did not go against the Chief Minister, there was hardly any reason for the Speaker to have taken up the Disqualification Applications in such a great haste.

54.We cannot lose sight of the fact that although the same allegations as had been made by Shri Yeddyurappa against the disqualified B.J.P. MLAs, were made also against Shri M.P. Renukacharya and Shri Narasimha Nayak, whose retraction was accepted by the Speaker, despite the view expressed by him that upon submitting the letter withdrawing support to the B.J.P. Government led by Shri B.S. Yeddyurappa, all the MLAs stood immediately disqualified under paragraph 2(1)(a) of the Tenth Schedule to the Constitution, the said two legislators were not disqualified and they were allowed to participate in the Confidence Vote, for reasons which are obvious.

55. Therefore, we hold that the impugned order of the Speaker is vitiated by mala fides.

56. On the question of justiciability of the Speaker's order on account of the expression of finality in paragraph 2 of the Tenth Schedule to the Constitution, it is now well-settled that such finality did not bar the jurisdiction of the superior Courts under Articles 32, 226 and 136 of the Constitution to judicially review the order of the Speaker. Under paragraph 2 of the Tenth Schedule to the Constitution, the Speaker discharges quasi-judicial functions, which makes an order passed by him in such capacity, subject to judicial review.

57. We are, therefore, unable to sustain the decision of the Speaker, as affirmed by the High Court on all counts, and we, accordingly, allow the appeals and set aside the orders passed by the Speaker on 11th October, 2010 and by the Full Bench of the High Court on 14th February, 2011.

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

MARGRET ALMEIDA & ORS. ETC. ETC.
v.
THE BOMBAY CATHOLIC CO-OPERATIVE HOUSING SOCIETY LTD. & ORS. ETC. ETC.
(Civil Appeal Nos. 1175-1177 of 2012)

JANUARY 30, 2012

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

Co-operative Socieites:

Maharashtra Co-operative Societies Act, 1960 – ss. 91 and 163 – Maintainability of suits – Initiation of proceedings for the division of the Co-operative Society by tenant members (including appellant) – Meanwhile, resolution passed by General Body of the Society in favour of respondents (3rd party) – Dispute arising out of a decision of the society to alienate the property of the society – Suits filed by appellants and others before the High Court – High Court holding the suits not maintainable on the ground that the dispute was amenable to the exclusive jurisdiction u/s. 91 to the Co-operative Court – Sustainability of – Held: Not sustainable – s. 94 (3)(a) does not enable a person other than enumerated persons (specified under clauses (a) to (e) to sub section (1) of s. 91) to refer a dispute to Co-operative Court – Property in which the 3rd party acquired interest must bear some relationship with the dispute pending before the tribunal – To hold otherwise would be to enable the Co-operative Court to examine questions unconnected with the dispute pending before it and wholly unconnected with the affairs of the Society – From the language of the sub section (3)(a) to Section 94 it is clear that the legislature intended the Co-operative Court to deal with only the cases of acquisition of interest in the property during the pendency of the litigation before it – If any party such as the appellants disputes the validity of the title conveyed thereunder, necessarily such a dispute would have

to be adjudicated by a competent court u/s. 9 CPC wherein, necessarily, the question whether a valid title was conveyed in favour of 3rd party by the society would arise for determination – Thus, the order passed by the High Court set aside – Suits are maintainable and are to be tried by the High Court in exercise of its original jurisdiction – Code of Civil Procedure, 1908 – s. 9.

First respondent is a Housing Co-operative Society. The society has different classes of members known as owners, lessees, alottees, tenants etc. Some of the tenant members including appellants of the Society initiated proceedings for the division of the Society, invoking Section 18 of the Maharashtra Co-operative Societies Act, 1960 by making an application to the Registrar. Meanwhile, the General Body of the Society passed a resolution to sell the said land in favour of respondent Nos. 22 and 23. Thereafter, a sale deed/conveyance was executed. The appellants filed two suits seeking declarations that a resolution of first respondent Society and Conveyance executed on behalf of the first respondent Society in favour of respondent Nos. 22 and 23 is illegal and *void ab initio* in the alternative voidable against the plaintiffs of whom some are appellants (tenant members). The plaintiffs also filed an interlocutory application seeking an interim order. The defendants raised a preliminary objection regarding the maintainability of the suits in view of Sections 91 and 163 of the Act. The High Court held that the two suits are not maintainable in view of the provisions of Sections 91 and 163 of the Act. Therefore, the appellants filed the instant appeals.

Disposing of the appeals, the Court

HELD: 1.1. The Civil Court's jurisdiction to adjudicate civil disputes is unlimited, subject only to the limitations imposed by law either expressly or by necessary

implications. Section 163 of the Maharashtra Co-operative Societies Act, 1960 bars the jurisdiction of Civil and Revenue Courts. Section 163(1)(b) and Section 91(3) are complimentary to each other. Section 163 only excludes the jurisdiction of the Civil Court with reference to the disputes arising out of the registration. A dispute arising out of a decision of the society to alienate the property of the society is not expressly covered under Section 163 of the Act. [Paras 16, 17, 18 and 19]

1.2. Section 91 makes it mandatory that certain disputes, the nature of which is specified in the said sub-section, be referred to the 'Co-operative Court' as defined under Section 2(10-a ii). Such reference is required to be made by "any of the parties to the dispute". The Section also specifies the nature/subject matter of dispute which is required to be referred to the Co-operative Courts. They are "disputes touching" the (1) Constitution of the society; (2) Elections of the "Committee or its officers"; (3) Conduct General Meetings; (4) Management of the society or (5) Business of the society. Section 91 also stipulates that the disputes which are mandatorily required to referred to the Co-operative Court for an adjudication must also be disputes arising between the parties to the dispute who should belong to one or the other categories specified under clauses (a) to (e) to sub-section (1) (enumerated persons). It can be seen from the scheme of Section 91, to confer exclusive jurisdiction on the Co-operative Court, the dispute must satisfy two requirements. Both the subject matter as well as the parties to the dispute must be those specified under the Section. If either of the two requirements is not satisfied then the dispute cannot be adjudicated by the Co-operative Court. If one of the parties to the dispute is not an enumerated person, the question whether the subject matter of the dispute is one which falls exclusively within the jurisdiction of the Co-operative Court need not be

examined. Similarly, if it is found in a given case that the subject matter of dispute is not covered by Section 91, an enquiry into the question whether the parties to the dispute fall under any of the categories enumerated under Section 91 would become irrelevant. [Paras 21 and 22]

Marine Times Publications (P) Ltd. vs. *Shriram Transport &Finance Co. Ltd.* **(1991) 1 SCC 469: 1990 (2) Suppl. SCR 466 – referred to.**

1.3. When Section 91(1)(c) stipulates that persons other than the members of the society with whom the society has any transaction as one of the classes of persons who could be parties to a dispute amenable exclusively to the jurisdiction of the Co-operative Court, such a class is not an unqualified class. The said sub-section further qualifies the said class by expressly mentioning that the transactions of such persons with a society should be a transactions "in respect of which restrictions and Regulations have been made or prescribed under Sections 43, 44, or 45 of the Act". [Para 24]

1.4. Where Section 91 (1) (c) speaks of persons other than the members of the society, it is actually referring to persons other than the members of the society who have deposited money with the society or who have either lent or borrowed money from the society in accordance with the provisions of Sections 43 and 44 and subject to the conditions and limitations if any prescribed with reference to such lending to or borrowing from the society. [Para 29]

1.5. Section 94 (1) enumerates the powers of the Cooperative Court. The substance of sub-section (3)(a) is that if the Co-operative Court in the course of adjudication of a dispute is satisfied that any person

other than a party to the dispute "has acquired any interest in the property of a party to a dispute", then the Co-operative Court is empowered to implead such a 3rd party as a party to the dispute. Such a 3rd party may or may not even be a member of the society. The sub-section further declares such an impleaded 3rd party to be bound by the decision of the Co-operative Court. [Para 30]

1.6. The submission that the scheme and language of Section 94(3)(a) makes it beyond doubt that the Co-operative Court's jurisdiction to adjudicate the dispute is not confined only to the disputes between the various classes of persons enumerated under Section 91 alone but extends to others also if such a 3rd party (even in a case where he happen to be a non-member) acquires some interest in the property of either the society or the members or any other person enumerated in Section 91 cannot be accepted. If really the legislature intended that the Co-operative Court should have jurisdiction in all the disputes irrespective of the nature of the dispute arising between the various classes of persons enumerated in Section 91 and non-member 3rd parties who acquire any interest in the property of such enumerated persons, the Legislature could have clearly indicated the same in Section 91 itself. Section 94(3)(a) does not enable a person other than an enumerated person to refer a dispute to the Co-operative Court. [Para 32]

Marine Times Publications (P) Ltd. vs. *Shriram Transport & Finance Co. Ltd.* **(1991) 1 SCC 469: 1990 (2) Suppl. SCR 466 – referred to.**

1.7. Accepting the submission would lead to a situation that while on one hand it is the settled position of law that the Act does not permit a person other than the one enumerated under Section 91 to seek

adjudication of his dispute with 'enumerated persons' in a Co-operative Court, such a Court would be authorised by virtue of Section 94(3)(a) to adjudicate a dispute between an enumerated person and a non-member 3rd party, if raised by an enumerated person. On the other hand, from the language of the said sub-section, it appears that the only circumstance which enables the Co-operative Court to exercise its jurisdiction against such a 3rd party is that while adjudicating a dispute which is otherwise amenable to its jurisdiction, the Co-operative Court reaches the conclusion that a 3rd party acquired some interest in the property of one of the parties to the dispute. [Para 33]

1.8. As regards the question whether the property referred to in the sub-section is any property of one of the parties to the dispute or should such property bear any relationship to the dispute, the property in which the 3rd party acquired interest must bear some relationship with the dispute pending before the tribunal. To hold otherwise would be to enable the Co-operative Court to examine questions unconnected with the dispute pending before it and wholly unconnected with the affairs of the Society. An illogical result to be normally avoided unless compelled by the express language of the Act. [Para 34]

1.9. As regards the second question whether the acquisition of the interest referred to should be anterior to the reference of the dispute to the Co-operative Court or on acquisition made during the pendency of the litigation, having regard to the language of Section 94, sub-section (3)(a), more specifically "has acquired any interest", the acquisition of the interest contemplated is only an acquisition made during the pendency of the dispute before the Co-operative Court. For the reason that such an acquisition of interest is qualified by the words,

"in the property of a person who is a party to the dispute", it is held so for another reason also. [Para 36]

1.10. To hold otherwise would lead to a situation where a dispute between an enumerated person and a 3rd party would become amenable to the jurisdiction of the Co-operative Court at the instance of the persons enumerated under Section 91 but not at the instance of a 3rd party. An absurd situation, ex facie violative of Article 14, in as much as such a construction would lead to a situation that with reference to a dispute, the affected parties are compelled to approach different fora for the adjudication of the same dispute depending upon the fact which party is seeking a relief. Such a construction, being inconsistent with a constitutional mandate, is impermissible. [Para 37]

1.11. For coming to the conclusion that the suits in question are not maintainable and the dispute could be examined exclusively by the Co-operative Court, the High Court proceeded on the basis that it is possible to challenge the resolution and the conveyance independently. Starting from such a premise, the High Court opined that challenge alone to the resolution without challenging the conveyance is possible but not vice-versa. It is presumed that it is possible for the plaintiffs, appellants to challenge only the general body resolution; that the conclusion arrived at by the High Court that if the general body resolution is set aside, the same would impair the validity of the conveyance even without an appropriate declaration by a competent judicial body. If the resolution alone is challenged before the Co-operative Court, the respondents 22 and 23 (the beneficiaries of the resolution) could not be made parties before the Co-operative Court. In such a situation, even if the Co-operative Court came to the conclusion that the resolution is illegal, it would always be open for the

respondents 22 and 23 to ignore such a determination as they are not parties to the proceedings and assert their title on the basis of the conveyance. If any party such as the plaintiffs (the appellants) disputes the validity of the title conveyed thereunder, necessarily such a dispute would have to be adjudicated by a competent Court under Section 9 of the Code of Civil Procedure wherein, necessarily, the question whether a valid title was conveyed in favour of respondents 22 and 23 by the society would arise for determination. The legality of the resolution would still have to be gone into again. Therefore, the premise in which the High Court commenced its enquiry itself is wrong. [Para 38]

1.12. The conclusion of the High Court that the suits in question are not maintainable on the ground that the dispute is amenable to the exclusive jurisdiction under Section 91 of the Act to the Co-operative Court cannot be sustained and is set aside. [Para 39]

1.13. As regards the question whether the High Court was right in going into the maintainability of the suits, it was submitted that in view of the provisions contained in Section 9A of the Code of Civil Procedure which was introduced by local amendment of the Maharashtra Legislature to the Code by Maharashtra Act No.65 of 1977, the course of action followed by the High Court is not only justified. but also the court is obliged to follow such a course of action. The language of Section 9A is self-explanatory. The submission is accepted. [Para 40]

1.14. As regards the interim order, the suits are maintainable and having regard to the fact that the suits are to be tried by the High Court in exercise of its original jurisdiction, no interim order is passed and it is left open to the High Court to consider the applications filed by the plaintiffs for interim orders in accordance with law and pass appropriate orders. The principles governing the

grant of interim orders are well settled. However, on the question of the existence of a prima facie case in favour of the plaintiffs, the following factors are germane and require to be examined. Having regard to the content of the plaint, the nature of the legal right, the plaintiffs claim for seeking the relief such as the one sought in the suits necessarily depends upon the byelaws of the Society, the rights and obligations of the various classes of its members with respect to the property in dispute. The High Court may examine the said aspects before passing an appropriate interim order. All the parties are directed to maintain status quo to enable the High Court to examine the applications of the plaintiffs for interim orders and pass appropriate orders in accordance with law. [Paras 41 and 42]

Case Law Reference:

1990 (2) Suppl. SCR 466 Referred to. Para 22

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1175-1176 of 2012.

From the Judgment & Order dated 29.8.2011 of the High Court of Judicature at Bombay in Appeal Nos. 413, 489, 573 of 2011 in Notice of Motion No. 172 of 2010 in Suit No. 144 of 2010.

WITH

C.A. Nos. 1178 & 1179-1180 of 2012.

H.N. Salve, Mukul Rohtagi, Dr. A.M. Singhvi, Jaibeer Shergill, Shally Bhasin Maheshwari for the Appellant.

K.K. Venugopal, L.N. Rao, Shyam Dewan, C.A. Sundaram, Abhinav Vashist, Chetan Kapadia, Vatsal Merchant, Pratap Venugopal, Purushottham Kumar Jha, Gaurav Nair, Namrata

Soud, Prerna Kumari, Sumer Associates & Robin, K.J. John & Co, P.S. Sudheer, Rishi Maheshwari, C.D. Mehta, Vineet B. Nair, Nikhil Nayyar, TVS Raghavendra, Sreyas, P. Srikumar, Lalan Gupta, J.P. Sen Savitri Daditch, Garima, Prasahad, E.C. Agrawala for the Respondent.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted.

2. These appeals arise out of a common order dated 29th August, 2011 of the Division Bench of the Bombay High Court passed in three writ petitions and two suits, 144 and 145 of 2010.

3. By the said common order, it was held, among other things, that the two suits are not maintainable in view of the provisions of Sections 91 and 163 of the Maharashtra Co-operative Societies Act, 1960 (hereinafter 'the Act', for short). We are not concerned with the remaining part of the Division Bench's judgment as the instant special leave petitions are preferred only against that part of the Division Bench's judgment. The brief factual background of this litigation is as follows.

4. The first respondent is a Society which was originally incorporated in the year 1914. The full particulars of such incorporation are not available at this juncture on record and are also not necessary for the present purpose. It is sufficient to state that it is admitted on all hands that it is a housing cooperative society and the Act governs the affairs of the said Society.

5. It is also an admitted fact on all hands that the said Society has different classes of members known as owners, lessees, allottees, tenants, etc. It is also an admitted fact that the total membership is 762 out of which 69 members fall under the classification of tenant members. However, the exact rights and obligations of these various classes of members, vis-à-vis

the first respondent Society or these various classes of members inter se are also not available on record.

6. It appears from the record that, as on today, the first respondent Society owns an extent of approximately 21,774.10 sq. mts. of land in the city of Mumbai alongwith structures popularly known as Wellingdon Catholic Colony. It appears that the said property was part of a larger parcel of land earlier owned by the first respondent Society but is not owned by the Society now. Some of the 'tenant members' (including the appellants herein) of the Society initiated proceedings for the division of the Society sometime in the year 1970 invoking Section 18 of the Act by making an application to the Registrar. The said application has a very long and chequered history, the details of which are not necessary for the present purpose except to state that by virtue of the judgment under appeal, the application is still open and pending.

7. In the meanwhile, in a resolution came to be passed on the 6th December, 2009 by the General Body of the Society to sell the above mentioned land in favour of respondents No.22 and 23. In furtherance of the said resolution, a sale deed/ conveyance came to be executed on 7th December, 2009. Aggrieved by the said resolution and the sale, two suits 144 and 145/2010 came to be filed invoking the original jurisdiction of the Bombay High Court. A copy of the plaint in the suit No.145/2010 is placed on record in these SLPs. The principal prayer in both the civil suits is

> "(a) for a declaration that the said Resolution dated 6th December, 2009 (Exhibit 'K' hereto) and the said Conveyance dated 7th December, 2009 (Exhibit 'M' hereto) are invalid, illegal and void ab initio and/or the same are voidable as against the Plaintiffs and the Tenant members of Defendant No.17 Association;
>
> (a-i) That this Hon'ble Court be pleased to pass Order declaring Section 164 of Maharashtra Co-operative

Societies Act, 12 Violation of Article 14 of the Constitution of India and the same ought to be struck down."

It can be seen from prayer (a) extracted above that the plaintiffs seek in effect two declarations – (i) that a resolution dated 6th November, 2009 of the first respondent Society, and (ii) a Conveyance dated 7th December, 2009 executed on behalf of the first respondent Society in favour of respondents 22 and 23, are either illegal, *void ab initio* or in the alternative that they are voidable as against the plaintiffs (of whom at least some) are the appellants herein and claim to be the tenant members of the respondent society (we may state here that there is a dispute regarding the membership of some of the appellants herein but, for the present case, we do not go into the dispute but refer the appellants, only for the sake of convenience, as 'tenant members'). The substance of the factual and legal basis (asserted in the plaint) on which the plaintiffs seek the two declarations (referred to earlier) in the civil suits, and argued at the Bar is that the 'tenant members' alone have the right, title and interest over the property sought to be sold by the impugned conveyance dated 7th December, 2009 and that the other members of the Society have no right, title or interest in the property in dispute. The plaintiffs expect an order of bifurcation of the respondent No.1 Society and also to get a declaration in their favour of the right, title and interest in the property in dispute. The plaintiffs also therefore claimed appropriate interim orders regarding the property during the pendency of the suits.

8. The defendants raised a preliminary objection regarding the maintainability of the suits in view of Sections 91 and 163 of the Act which was rejected by a learned single judge but found favour with the Division Bench of the Bombay High Court resulting in that part of the judgment which is under appeal now.

9. By the judgment under appeal it is held that:

"In our opinion, therefore, what is principally challenged in

the Civil Suit is the resolution of the general body. And challenge to the conveyance is ancillary"

And therefore opined:

"That the Plaintiffs could have filed the dispute before the Co-operative Court challenging the resolution of the General Body and the consequent execution of conveyance in favour of M/s. Sumer associates and could have joined M/s. Sumer associates as a Defendant in that dispute. In our opinion thus the entire subject matter of the Civil Suit could have been the subject matter of the dispute filed under Section 91."

10. Shri Mukul Rohtagi and Dr. Abhishek M. Singhvi, learned senior counsel appearing for the appellants argued that irrespective of the fact whether a declaration regarding illegality of the impugned resolution dated 6th December, 2009 could be granted by the ordinary civil courts in view of Section 91 of the Act, a declaration regarding the voidness of the impugned conveyance dated 7th December, 2009 could only be given by a competent civil court contemplated under Section 9 of the Code of Civil Procedure (hereinafter 'the Code' for short) because such conveyance is in favour of a person who is not a member of the Society. It is submitted that the ultimate dispute and grievance of the plaintiffs is against the alienation of the property in favour of the respondents 22 and 23 herein by the impugned conveyance which has the effect of depriving the plaintiffs of their right, title and interest in the property in dispute. Such a conveyance could only be declared illegal and void ab initio by a competent civil court contemplated under Section 9 of the Code. The impugned resolution, which purportedly authorises the sale of the property covered by the impugned conveyance, by itself does not transfer or create any interest in the property adverse to the interest of the plaintiffs. Therefore, even if it is assumed that the legality of the impugned resolution is amenable to the jurisdiction of the Co-operative Court

functioning under Section 91, the suits in question could not have been held to be not maintainable as the jurisdiction to adjudicate upon the incidental question regarding the impugned resolution dated 6th December, 2009 would stand subsumed by the jurisdiction of the competent civil court which alone is competent to decide the legality of the impugned conveyance dated 7th December, 2009. The learned counsel further argued that the ouster of the jurisdiction conferred on the Civil Courts under Section 9 of the Code is to be conceded only where there is an express exclusion by the language of the Statute or if such an ouster arises by a necessary implication from the Scheme of a particular Statute. It is argued that there is nothing either in the language of Section 91 or the Scheme of the Act which would lead to a conclusion that the jurisdiction conferred under Section 9 of the Code is excluded to adjudicate the suits in question.

11. On the question of interim order during the pendency of the suits, the learned counsel argued that in view of the pendency of the claim of the plaintiff for the bifurcation of the respondent society (and according to the appellants, they have a very strong case), the disputed property must be preserved as it is and the balance of convenience is in favour of the appellants. The learned counsel argued that the High Court grossly erred in examining the maintainability of the suits in the interlocutory application filed by the plaintiff seeking interim order.

12. On the other hand, learned senior counsel Shri C.A. Sundaram appearing for the respondents argued that the language of Section 91, sub-section 1(c) of the Act clearly indicates that the jurisdiction of the Co-operative Court contemplated under Section 91 is not confined only to the adjudication of the disputes between the society and its members or servants etc. enumerated in Section 91(1)(a), (b), (d) and (e) but also extends to the disputes where one of the parties to the dispute is a person other than a member of the

society.

13. According to the learned counsel, such conclusion is irresistible from the language of Section 91(1) (c) and Section 94 (3) (a).Hence, the judgment under appeal does not call for any interference.

14. Shri K.K. Venugopal, learned senior counsel submitted that the course adopted by the Bombay High Court in examining the maintainability of the suits in the Interlocutory Application filed by the plaintiffs is not only justified but also mandatory in view of the language of Section 9A of the Civil Procedure Code inserted by the State Legislation of Maharashtra.

15. On the question of interim arrangement to be made during the pendency of the suit, learned counsel for the respondent submitted that the suit itself is based on the expectancy that the tenant Members would succeed in their application for the bifurcation of the society, and upon bifurcation, the tenant members would be entitled for the exclusive title and possession of the disputed property. Even if the above mentioned understanding of the plaintiff's is right since the plaintiffs are only some of the tenant members of the society, they would not be entitled for the title and possession of the entire disputed property, but only a part of it. It is argued that since other tenant members have no objection to the alienation of the property in dispute in favour of the respondent no. 22 and 23, impeding of conveyance dated 7th December, 2009 would not be justified as the impugned resolution and the conveyance have made adequate provisions for safeguarding the interest (if any) of the appellants.

16. We shall now examine the issue of maintainability of the suits. As rightly contended by the learned counsel for the appellants the Civil Court's jurisdiction to adjudicate Civil disputes is unlimited, subject only to the limitations imposed by law either expressly or by necessary implications. The law in

this regard is well settled and needs no elaboration. Therefore, it becomes necessary for us to examine whether there is anything in the language of Section 91 or Section 163 which expressly excludes the jurisdiction of the Civil Courts in the context of the suits in question. Section 163 of the Act bars the jurisdiction of Civil and Revenue Courts reads as follows:

"163. Bar of jurisdiction of Courts.

(1) Save as expressly provided in this Act, no Civil or Revenue Court shall have any jurisdiction in respect of

(a) the registration of a society or its by-laws or the amendments of its by-laws or the dissolution of the committee of a society, or the management of the society on dissolution thereof: or

(b) any dispute required to be referred to the Co-operative Court for decision.

(c) any matter concerned with the winding up and dissolution of a society.

(2) while a society is being wound up, no suit or other legal proceeding relating to the business of such society shall be proceeded with or instituted against the society or any member thereof, or any matter touching the affairs of the society, except by the leave of the Registrar, and subject to such terms as he may impose.

(3) all orders, decisions or awards passed in accordance with the Act or the Rules shall, subject to the provisions for appeal or revision in this Act be final; and no such order, decision or award shall be liable to be challenged, set aside, modified, revised or declared void in any Court upon the merits or upon any other ground whatsoever."

17. Section 163 (1)(b) and Section 91 (3) are complimentary to each other. Section 91(3) reads as follows:

"Save as otherwise provided under "sub-section (2) to section 93, no Court shall have jurisdiction to entertain any suit or other proceedings in respect of any dispute referred to in sub-section (1)"

18. It can be seen that the Section 163 only excludes the jurisdiction of the Civil Court with reference to the disputes arising out of the registration:-

(1) Registration of the society;

(2) Disputes relating to the bye-laws of the society;

(3) Dissolution of the Committee of the society;

(4) Management of the society on dissolution of the society;

(5) Any disputes which is required to be referred to the Co-operative Court under Section 91.;

(6) Any matter concerned with the winding up and dissolution of the society etc.

19. A dispute arising out of a decision of the society to alienate the property of the society, in our opinion, is not expressly covered under Section 163 of the Act. It is to be examined whether it is a matter which is required to be resolved by the Co-operative Court by virtue of the provisions under Section 91 of the Act. In view of the conclusion of the High Court that "the entire subject matter of the civil suit could have been the subject matter of dispute filed under Section 91."

20. It is necessary to examine the scope of Section 91(1), which reads as follows

"(1) Notwithstanding anything contained in any other law for the time being in force any dispute touching the Constitution, (Election of Committee or its Officers) other than the elections of the committees of the specified

societies including its officers), Conduct of general meetings, management or business or a society shall be referred by any of the parties to the disputes, or by federal society to which the society is affiliated or by a creditor of the society, (in the Co-operative Court) If both the parties there to are one or other of the following;-

(a) a society, its committee, any past committee, any past or present officer, any past or present agent, any past and present servant or nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the society or the liquidator of the society (or the official Assignee of a De-Registered Society),

(b) a member, past member of a person claiming through a member, past member of a deceased member of society, or a society which is a member of the society (or a persons who claims to be a member of the society;)

(c) a person other than a member of the society, with whom the society has any transactions in respect of which any restrictions or regulations have been imposed, made or prescribed under sections 43,44 or 45 and any person claiming through such person:

(d) a surety of a member, past member or deceased member, or surety of a person other than a member with whom the society has any transactions in respect of which restrictions have been prescribed under section 45, whether such surety or person is or is not a member of the society:

(e) any other society , or the Liquidator of such a society or de-registered society or the official

Assignee of such a de-registered society."

21. It can be seen from the above extract that the Section makes it mandatory that certain disputes, the nature of which is specified in the said sub-section, be referred to the 'Co-operative Court'* – as defined under Section 2(10-a ii). Such reference is required to be made by "any of the parties to the dispute". The Section also specifies the nature/subject matter of dispute which is required to be referred to the Co-operative Courts. They are "disputes touching" the

(1) Constitution of the society

(2) Elections of the "Committee or its officers"

(3) Conduct General Meetings

(4) Management of the society or

(5) Business of the society.

22. Section 91 also stipulates that the disputes which are mandatorily required to referred to the Co-operative Court for an adjudication must also be disputes arising between the parties to the dispute who should belong to one or the other categories specified under clauses (a) to (e) to sub-section (1), hereinafter referred to as 'enumerated persons', for the sake of convenience. It can be seen from the scheme of Section 91, to confer exclusive jurisdiction on the Co-operative Court, the dispute must satisfy two requirements. It was held so in *Marine Times Publications (P) Ltd.* Vs. *Shriram Transport & Finance Co. Ltd.,* (1991) 1 SCC 469 at para 11:

"11. Before a dispute can be referred to a Cooperative Court under the provisions of Section 91(1) of the said Act it is not only essential that the dispute should be of a kind described in sub-section (1) of Section 91 but it is also

* 'Co-operative Court' means a court constituted under this Act to decide disputes referred to it under any of the provisions of the Act.

essential that the parties to the said dispute must belong to any of the categories specified in clauses (*a*) to (*e*) of sub-section (1) of the said section."

Both the subject matter as well as the parties to the dispute must be those specified under the section. In other words if either of the above mentioned two requirements is not satisfied then the dispute cannot be adjudicated by the Co-operative Court. If one of the parties to the dispute is not an enumerated person, the question whether the subject matter of the dispute is one which falls exclusively within the jurisdiction of the Co-operative Court need not be examined. Similarly, if it is found in a given case that the subject matter of dispute is not covered by Section 91, an enquiry into the question whether the parties to the dispute fall under any of the categories enumerated under Section 91 would become irrelevant.

23. However, learned counsel for the respondent argued that in view of the language of Section 91(1) (c) and Section 94(3) the various classes of persons contemplated under Section 91 to bring the dispute within the jurisdiction of the Co-operative Court (if the subject matter of the dispute is otherwise exclusively amenable to the jurisdiction of the Co-operative Court), includes persons other than the members of the society though not covered by clauses (a), (b), (d) and (e) of Section 91(1). The leaned counsel laid emphasis on the clause "persons other than a member of the society" occurring under Section 91(1) (c) and the clause "whether he be a member of the society or not has acquired any interest in the property of a person who is a party to a dispute" occurring under Section 94(3)(a) clearly demonstrate that the jurisdiction of the Co-operative Court is not confined only to those cases where both the parties are either members or officers etc. specified in clauses (a), (b), (d) and (e) of Section 91(1).

24. To examine the correctness of the submissions made by Shri C.A. Sundaram, it requires an analysis of Section 91(1)(c) and 94 (3). When Section 91(1)(c) stipulates that

persons other than the members of the society with whom the society has any transaction as one of the classes of persons who could be parties to a dispute amenable exclusively to the jurisdiction of the Co-operative Court, such a class is not an unqualified class. The said sub-section further qualifies the said class by expressly mentioning that the transactions of such persons with a society should be a transactions "in respect of which restrictions and Regulations have been made or prescribed under Sections 43, 44, or 45 of the Act". Therefore, to understand the exact nature of the above mentioned class, an examination of the scheme of Sections 43, 44 is necessary.

25. Section 43 (1) reads as follows:

"43. (1) A society shall receive deposits and loans from members and other persons, only to such extent, and under such conditions, as may be prescribed, or specified by the by-laws of the society."

The said provision recognises the legal authority of a co-operative society to receive deposits and loans either from the members or other persons. It further stipulates that the receipt of deposits and loans is permissible only to the extent and subject to such conditions as may be prescribed.

26. Section 44 on the other hand deals with the legal authority of the co-operative society to make a loan/lend money. Section 44 in so far as it is relevant reads as follows.

"44.(1) No society shall make a loan to any person other than a member or on the security of its own shares, or on the security of any person who is not a member.

Provided that with the special sanction of the Registrar, a society may make loans to another society.

(2) Notwithstanding anything contained in the foregoing sub-section, a society may make a loan to a depositor on

the security of his deposit.

(3) **********"

It can be seen from sub-section (1) that it prohibits a society from lending money to a person other than a member. It also prohibits lending of money by the society even to a member on the security of the shares of the same society. Further it also prohibits lending of money to a member on security to a person who is not a member. However, the proviso to sub-section (1) authorises a society to lend money to any other society with the special sanction of the Registrar.

27. Sub-section (2) expressly authorises the society to lend money to a depositor on the security of his deposits. Such an authorisation is declared to be notwithstanding anything contained in sub-section (1). In other words, the restriction contained in sub-section (1) that a society shall not lend money to a person other than a member is relaxed with reference to a depositor, who is not a member of the society, as we have already noticed under Section 43 that the deposits or loans can be received by a society not only from its members but also from persons other than members.

28. Section 45 makes a general declaration that the transactions of the society with persons other than its members shall be subject to such restrictions as may be prescribed. Section 45 reads as follows:-

"45. Save as is provided in this Act, the transactions of a society with persons other than members shall be subject to such restrictions, if any, as may be prescribed."

29. Therefore, where Section 91 (1) (c) speaks of persons other than the members of the society, it is actually referring to persons other than the members of the society who have deposited money with the society or who have either lent or borrowed money from the society in accordance with the provisions of Sections 43 and 44 and subject to the conditions

and limitations if any prescribed with reference to such lending to or borrowing from the society.

30. Coming to the language and Scheme of Section 94(3). Section 94(1) enumerates the powers of the Cooperative Court such as the power of summoning the witness and documents etc. Sub-section (3)(a) reads as follows:

94. Procedure for settlement of disputes and power of Co-operative Court

xxx xxx xxx xxx

(3)(a) If the Co-operative Court is satisfied that a person whether he be a member of the society or not **has acquired any interest in the property of a person who is a party to a dispute** it may order that the person who has acquired the interest in the property may join as a party to the dispute; and any decision that may be passed on the reference by the Co-operative Court shall be binding on the party so joined in the same manner as if he were an original party to the dispute."

[emphasis supplied]

The substance of sub-section (3)(a) is that if the Co-operative Court in the course of adjudication of a dispute is satisfied that any person other than a party to the dispute "has acquired any interest in the property of a party to a dispute", then the Co-operative Court is empowered to implead such a 3rd party as a party to the dispute. Such a 3rd party may or may not even be a member of the society. The sub-section further declares such an impleaded 3rd party to be bound by the decision of the Co-operative Court.

31. It is argued by Shri C.A. Sundaram, learned senior counsel for the respondents that the scheme and language of Section 94(3)(a) makes it beyond doubt that the Co-operative Court's jurisdiction to adjudicate the dispute is not confined only

to the disputes between the various classes of persons enumerated under Section 91 alone but extends to others also if such a 3rd party (even in a case where he happen to be a non-member) acquires some interest in the property of either the society or the members or any other person enumerated in Section 91.

32. We find it difficult to accept the submissions of Shri Sundaram for the reason if really the Legislature intended that the Co-operative Court should have jurisdiction in all the disputes irrespective of the nature of the dispute arising between the various classes of persons enumerated in Section 91 and non-member 3rd parties who acquire any interest in the property of such enumerated persons, the Legislature could have clearly indicated the same in Section 91 itself. It must be remembered that Section 94(3)(a) does not enable a person other than an enumerated person to refer a dispute to the Co-operative Court. The said legal position is made clear in *Marine Times* (supra). It was a case where a member of a housing society occupying a part of the building owned by the society agreed to sell that property to a 3rd party subject to the approval of the society. The society declined approval. The 3rd party raised a dispute against the society as well as the member before the Co-operative Court. Dealing with the question whether the Co-operative Court would have jurisdiction to adjudicate the dispute, this Court answered the question in the negative.

33. Accepting the submission of Shri Sundaram would lead to a situation that while on one hand it is the settled position of law that the Act does not permit a person other than the one enumerated under Section 91 to seek adjudication of his dispute with 'enumerated persons' in a Co-operative Court, such a Court would be authorised by virtue of Section 94(3)(a) to adjudicate a dispute between an enumerated person and a non-member 3rd party, if raised by an enumerated person. On the other hand, from the language of the said sub-section, it appears that the only circumstance which enables the Co-

operative Court to exercise its jurisdiction against such a 3rd party is that while adjudicating a dispute which is otherwise amenable to its jurisdiction, the Co-operative Court reaches the conclusion that a 3rd party acquired some interest in the property of one of the parties to the dispute. Necessarily the following two questions must be examined to understand the exact scope of the said sub-section. (1) Whether the property referred to in the sub-section is any property of one of the parties to the dispute or should such property bear any relationship to the dispute? (2) Whether the acquisition of the interest referred to should be anterior to the reference of the dispute to the Co-operative Court or on acquisition made during the pendency of the litigation?

34. The answer to the first question to our mind is plain. The property in which the 3rd party acquired interest must bear some relationship with the dispute pending before the tribunal. To hold otherwise would be to enable the Co-operative Court to examine questions unconnected with the dispute pending before it and wholly unconnected with the affairs of the Society. An illogical result to be normally avoided unless compelled by the express language of the Act.

35. Coming to the second question, learned counsel for the appellant argued that the intention of the Legislature is to be gathered from the language of the sub-section (3)(a) and the employment of the present perfect tense (has acquired any interest) must only lead to a conclusion that the Legislature intended the Co-operative Court to deal with only the cases of acquisition of interest in the property during the pendency of the litigation before it. On the other hand, Shri Sundaram argued that there is no warrant for such an inference in the language of sub-section (3)(a).

36. We are of the opinion that having regard to the language of Section 94, sub-section (3)(a), more specifically "has acquired any interest", the acquisition of the interest contemplated is only an acquisition made during the pendency

of the dispute before the Co-operative Court. For the reason that such an acquisition of interest is qualified by the words, "in the property of a person who is a party to the dispute", we hold so for another reason also.

37. To hold otherwise, would lead to a situation where a dispute between an enumerated person and a 3rd party would become amenable to the jurisdiction of the Co-operative Court at the instance of the persons enumerated under Section 91 but not at the instance of a 3rd party in view of the judgment of this Court in (1991) 1 SCC 469. An absurd situation, ex facie violative of Article 14, in as much as such a construction would lead to a situation that with reference to a dispute, the affected parties are compelled to approach different fora for the adjudication of the same dispute depending upon the fact which party is seeking a relief. Such a construction, being inconsistent with a constitutional mandate, is impermissible.

38. For coming to the conclusion that the suits in question are not maintainable and the dispute could be examined exclusively by the Co-operative Court, the High Court proceeded on the basis that it is possible to challenge the resolution and the conveyance independently. Starting from such a premise, the High Court opined that challenge alone to the resolution without challenging the conveyance is possible but not vice-versa. The reason given by the High Court for the same is as follows:-

> "If Court passes a decree or order setting aside the resolution of the general body, the validity of the conveyance will not be intact, but if a decree or order is made merely setting aside the conveyance, the resolution of the General body will remain intact. By the conveyance land owned by the Society is transferred. The society is a body corporate. The person or persons who have signed the conveyance on behalf of the Society derive the authority to do so from resolution of the General Body. If the resolution is set aside or is declared invalid the act of the person of executing the conveyance would become unauthorised. Such an order in relation to the validity of the General Body resolution will impair the validity of the conveyance. Consequently, if the resolution remains intact but the conveyance is set aside for some reason the Society may be in a position to execute another conveyance pursuant to the resolution of the general body."

We do not propose to examine the correctness of the legal premise that the general body resolution and the conveyance could be segregated in a dispute such as one on the hand. For the sake of argument, we presume that it is possible for the plaintiffs, appellants herein, to challenge only the general body resolution. We also presume that the conclusion arrived at by the High Court that if the general body resolution is set aside, the same will impair the validity of the conveyance even without an appropriate declaration by a competent judicial body. (We emphasise that we only presume so without examining to the said conclusion for the limited purpose) If the resolution dated 6th December, 2009 alone is challenged before the Co-operative Court, in view of our conclusion recorded earlier, the respondents 22 and 23 (the beneficiaries of the resolution) could not be made parties before the Co-operative Court. In such a situation, even if the Co-operative Court came to the conclusion that the resolution is illegal, it would always be open for the respondents 22 and 23 to ignore such a determination as they are not parties to the proceedings and assert their title on the basis of the conveyance dated 7th December, 2009. If any party such as the plaintiffs (the appellants herein) disputes the validity of the title conveyed thereunder, necessarily such a dispute would have to be adjudicated by a competent Court under Section 9 of the Code of Civil Procedure wherein, necessarily, the question whether a valid title was conveyed in favour of respondents 22 and 23 by the society would arise for determination. The legality of the resolution would still have to be gone into again. Therefore, in our opinion, the premise in which the High Court commenced its enquiry itself is wrong.

39. For all the above-mentioned reasons, we are of the opinion that the conclusion of the High Court that the suits in question are not maintainable on the ground that the dispute is amenable to the exclusive jurisdiction under Section 91 of the Act to the Co-operative Court cannot be sustained and the same is required to be set aside.

40. That takes us to the next question raised in these appeals - whether the High Court was right in going into the maintainability of the suits in question. Shri Venugopal, learned senior counsel appearing for some of the respondents submitted that in view of the provisions contained in Section 9A of the Code, which was introduced by local amendment of the Maharashtra Legislature to the Code by Maharashtra Act No.65 of 1977, the course of action followed by the High Court is not only justified but also the Court is obliged to follow such a course of action. Section 9A reads as follows:

"9A. Whereof the hearing of application relating to interim relief in a suit, objection to jurisdiction is taken, such issue to be decided by the Court as a preliminary issue.-

(1) Notwithstanding anything contained in this Code or any other law for the time beiong in force, if, at the hearing of any application for granting or setting aside an order granting any interim relief, whether by way of stay, injunction, appointment of a receiver or otherwise, made in any suit, an objection to the jurisdiction of the Court to entertain such a suit is taken by any of the parties to the suit, the Court shall proceed to determine at the hearing of such application the issue as to the jurisdiction as a preliminary issue before granting or setting aside the order granting the interim relief. Any such application shall be heard and disposed of by the Court as expeditiously as possible and shall not in any case be adjourned to the hearing of the suit.

(2) Notwithstanding anything contained ion sub-section (1),

at the hearing of any such application, the Court may grant such interim relief as it may consider necessary, pending determination by it of the preliminary issue as to the jurisdiction."

The language of Section 9A is self-explanatory. We accept the submission made by Shri Venugopal in toto.

41. Coming to the question of the interim order in view of our conclusion that the suits in question are maintainable and having regard to the fact that the suits are to be tried by the High Court in exercise of its original jurisdiction, we do not propose to pass any interim order and leave it open to the High Court to consider the applications filed by the plaintiffs for interim orders in accordance with law and pass appropriate orders. The principles governing the grant of interim orders are too well settled and we need not expound the same once again. However, we would like to indicate that on the question of the existence of a prima facie case in favour of the plaintiffs, the following factors are germane and require to be examined. Having regard to the content of the plaint, we are of the opinion that the nature of the legal right, the plaintiffs claim for seeking the relief such as the one sought in the suits necessarily depends upon the byelaws of the Society, the rights and obligations of the various classes of its members with respect to the property in dispute. The High Court may examine the above aspects before passing an appropriate interim order.

42. In view of the above, we also deem it proper to direct all the parties to maintain status quo as on today for a period of two weeks to enable the Bombay High Court to examine the applications of the plaintiffs for interim orders and pass appropriate orders in accordance with law.

43. The appeals are, accordingly, disposed of.

N.J. Appeals disposed of.

MARGRET ALMEIDA & ORS., ETC. ETC.
v.
BOMBAY CATHOLIC COOP. HOUSING SOCIETY LTD. & ORS.
I.A. Nos. 4-6 of 2012
IN
Civil Appeal Nos.1175-1177 of 2012

FEBRUARY 24, 2012

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

Maharashtra Co-operative Societies Act, 1960 – s.91 – Trial court passing interim order of status quo during the pendency of the suits in favor of the appellants holding that the suits are maintainable – Division Bench of High Court held that the suits were not maintainable – On appeal, the Supreme Court held that the suits are maintainable and directed the parties to maintain status quo to enable the High Court to examine the applications for interim orders – Interlocutory applications seeking clarification of the order of the Supreme Court – Order modified to the effect that the matter be considered by the Division Bench of the High Court and decide whether the interim order granted by the trial judge is sustainable.

Appellants-plaintiffs filed two suits. The trial judge held that the suits were maintainable, as also granted interim order in favour of the appellants, directing the parties to the suits to maintain *status quo* during the pendency of the suits. The Division Bench of the High Court held that the suits were not maintainable in view of Section 91 of the Maharashtra Cooperative-Societies Act, 1960 and dismissed the suits. Thereafter, appeals were filed before the Supreme Court. By order dated 30.01.2012, the Supreme Court holding that the suits were maintainable, set aside the order passed by the

Division Bench and directed the parties to maintain status quo to enable the High Court to examine the applications of the appellants for interim orders. Therefore, the instant interlocutory applications were filed seeking clarification of the order dated 30.1.2012.

The appellants contended that the judgment of the Supreme Court wrongly recorded that the application of the plaintiffs-appellants for interim orders is required to be considered, whereas, as a matter of fact, the appellants were granted interim order by the trial judge and it was the respondents, who challenged the grant of such an interim order and, therefore, the judgment of Supreme Court, is required to be clarified.

Allowing the interlocutory applications, the Court

HELD: The submissions of the appellants are accepted. The erroneous conclusion of the Division Bench of the High Court cannot operate to the prejudice of the appellants-plaintiffs, who successfully demonstrated before Supreme Court that the order of the Division Bench cannot be sustained. The settled principle of law is that the *actus curiae neminem gravabit* - 'act of the court shall not harm anybody'. Therefore, the matter should be considered by the Division Bench of the High Court and decide whether the interim order granted by the trial judge is sustainable. The judgment of Supreme Court dated 30.1.2012 stands modified. [Paras 7 and 8]

South Eastern Coal Fields Limited vs. State of M.P. **(2003) 8 SCC 648 : 2003 (4) Suppl. SCR 651 – referred to.**

Case Law Reference:

2003 (4) Suppl. SCR 651 Referred to Para 7

CIVIL APPELLATE JURISDICTION : I.A. Nos. 4-6 of 2012.

From the Judgment & Order dated 29.08.2011 of the High

Court of Judicature at Bombay in Appeal No. 413 of 2011 in Notice of Motion No. 172 of 2010 in Suit No. 144 of 2010, Appeal No. 489 of 2011 in Notice of Motion No. 172 of 2010 in Suit No. 144 of 2010 and Appeal No. 573 of 2011 in Notice of Motion No. 172 of 2010 in Suit No. 144 of 2010.

Mukul Rohtagi, Shally Bhasin Maheshwari for the Appellant.

C.A. Sundaram, Shyam Divan, Pratap Venugopal, Namrata Sood, Anuj Sarma, Gaurav Nair (for K.J. John & Co.) E.C. Agrawala, C.D. Mehta, Pritha Srikumar, Nikhil Nayyar, Garima Prashad, P.S. Sudheer, Rishi Maheshwari for the Respondents.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. This is an Application filed with the prayer as follows:

'In the above facts and circumstances, the Applicants / Appellants most respectfully pray that the Hon'ble Court may be pleased to:

(a) Clarify the order dated 30.01.2012 passed by this Hon'ble Court in Civil appeal No.1175-1177 of 2012 titled as "Margret Almeida & Ors. Etc. Etc Versus The Bombay Catholic Co-operative Housing Society Ltd. & Ors. Etc. etc." as sought in Para 6; and / or

(b) Pass such other further or other reliefs as the Applicants / Appellants may be found to be entitled under the facts and circumstances stated hereinabove."

2. By the Judgment dated 30-01-2012 C.A.Nos.1175 – 1177 of 2012 were disposed of setting aside the Judgment dated 29-08-2011 of a Division Bench of the Bombay High Court. The said Judgment was rendered in a batch of connected matters, arising out of two suits No.144 & 145 of 2010, on the original side of the Bombay High Court. The

question before the Division Bench was whether the two suits were maintainable in view of Section 91 of the Maharashtra Cooperative Societies Act, 1960. It appears from the Division Bench Judgment of the High Court that the learned Trial Judge not only held that the suits are maintainable, but also, granted interim order in favour of the plaintiffs (appellants/ petitioners herein), directing the parties to the suits to maintain status quo during the pendency of the suits.

3. In view of the conclusion of the Division Bench that the suits were not maintainable, the Division Bench recorded an order of dismissal of the suits.

4. While allowing the appeals, this Court directed, at paras 41 and 42 of the Judgment, as follows:

"41. Coming to the question of the interim order in view of our conclusion that the suits in question are maintainable and having regard to the fact that the suits are to be tried by the High Court in exercise of its original jurisdiction, we do not propose to pass any interim order and leave it open to the High Court to consider the applications filed by the plaintiffs for interim orders in accordance with law and pass appropriate orders. The principles governing the grant of interim orders are too well settled and we need not expound the same once again. However, we would like to indicate that on the question of the existence of a prima facie case in favour of the plaintiffs, the following factors are germane and require to be examined. Having regard to the content of the plaint, we are of the opinion that the nature of the legal right, the plaintiffs claim for seeking the relief such as the one sought in the suits necessarily depends upon the byelaws of the Society, the rights and obligations of the various classes of its members with respect to the property in dispute. The High Court may examine the above aspects before passing an appropriate interim order.

42. In view of the above, we also deem it proper to direct

all the parties to maintain status quo as on today for a period of two weeks to enable the Bombay High Court to examine the applications of the plaintiffs for interim orders and pass appropriate orders in accordance with law."

(Emphasis supplied)

And hence, the present Application.

5. The learned senior counsel for the Applicants Mr. Mukul Rohtagi, argued that the appellants (plaintiffs) had an interim order of *status quo* in their favour granted by the learned Trial Judge while holding that the suits are maintainable and rejected the objection to the contra by the defendants. Aggrieved by the decision of the learned Trial Judge, the defendants carried the matter in appeal before the Division Bench of the Bombay High Court. Appeals were allowed by the Division Bench, on an erroneous appreciation of the legal position regarding the maintainability of the suits. In view of the Judgement of this Court dated 30-01-2012, it is for the Division Bench of the Bombay High Court, to consider whether the interim order granted by the learned single Judge, to maintain status quo during the pendency of the suit, is to be sustained or not. The above extracted portion of the Judgement of this Court wrongly recorded that the application of the plaintiffs (appellants herein) for interim orders is required to be considered, whereas, as a matter of fact, the appellants herein were granted interim order by the learned Trial Judge and it is the respondents herein, who are challenging the grant of such an interim order and, therefore, the Judgment of this Court dated 30-01-2012, is required to be clarified accordingly.

6. On the other hand, the learned senior counsel Mr. C.A. Sundaram, appearing for respondent, argued that in view of the fact that the appeals preferred by the respondents before the Division Bench of the Bombay High Court were allowed dismissing the suits, the interim order granted during the pendency of the suits, by the learned single Judge of the Bombay High Court, lapsed with the dismissal of the suits and,

therefore, this Court, rightly, opined that the application of the plaintiffs for interim orders is required to be considered afresh.

7. We agree with the submission made by the learned senior counsel Mr. Mukul Rohtagi. The erroneous conclusion of the Division Bench cannot operate to the prejudice of the plaintiffs, who successfully demonstrated before this Court that the order of the Division Bench cannot be sustained. The settled principle of law is that the actus curiae neminem gravabit - 'act of the court shall not harm anybody'. In *South Eastern Coal Fields Limited Vs State of M.P.,* (2003) 8 SCC 648, this Court held:

"27. That no one shall suffer for an act of the court is not a rule confined to an erroneous act of the court; the act of the court embraces within its sweep all such acts as to which the court may form an opinion in any legal proceeding that the court would not have so acted had it been correctly appraised of the facts and the law. *The factor attracting applicability of the restitution is not the act of the court being wrongful or mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable has resulted in one party gaining an advantage which it would not have otherwise earned;* or the other party has suffered a impoverishment which it would not have suffered but for the order of the court and the act of such party."

(Emphasis supplied)

Therefore, we are of the opinion that the matter should be considered by the Division Bench of the Bombay High Court and decide whether the interim order granted by the learned Trial Judge is sustainable.

8. The application is accordingly allowed and the Judgement of this Court dated 30-01-2012 stands modified, as indicated above.

N.J. Interlocutory application allowed

M/S ACG ASSOCIATED CAPSULES PVT. LTD.
(FORMERLY M/S ASSOCIATED CAPSULES PVT. LTD.)
v.
THE COMMISSIONER OF INCOME TAX, CENTRAL-IV, MUMBAI
(CIVIL APPEAL No. 1914 OF 2012 Etc.)

FEBRUARY 08, 2012

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

Income Tax Act, 1961: s.80HHC, Explanation (baa) – Deduction under – Held: Ninety per cent of the net interest, which has been included in the profits of the business of the assessee as computed under the head 'Profits and Gains of Business or Profession' is to be deducted under clause (1) of Explanation (baa) to s.80HHC for determining the profits of the business.

The question which arose for consideration in the instant appeals was whether while determining the profits of the business as defined in Explanation (baa) to Section 80HHC of the Income Tax Act, 1961, ninety per cent of only the net interest which has been included in the profits of the business of the assessee as computed under the head 'Profits and Gains of Busniness and Profession' would be excluded for the purpose of working out the deduction under Section 80HHC of the Act.

Disposing of the appeals, the Court

HELD: 1. Explanation (baa) to Section 80HHC of the Income Tax Act, 1961 states that "profits of the business" means the profits of the business as computed under the head "Profits and Gains of Business or Profession" as

reduced by the receipts of the nature mentioned in clauses (1) and (2) of the Explanation (baa). Thus, profits of the business of an assessee will have to be first computed under the head "Profits and Gains of Business or Profession" in accordance with provisions of Section 28 to 44D of the Act. In the computation of such profits of business, all receipts of income which are chargeable as profits and gains of business under Section 28 of the Act will have to be included. Similarly, in computation of such profits of business, different expenses which are allowable under Sections 30 to 44D have to be allowed as expenses. After including such receipts of income and after deducting such expenses, the total of the net receipts are profits of the business of the assessee computed under the head "Profits and Gains of Business or Profession" from which deductions are to made under clauses (1) and (2) of Explanation (baa). [Para 9]

2. Under Clause (1) of Explanation (baa), ninety per cent of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in any such profits are to be deducted from the profits of the business as computed under the head "Profits and Gains of Business or Profession". The expression "included any such profits" in clause (1) of the Explanation (baa) would mean only such receipts by way of brokerage, commission, interest, rent, charges or any other receipt which are included in the profits of the business as computed under the head "Profits and Gains of Business or Profession". Therefore, if any quantum of the receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature is allowed as expenses under Sections 30 to 44D of the Act and is not included in the profits of business as computed under the head "Profits and Gains of Business or Profession", ninety per cent of such quantum of

receipts cannot be reduced under Clause (1) of Explanation (baa) from the profits of the business. In other words, only ninety per cent of the net amount of any receipt of the nature mentioned in clause (1) which is actually included in the profits of the assessee is to be deducted from the profits of the assessee for determining "profits of the business" of the assessee under Explanation (baa) to Section 80HHC. [Para 10]

3. In **Distributors (Baroda) P. Ltd. v. Union of India and Others* **the Constitution Bench of this Court held that Section 80M of the Act provided for deduction in respect of certain intercorporate dividends and it provided in sub-section (1) of Section 80M that "where the gross total income of an assessee being a company includes any income by way of dividends received by it from a domestic company, there shall, in accordance with and subject to the provisions of this Section, be allowed, in computing the total income of the assessee, a deduction from such income by way of dividends an amount equal to" a certain percentage of the income mentioned in this Section. The Constitution Bench held that the Court must construe Section 80M on its own language and arrive at its true interpretation according to the plain natural meaning of the words used by the legislature and so construed the words "such income by way of dividends" in sub-section (1) of Section 80M must be referable not only to the category of income included in the gross total income but also to the quantum of the income so included. Similarly, Explanation (baa) has to be construed on its own language and as per the plain natural meaning of the words used in Explanation (baa), the words "receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits" will not only refer to the nature of receipts but also the quantum of receipts included in**

the profits of the business as computed under the head "Profits and Gains of Business or Profession" referred to in the first part of the Explanation (baa). Accordingly, if any quantum of any receipt of the nature mentioned in clause (1) of Explanation (baa) has not been included in the profits of business of an assessee as computed under the head "Profits and Gains of Business or Profession", ninety per cent of such quantum of the receipt cannot be deducted under Explanation (baa) to Section 80HHC. Therefore, if the rent or interest is a receipt chargeable as profits and gains of business and chargeable to tax under Section 28 of the Act, and if any quantum of the rent or interest of the assessee is allowable as an expense in accordance with Sections 30 to 44D of the Act and is not to be included in the profits of the business of the assessee as computed under the head "Profits and Gains of Business or Profession", ninety per cent of such quantum of the receipt of rent or interest will not be deducted under clause (1) of Explanation (baa) to Section 80HHC. In other words, ninety per cent of not the gross rent or gross interest but only the net interest or net rent, which has been included in the profits of business of the assessee as computed under the head "Profits and Gains of Business or Profession", is to be deducted under clause (1) of Explanation (baa) to Section 80HHC for determining the profits of the business. [Para 11, 12]

Distributors (Baroda) P. Ltd. v. Union of India and Others* **(1985) 155 ITR 120 – Followed.

Commissioner of Income-Tax v. Shri Ram Honda Power Equip **(2007) 289 ITR 475 (Delhi) – approved**

Commissioner of Income-Tax v. Asian Star Co. Ltd. **(2010) 326 ITR 56 (Bom);** *Commissioner of Income-Tax v. Gokuldas Exports, etc.* **(2011) 333 ITR 214 (Karn);**

Commissioner of Income-Tax v. K. Ravindranathan Nair **(2007) 295 ITR 228 (SC) – referred to.**

Case Law Reference:

(2007) 289 ITR 475 (Delhi)	**approved**	**Para 3**
(2010) 326 ITR 56 (Bom)	**referred to**	**Para 3**
(1985) 155 ITR 120	**followed**	**Para 5**
(2011) 333 ITR 214 (Karn)	**referred to**	**Para 5**
(2007) 295 ITR 228 (SC)	**referred to**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1914 of 2012.

From the Judgment & Order dated 6.8.2010 of the High Court of Judicature at Bombay in ITA (Lodg.) No. 1276 of 2010.

WITH

C.A. No. 4534 of 2008.

Rashmikumar Manilal Vithlani for the Appellant.

B.V. Balram Das, N. Ganpathy for the Respondent.

The Judgment of the Court was delivered by

A. K. PATNAIK, J.

CIVIL APPEAL No. OF 2012

(Arising out of SLP (C) No. 32450 of 2010)

1. Leave granted.

2. This is an appeal against the judgment and order dated 06.08.2010 of the Bombay High Court in ITA(L) No. 1276 of 2010 deciding two issues against the assessee. On the first issue, the High Court has held, relying on its judgment in

Commissioner of the Income Tax vs. *Kalpataru Colours and Chemicals* (ITA(L) 2887 of 2009), that the entire amount received by an assessee on sale of the Duty Entitlement Pass Book (for short 'the DEPB') represents profit on transfer of DEPB under Section 28(iiid) of the Income Tax Act, 1961 (for short 'the Act'). We have already decided this issue in favour of the assessee in a separate judgment in M/s Topman Exports vs. Commissioner of Income Tax, Bombay, and other connected matters and we have held that not the entire amount received by the assessee on sale of DEPB, but the sale value less the face value of the DEPB will represent profit on transfer of DEPB by the assessee. The first issue is, therefore, decided accordingly.

3. For appreciating the second issue, we may refer very briefly to the facts of the case. For the assessment year 2003-04, the assessee filed a return of income claiming a deduction of Rs.34,44,24,827/- under Section 80HHC of the Act. The Assessing Officer passed the assessment order deducting ninety per cent of the gross interest and gross rent received from the profits of business while computing the deduction under Section 80HHC and accordingly restricted the deduction under Section 80HHC to Rs.2,36,25,053/-. The assessee filed an appeal against the assessment order before the Commissioner of Income-Tax (Appeals), who confirmed the order of the Assessing Officer excluding ninety per cent of the gross interest and gross rent received by the assessee while computing the profits of the business for the purposes of Section 80HHC. Aggrieved, the assessee filed an appeal before the Income Tax Appellate Tribunal (for short 'the Tribunal'). The Tribunal held, relying on the decision of the Delhi High Court in *Commissioner of Income-Tax v. Shri Ram Honda Power Equip* [(2007) 289 ITR 475 (Delhi)], that netting of the interest could be allowed if the assessee is able to prove the nexus between the interest expenditure and interest income and remanded the matter to the file of the Assessing Officer. The Tribunal also remanded the issue of netting of the rent to the

Assessing Officer with the direction to find out whether the assessee has paid the rent on the same flats against which rent has been received from the staff and if such rent was paid then such rent is to be reduced from the rental income for the purpose of exclusion of business income for computing the deduction under Section 80HHC. Against the order of the Tribunal, the Revenue filed an appeal before the High Court and the High Court has directed that on remand the Assessing Officer will decide the issue in accordance with the judgment of the High Court in *Commissioner of Income-Tax v. Asian Star Co. Ltd*. [(2010) 326 ITR 56 (Bom)] in which it has been held that while determining the profits of the business as defined in Explanation (baa) to Section 80HHC, ninety per cent of the gross receipts towards interest and not ninety per cent of the net receipts towards interest on fixed deposits in banks received by the assessee would be excluded for the purpose of working out the deduction under Section 80HHC of the Act.

4. Learned counsel for the appellant submitted that it will be clear from the Explanation (baa) that ninety per cent of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits will be excluded for determining the profits and gains of business or profession. He argued that as the net receipts and not the gross receipts towards interest and rent are included in profits and gains of business or profession, ninety per cent of such net interest and net rent and not ninety per cent of gross interest and gross rent are to be excluded for determining the profits of the business under Explanation (baa) to Section 80HHC of the Act.

5. In support of this argument, learned counsel for the appellant relied on the decision of this Court in *Distributors (Baroda) P. Ltd. v. Union of India and Others* [(1985) 155 ITR 120] in which a Constitution Bench of this Court has held that only the dividends computed in accordance with the provisions of the Act, which is included in the gross total income of the

domestic company, shall be taken into account for working out the relief under Section 80M of the Act. He cited the judgment in *Commissioner of Income-Tax v. Shri Ram Honda Power Equip* (supra) in which the Delhi High Court has taken a view that the word 'interest' in Explanation (baa) to Section 80HHC connotes 'net interest' and not 'gross interest' and, therefore, in deducting such interest, the Assessing Officer will have to take into account the net interest, i.e. gross interest as reduced by expenditure incurred for earning such interest. He submitted that the Karnataka High Court in *Commissioner of Income-Tax v. Gokuldas Exports, etc.* [(2011) 333 ITR 214 (Karn)] has taken a similar view relying on the decision of the High Court in *Commissioner of Income-Tax v. Shri Ram Honda Power Equip* (supra).

6. Learned counsel for the appellant referred to the Memorandum to Finance (No.2) Bill, 1991 explaining the rationale of Explanation (baa) in which *inter alia* it is stated that as some expenditure might be incurred in earning such incomes, which in the generality of cases is part of common expenses, and thus ad-hoc 10 per cent deduction from such incomes have been provided for to account for these expenses. He submitted that the High Court has not correctly appreciated the Memorandum and has held, relying on the Memorandum, that gross interest and gross rent have to be deducted under Explanation (baa) to Section 80HHC to avoid a distorted figure of export profits.

7. Learned counsel for the Revenue, on the other hand, relied on the reasons given by the Bombay High Court in *Commissioner of Income-Tax v. Asian Star Co. Ltd*. (supra) and submitted that the Bombay High Court has rightly held that ninety per cent of the gross amount received towards interest and rent have to be excluded from the profits and gains of business for computing the profits of the business as defined in Explanation (baa) to Section 80HHC of the Act. He also relied on the Memorandum to the Finance (No.2) Bill 1991 in support of his submission that ninety per cent of the gross

interest and gross rent has to be deducted from the profits of the assessee under Explanation (baa).

8. Before we deal with the contentions of learned counsel for the parties, we may extract Explanation (baa) to Section 80HHC of the Act.

"Explanation:- For the purposes of this section,-

(baa) "profits of the business" means the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by-

(1) ninety per cent of any sum referred to in clauses (iiia), (iiib), (iiic), (iiid) and (iiie) of Section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits; and

(2) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India".

9. Explanation (baa) extracted above states that "profits of the business" means the profits of the business as computed under the head "Profits and Gains of Business or Profession" as reduced by the receipts of the nature mentioned in clauses (1) and (2) of the Explanation (baa). Thus, profits of the business of an assessee will have to be first computed under the head "Profits and Gains of Business or Profession" in accordance with provisions of Section 28 to 44D of the Act. In the computation of such profits of business, all receipts of income which are chargeable as profits and gains of business under Section 28 of the Act will have to be included. Similarly, in computation of such profits of business, different expenses which are allowable under Sections 30 to 44D have to be allowed as expenses. After including such receipts of income and after deducting such expenses, the total of the net receipts are profits of the business of the assessee computed under the

head "Profits and Gains of Business or Profession" from which deductions are to made under clauses (1) and (2) of Explanation (baa).

10. Under Clause (1) of Explanation (baa), ninety per cent of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in any such profits are to be deducted from the profits of the business as computed under the head "Profits and Gains of Business or Profession". The expression "included any such profits" in clause (1) of the Explanation (baa) would mean only such receipts by way of brokerage, commission, interest, rent, charges or any other receipt which are included in the profits of the business as computed under the head "Profits and Gains of Business or Profession". Therefore, if any quantum of the receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature is allowed as expenses under Sections 30 to 44D of the Act and is not included in the profits of business as computed under the head "Profits and Gains of Business or Profession", ninety per cent of such quantum of receipts cannot be reduced under Clause (1) of Explanation (baa) from the profits of the business. In other words, only ninety per cent of the net amount of any receipt of the nature mentioned in clause (1) which is actually included in the profits of the assessee is to be deducted from the profits of the assessee for determining "profits of the business" of the assessee under Explanation (baa) to Section 80HHC.

11. For this interpretation of Explanation (baa) to Section 80HHC of the Act, we rely on the judgment of the Constitution Bench of this Court in *Distributors (Baroda) P. Ltd. v. Union of India and Others* (supra). Section 80M of the Act provided for deduction in respect of certain intercorporate dividends and it provided in sub-section (1) of Section 80M that "where the gross total income of an assessee being a company includes any income by way of dividends received by it from a domestic company, there shall, in accordance with and subject to the

provisions of this Section, be allowed, in computing the total income of the assessee, a deduction from such income by way of dividends an amount equal to" a certain percentage of the income mentioned in this Section. The Constitution Bench held that the Court must construe Section 80M on its own language and arrive at its true interpretation according to the plain natural meaning of the words used by the legislature and so construed the words "such income by way of dividends" in sub-section (1) of Section 80M must be referable not only to the category of income included in the gross total income but also to the quantum of the income so included. Similarly, Explanation (baa) has to be construed on its own language and as per the plain natural meaning of the words used in Explanation (baa), the words "receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits" will not only refer to the nature of receipts but also the quantum of receipts included in the profits of the business as computed under the head "Profits and Gains of Business or Profession" referred to in the first part of the Explanation (baa). Accordingly, if any quantum of any receipt of the nature mentioned in clause (1) of Explanation (baa) has not been included in the profits of business of an assessee as computed under the head "Profits and Gains of Business or Profession", ninety per cent of such quantum of the receipt cannot be deducted under Explanation (baa) to Section 80HHC.

12. If we now apply Explanation (baa) as interpreted by us in this judgment to the facts of the case before us, if the rent or interest is a receipt chargeable as profits and gains of business and chargeable to tax under Section 28 of the Act, and if any quantum of the rent or interest of the assessee is allowable as an expense in accordance with Sections 30 to 44D of the Act and is not to be included in the profits of the business of the assessee as computed under the head "Profits and Gains of Business or Profession", ninety per cent of such quantum of the receipt of rent or interest will not be deducted under clause (1) of Explanation (baa) to Section 80HHC. In other words, ninety

per cent of not the gross rent or gross interest but only the net interest or net rent, which has been included in the profits of business of the assessee as computed under the head "Profits and Gains of Business or Profession", is to be deducted under clause (1) of Explanation (baa) to Section 80HHC for determining the profits of the business.

13. The view that we have taken of Explanation (baa) to Section 80HHC is also the view of the Delhi High Court in *Commissioner of Income-Tax v. Shri Ram Honda Power Equip* (supra) and the Tribunal in the present case has followed the judgment of the Delhi High Court. On appeal being filed by the Revenue against the order of the Tribunal, the High Court has set aside the order of the Tribunal and directed the Assessing Officer to dispose of the issue in accordance with the judgment of the Bombay High Court in *Commissioner of Income-Tax v. Asian Star Co. Ltd*. (supra). We must, thus, examine whether reasons given by the High Court in its judgment in *Commissioner of Income-Tax v. Asian Star Co. Ltd*. (supra) were correct in law.

14. On a perusal of the judgment of the High Court in *Commissioner of Income-Tax v. Asian Star Co. Ltd*. (supra), we find that the reason which weighed with the High Court for taking a different view, is that rent, commission, interest and brokerage do not possess any nexus with export turnover and, therefore, the inclusion of such items in the profits of the business would result in a distortion of the figure of export profits. The High Court has relied on a decision of this Court in *Commissioner of Income-Tax v. K. Ravindranathan Nair* [(2007) 295 ITR 228 (SC)] in which the issue raised before this Court was entirely different from the issue raised in this case. In that case, the assessee owned a factory in which he processed cashew nuts grown in his farm and he exported the cashew nuts as an exporter. At the same time, the assessee processed cashew nuts which were supplied to him by exporters on job work basis and he collected processing charges for the same. He, however, did not include such

processing charges collected on job work basis in his total turnover for the purpose of computing the deduction under Section 80HHC (3) of the Act and as a result this turnover of collection charges was left out in the computation of profits and gains of business of the assessee and as a result ninety per cent of the profits of the assessee arising out of the receipt of processing charges was not deducted under clauses (1) of the Explanation (baa) to Section 80HHC. This Court held that the processing charges was included in the gross total income from cashew business and hence in terms of Explanation (baa), ninety per cent of the gross total income arising from processing charges had to be deducted under Explanation (baa) to arrive at the profits of the business. In this case, this Court held that the processing charges received by the assessee were part of the business turnover and accordingly the income arising therefrom should have been included in the profits and gains of business of the assessee and ninety per cent of this income also would have to be deducted under Explanation (baa) under Section 80HHC of the Act. In this case, this Court was not deciding the issue whether ninety per cent deduction is to be made from the gross or net income of any of the receipts mentioned in clause (1) of the Explanation (baa).

15. The Bombay High Court has also relied on the Memorandum explaining the clauses of the Finance Bill, 1991 contained in the circular dated 19.12.1991 of the Central Board of Direct Taxes to come to the conclusion that the Parliament intended to exclude items which were unrelated to the export turnover from the computation of deduction and while excluding such items which are unrelated to export for the purpose of Section 80HHC, Parliament has taken due note of the fact that the exporter assessee would have incurred such expenditure in earning the profits and to avoid a distorted figure of export profits, ninety per cent of the receipts like brokerage, commission, interest, rent, charges are sought to be excluded from the profits of the business. In our considered opinion, it was not necessary to refer to the explanatory Memorandum

when the language of Explanation (baa) to Section 80HHC was clear that only ninety per cent of receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits computed under the head profits and gains of business of an assessee could be deducted under clause (1) of Explanation (baa) and not ninety per cent of the quantum of any of the aforesaid receipts which are allowed as expenses and therefore not included in the profits of business of the assessee.

16. In the result, we allow the appeal and set aside the impugned order of the High Court and remand the matter to the Assessing Officer to work out the deductions from rent and interest in accordance with this judgment. No costs.

CIVIL APPEAL No. 4534 OF 2008

1. This is an appeal against the order dated 19.01.2007 of the Delhi High Court in I.T.A. No. 541 of 2006.

2. The facts of this case very briefly are that Bharat Rasayan Limited (for short 'the assessee') filed a return of income tax claiming a deduction of Rs.72,76,405/- under Section 80HHC of the Act. In the assessment order, the Assessing Officer held that ninety per cent of the gross interest has to be excluded from the profits of the business of the assessee under Explanation (baa) to Section 80HHC of the Act and deducted ninety per cent of the gross interest of Rs.50,26,284/- from the profits of the business of the assessee. The assessee preferred an appeal contending that only ninety per cent of the net interest should have been deducted from the profits of the business of the assessee under Explanation (baa) to Section 80HHC, but the Commissioner of Income Tax (Appeals) rejected this contention of the assessee. Aggrieved, the assessee filed an appeal before the Income Tax Appellate Tribunal (for short 'the Tribunal') and the Tribunal allowed the appeal of the assessee and held that the assessee was entitled to deduct the expenses from the interest received and only

ninety per cent of the net amount of interest could be excluded under Explanation (baa) to Section 80HHC and remitted the matter to the Assessing Officer to examine whether there is factually an excess between the interest paid and interest received and take a fresh decision. The Revenue filed an appeal against the order of the Tribunal before the High Court, but by the impugned order the High Court following its decision in *Commissioner of Income-Tax v. Shri Ram Honda Power Equip* (supra) sustained the order of the Tribunal and dismissed the appeal.

3. We have held in our judgment in the case of *M/s ACG Associated Capsules Pvt. Ltd. v. Commissioner of Income Tax* that ninety per cent of not the gross interest but only the net interest, which has been included in the profits of the business of the assessee as computed under the heads 'Profits and Gains of Business or Profession' is to be deducted under clause (1) of Explanation (baa) to Section 80HHC for determining the profits of the business. Since, the view taken by the High Court in the impugned order is consistent with our aforesaid view, we find no merit in this appeal and we accordingly dismiss the same. There shall be no order as to costs.

D.G. Appeals disposed of.

A UNION OF INDIA THROUGH GENERAL MANAGER NORTHERN RAILWAYS

v.

CHAIRMAN, UP STATE ELECTRICITY BOARD & ORS.

(Transfer Case (Civil) No. 37 of 2001 etc.)

B FEBRUARY 9, 2012

[P.SATHASIVAM AND H.L. GOKHALE, JJ.]

RAILWAYS ACT, 1989:

C *ss. 11(a) and (g) – Construction of electric supply lines by Railways – Held: Provisions of Railways Act clearly authorize the Railways to construct necessary transmission lines, dedicated for their own purpose – NTPC, i.e. the generating company, does have the necessary authority to enter into a power purchasing agreement u/s 43A of Electric (Supply) Act, 1948 – Thus, the action of Railways of constructing transmission lines and drawing power from thermal power plants of NTPC was perfectly legal – Electricity (Supply) Act, 1948 – ss. 26A (1) and 43A – Electricity Act, 2003 – s. 10(2)*

In the instant transferred cases the issue for consideration before the court was the legality of construction of the transmission lines by Central Railways to draw power from the power plant of the National Thermal Power Corporation Limited.

Disposing of the Transferred Petition the Court:

HELD: 1.1. In the case of Railways, the transmission of electricity is governed by the provisions of a special enactment, i.e. the Railways Act, 1989 and not by the enactments governing electricity. [Para 15]

1.2. Sections 11 (a) and (g) of the Railways Act, 1989

clearly authorize the Railways to construct necessary transmission lines, dedicated for their own purpose. It is not possible to read this Section in a restricted manner. The principal part of s.11 authorizes the Railway administration to execute all necessary works for the purpose of constructing or maintaining railways. Sub-s (a) of this Section authorizes Railways to make or construct in or upon, across, under or over any lands electric supply lines. Sub-s. (g), thereof, cleawrly empowers the Railways to erect any electric traction equipment, and power supply and distribution installation which is in connection with the work of the Railways. This will certainly include construction of transmission lines. [para 15]

3. Besides, s.26A (1) of the Electricity (Supply) Act, 1948 exempts the generating company from the requirement of taking a license under Electricity Act, 1910. [Para 15]

4. NTPC the generating company does have the necessary authority to enter into a power purchasing agreement u/s 43A of the Electricity (Supply) Act, 1948. NTPC has been permitted by the Central Government to enter into an agreement. Railways and NTPC both have obtained the permission from the concerned ministries prior to entering into this agreement. In the instant case, the Railways found the tariff of UPSEB to be excessive and therefore, they decided to construct their own transmission lines. This being so, the action on the part of the Railways of constructing transmission lines, and drawing power from thermal power plants of NTPC, was perfectly legal. Even under the Electricity Act, 2003, a direct sale of power by a generating company to a consumer is specifically permitted u/s 10 (2) thereof. [Para 15]

1.5. In the circumstances, the notice dated 7.9.1999 given by the UPSEB was totally uncalled for, and is quashed and set-aside. [Para 16]

CIVIL ORIGINAL JURISDICTION : Transfef Case (Civil) No. 37 of 2001.

Under Article 139 of the Constitution of India.

WITH

Transfer Case (Civil) No. 38 of 2001.

P.P. Malhotra, ASG, Pradeep Misra, Suraj Singh, Manoj Kr. Sharma, Sunita Sharma, Shailendra Sharma, M.P.S. Tomar, A.K. Sharma, N.D.B. Raju, Bharathi Raju, Guntur Prabhakar, Rachana Joshi Issar, Nidhi Tiwari for the appearing parties.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. Both these transferred cases are concerning the legality of construction of the transmission lines by Northern Railways to draw power from the power plants of the National Thermal Power Corporation Ltd. ('NTPC' for short), and no more from the transmission lines of Uttar Pradesh State Electricity Board ('UPSEB' for short), through which they were drawing power earlier.

Facts leading to these transferred cases are as follows:-

2. UPSEB was purchasing power from the power plants of NTPC, and supplying the same to Northern Railways through transmission lines of the UPSEB. Railways found the tariff of UPSEB to be excessive, and therefore, decided to enter into a power purchasing agreement with NTPC, and to construct their own transmission lines to carry the supply. The Railways moved the Central Govt. for permission in this behalf, and obtained approval from the cabinet committee on 6.6.1990. This was recorded in the then Railway Minister's letter addressed to the then Minister of Energy dated 24.8.1990.

Later, it was decided that 100 MW power will be allocated to the Railways from Dadri Gas Station of NTPC. In case of a shortfall, the requirement would be met from the Auraria Gas Station of NTPC. The above allocation to Railways was to be subject to entering into a power purchasing agreement with NTPC. This is recorded in the letter dated 10.2.1998 from Deputy Secretary to the Ministry of Power addressed to the Chairman, Central Regulatory Electricity Authority. Accordingly, Railways entered into the necessary power purchasing agreement with NTPC in March 1998.

3. Thereafter, Railways started constructing transmission lines from Dadri Gas Power Plant and Auraria Gas Power Plant of NTPC upto the sub-station of Railways at Dadri, District Ghaziabad, U.P. This led to UPSEB to issue a threat to demolish the said transmission lines, and a notice was issued to the Railways on 7.9.1999. The notice was issued by the Superintendent Engineer, Electricity Transmission Circle, U.P. State Electricity Board, Ghaziabad, U.P. to the Chief Electrical Engineer (Construction), Northern Railways, Tilak Bridge, New Delhi, calling upon the Railways to immediately stop the activity of construction of distribution/service lines. The notice further stated that if the Railways did not stop or refrain from these activities inspite of receipt of the notice, UPSEB will be constrained to take steps of its own for demolition of the said lines and will also sue for damages suffered or to be suffered by UPSEB consequent upon this construction.

4. This notice led the Railways to file Writ Petition No.6802/1999 in the High Court of Delhi to challenge the said notice. The High Court vide its order dated 9.11.1999 stayed operation of this notice/order. The High Court subsequently passed another order on 12.5.2000 allowing the Railways to carry on their work of construction.

5. After the construction of transmission lines was completed, the Railways started drawing power from the NTPC power plants through those lines. That led UPSEB to file Writ

Petition No.3588/2001 in Allahabad High Court to challenge the act of Railways of drawing electrical energy from NTPC through Railway's own service lines.

6. Since, two petitions were filed in two different High Courts arising out of the same cause of action, the Railways sought transfer of these two writ petitions to the Supreme Court of India, in order to avoid the multiplicity of proceedings and conflicting decisions. The same having been allowed, W.P. No.6802/1999 in Delhi High Court has been numbered as Transferred Case No.37/2001 and W.P. 3588/2001 in Allahabad High Court has become Transferred Case No.38/2001 in this Court.

7. Union of India through General Manager, Northern Railways is the petitioner in Transferred Case No.37/2001. Railway Board, General Manager Northern Railways and Dy. Chief Engineer/Electrical (Construction) of Northern Railways are respondent No.1 to 3 in Transferred Case No.38/2001. UPSEB is the first respondent in Transferred Case No.37/2001 and petitioner in Transferred Case No.38/2001. NTPC and its officer are respondents No.4 to 6 in Transferred Case No.38/2001. The parties are referred to as Railways, UPSEB and NTPC for convenience. Shri P.P. Malhotra, learned Additional Solicitor General has appeared for Railways, Smt. Rachna Joshi Issar has appeared for NTPC, and Shri Pradeep Misra has appeared for UPSEB.

The submissions of the rival parties:-

8. It was submitted on behalf of the Railways by Shri Malhotra that the action of the Railways to erect, operate, maintain or repair any electric traction equipment was very much within the jurisdiction of the Railways, inasmuch as Sections 11 (a) and (g) of the Railways Act, 1989 empower them to carry out such activity and all such necessary works for the purposes of constructing or maintaining a railway. These Sections 11 (a) and (g) read as follows:-

"11. Power of railway administrations to execute all necessary works.- Notwithstanding anything contained in any other law for the time being in force, but subject to the provisions of this Act and the provisions of any law for the acquisition of land for a public purpose or for companies, and subject also, in the case of a non-Government Railway, to the provisions of any contract between the non-Government railway and the Central Government, a railway administration may, for the purposes of constructing or maintaining a railway-

(a) make or construct in or upon, across, under or over any lands, or any streets, hills, valley, roads, railway, tramways, or any rivers, canals, brooks, streams or other waters, or any drains, water-pipes, gas-pipes, oil-pipes, sewers, electric supply lines, or telegraph lines, such temporary or permanent inclined-planes, bridges, tunnels, culverts, embankments, aqueducts, roads, lines of railways, passages, conduits, drains, pies, cuttings and fences, in-take wells, tube wells, dams, river training and protection works as it thinks proper;

(b) .....

(c).....

(d).....

(e).....

(f).....

(g) erect, operate, maintain or repair any electric traction equipment, power supply and distribution installation in connection with the working of the railway; and....."

(emphasis supplied)

9. The NTPC has also the authority to sell power to Railways in its capacity as a generating company under Section 43A of the Electricity Act, 1948 This section reads as follows:-

"43A. Terms, conditions and tariff for sale of electricity by Generating Company. - (1) A Generating Company may enter into a contract for the sale of electricity generated by it-

(a) with the Board constituted for the State or any of the States in which a generating station owned or operated by the company is located;

(b) with the Board constituted for any other State in which it is carrying on its activities in pursuance of sub-section (3) of section 15A; and

(c) with any other person with consent of the competent government or governments.

[(2) The tariff for the sale of electricity by a Generating Company to the Board shall be determined in accordance with the norms regarding operation and the Plant Load Factor as may be laid down by the Authority ad in accordance with the rates of depreciation and reasonable return and such other factors as may be determined, from time to time, by the Central Government, by notification in this Official Gazette:

Provide that the terms, conditions and tariff for such sale shall, in respect of a Generating Company, wholly or partly owned by the Central Government, be such as may be determined by the Central Government and in respect of a Generating Company wholly or partly owned by one or more State Governments be such as may be determined, from time to tome, by the government or governments concerned.]]"

(emphasis supplied)

10. The generating company has, however, to obtain necessary clearance from the competent Govt. before entering into a contract for sale of electricity to any person other than an Electricity Board. NTPC is a wholly owned company of the Central Govt. It has, therefore, to obtain permission from the Central Government, which it had. 'Competent Government' is defined under Section 2 (3A) of the 1948 Act, which reads as follows:-

"2. Interpretation.....

(3A) "competent government" means the Central Government in respect of a Generating Company wholly or partly owned by it and in all other cases the Government of the State in which the generating station of a Generating Company is located or proposed to be located."

11. Railways had also obtained the necessary permission from the Government of India and, thereafter, they had entered into the necessary agreement with NTPC. It was pointed out that the authority of the Railways to act as above is left unhindered under Section 173 of the Electricity Act, 2003 [which Act replaced the Electricity (Supply) Act 1948]. This Section reads as follows:-

"173. Inconsistency in laws. - Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 (68 of 1986) or the Atomic Energy Act, 1962 (33 of 1962) or the Railways Act, 1989 (24 of 1989)."

12. The submissions of Shri Malhotra, learned counsel for the Railways were supported by Smt. Rachana Joshi Issar, learned counsel for NTPC. She also stressed the fact that NTPC was required to obtain only the consent from the Govt. of India under Section 43A of the Electricity Supply Act, 1948, and that consent had been obtained prior to entering into the

agreement from the Central Govt. which was the competent government under Section 2 (3A) of 1948 Act.

13. The submissions on behalf of the Railways and NTPC were countered by Shri Pradeep Misra, learned counsel for UPSEB. In his submission, Govt. of India was not competent to grant such permission to Railways to buy power from NTPC, or to construct these transmission lines. Such activity ought to have been sanctioned by the UP State Electricity Commission/ State Government under Section 27D of the 1910 Act. This Section 27D reads as follows:-

"27D. Grant of transmission license by the State Government: (1) Until the State Government Commission is established the State Government and thereafter the State Commission may, subject to the provisions of sub section (4), grant a transmission license to any person."

14. With respect to the authority of the Railways under Section 11 (a) and (g) of the Railways Act, 1989, Shri Misra submitted that this Section can be read to authorize the Railways to have their electricity supply and lines only for working and maintenance of railways, and not for transmitting energy from generating stations. If transmitting lines were to be constructed, a license was necessary to be obtained. Section 27D of the 1910 act cannot be ignored while reading Section 11 (a) and (g) of the Railways Act, 1989.

Consideration of the rival submissions

15. (i) We have considered the arguments by the rival parties. As far as reliance on Section 27D of the Electricity Act, 1910 is concerned, it is to be noted that this Section came into force on 31.12.1998. The agreement between Railways and NTPC was signed prior thereto in March, 1998. That apart, it is true that in terms of Section 27D of the Indian Electricity Act, 1910 and Sections 12 and 14 of the Electricity Act, 2003, no person other those authorized or otherwise exempted by an

Appropriate Government or the Appropriate Commission shall be entitled to engage in the activities of transmission or distribution of electricity. However, in the case of Railways, the transmission of electricity is governed by the provisions of a special enactment, i.e. the Railways Act, 1989 and not by the enactments governing electricity.

(ii) That apart, Sections 11 (a) and (g) of the Railways Act, 1989 clearly authorize the Railways to construct necessary transmission lines, dedicated for their own purpose. It is not possible to read this Section in a restricted manner in which it was sought to be conveyed. This is because the principal part of Section 11 authorizes the Railway administration to execute all necessary works for the purpose of constructing or maintaining railways. Sub-section (a) of this Section authorizes Railways to make or construct in or upon, across, under or over any lands electric supply lines. Under sub-Section (g), thereof, the Railways are authorized to erect, operate, maintain or repair any electric traction equipment, power supply and distribution installations in connection with working of the railways. This sub-section clearly empowers Railways to erect any electric traction equipment, and power supply and distribution installation which is in connection with the work of the Railways. This will certainly include construction of transmission lines. That being so, there is no substance in this submission made by the UPSEB as well.

(iii) Besides, Section 26A (1) of the Electricity Supply Act, 1948 exempts the generating company from the requirement of taking a license under Electricity Act, 1910. This section 26A (1) reads as follows:-

> **"26A. Applicability of the provisions of Act 9 of 1910 to Generating Company -** (1) Notwithstanding anything contained in sub-section (2), nothing in the Indian Electricity Act, 1910, shall be deemed to require a Generating Company to take out a licence under that Act, or to obtain sanction of the State Government for the

> purpose of carrying on any of its activities."

(iv) The generating company does have the necessary authority to enter into a power purchasing agreement under Section 43A of the Electricity Supply Act, 1948. NTPC has been permitted by the Central Government to enter into an agreement. Railways and NTPC both have obtained the permission from the concerned ministries prior to entering into this agreement. In the instant case, the Railways found the tariff of UPSEB to be excessive and therefore, they decided to construct their own transmission lines. This being so, the action on the part of the Railways of constructing transmission lines, and drawing power from thermal power plants of NTPC, was perfectly legal. Even under the Electricity Act, 2003, a direct sale of power by a generating company to a consumer is specifically permitted under Section 10 (2) thereof.

16. In the circumstances, the notice dated 7.9.1999 given by the UPSEB was totally uncalled for, and is required to be quashed and set-aside. Accordingly, the Transferred Case No.37/2001 will have to be allowed, and Transferred Case No.38/2001 will have to be dismissed.

17. In the circumstances, we pass the following order:-

(a) Transferred Case No.37/2001 is allowed. The impugned notice/order dated 7.9.1999, issued by UPSEB to the Northern Railways, is hereby quashed and set-aside.

(b) Transferred Case No.38/2001 is dismissed.

(c) There will be no order as to costs.

R.P. Transferred cases disposed of.

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 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. 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. 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 enhance 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 nature of restriction on such rights. Exceptions apart, normally the restriction or power to regulate the manner of exercise of a right would not frustrate the right. Take, for example, the most valuable right even from amongst the fundamental rights, i.e., the right to freedom of speech and expression. This right is conferred by Article 19(1)(a) but in turn, the Constitution 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. 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.

8. Let us also examine 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:
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> > "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 advantage from that case.

25. In the case of *Paradip Port Trust, Paradip v. Their Workmen* [AIR 1977 SC 36], this Court dealt with the right of the legal practitioners to represent employers before the Industrial Tribunal that too only with the consent of the opposite party and leave of the Tribunal. The restriction was limited in its scope and impact and this Court held that it was not violative of the right of the legal practitioners as they will have to conform 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 that under Article 19(1)(g), all citizens have a right to practice any profession or carry on any occupation, trade or business. The

term 'any profession' may include even plurality of professions. However, this is not an absolute right and 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 restriction on the entry to the legal profession and if such restriction is founded to be reasonable, Article 19(1)(g) would not get stultified {*Dr. Haniraj L. Chulani v. Bar Council, State of Maharashtra & Goa* [(1996) 3 SCC 342]}.

32. In this very case, the Court also observed that these well- established connotations and contours of the requirements of the legal profession itself supply the necessary guidelines to the concerned Bar Councils or Legislatures to frame 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 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.

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*

1. (1997) 5 SCC 438.
2. (1999) 2 SCC 471.
3. (1997) 4 SCC 713.
4. (1998) 6 SCC 683.
5. (1999) 6 SCC 35.
6. (2000) 1 SCC 434.
7. (2000) 3 SCC 708.
8. (2001) 3 SCC 179.
9. (2004) 6 SCC 359.
10. (2005) 12 SCC 588.

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

11. (2006) 6 SCC 392.
12. (2008) 3 SCC 99.
13. (2009) 5 SCC 264.
14. (2010) 13 SCC 216.
15. (2011) 9 SCC 684.

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

16. (2011) 9 SCC 678.

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,

17. (2001) 6 SCC 652.

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 probation 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 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 r. 4.9 of the Lawrence School Lovedale (Nilgiris) Rules

assumes immense signification. This Court is only required to construe 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 has been preferred by the first respondent.

4. To proceed with the narration, after 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 three years, in law, as stated by the Supreme Court, the services of the teacher would be treated as confirmed after

1. (2001) 7 SCC 161 : AIR 2001 SC 3234.

1.9.1996. Mr. K. R. Vijayakumar, learned counsel for the school has 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 with the age of retirement and it has no postulate which would destroy the concept of deemed confirmation. It has been further 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: -

2. AIR 1962 SC 1711

3. AIR 1966 SC 175.

"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

4. AIR 1966 SC 1842.

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.

5. AIR 1968 SC 1210.

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

6. (1974) 2 SCC 831.

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

7. AIR 1986 SC 1844.

8. AIR 1991 SC 1402.

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 within the maximum period of probation, the probationer judicial 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

9. (2001) 7 SCC 161 : AIR 2001 SC 3234.

10. AIR 1997 SC 3629.

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.

11. (1987) 1 SCC 424.

> 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: -

12. (1970) 1 SCC 653.

> "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

13. (1986) SCC 91.

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 filing yet another writ petition praying for quashing of inquiry proceedings by the vigilance department on the ground that an inquiry had already been conducted on the same complaint - By way of an interim order, High Court directing State Government not to take any coercive action against the respondent till further orders - For a similar relief, respondent filing another petition u/s.482 - High Court quashing the investigation proceedings - On appeal, held: 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 - High Court had itself 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 - 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

1. (1982) 1 SCC 561 : 1982 SCC (Cri) 283: (1982) 3 SCR 121.

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

2. (2010) 6 SCC 243.

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:

3. (2002) 1 SCC 241.

"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 the result that there was no occasion for the department concerned 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

1. (1964) 3 SCR 425.
2. AIR 1965 SC 1783.
3. (2004) 8 SCC 14.
4. (1973) 2 SCC 337.
5. AIR 2004 SC 3582.

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 India*[7] 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

6. 117 (2005) DLT 387.
7. 2006 (89) DRJ 406.

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

8. (2010) 11 SCC 242.
9. (1967) 1 SCR 373.
10. (1971) 1 SCC 671.
11. (1977) 1 SCC 133.
12. (1980) 2 SCC 471.
13. (1984) 4 SCC 308.
14. (1986) 4 SCC 251.
15. (1993) SCC 84.
16. (1996) 2 SCC 549.
17. (1996) 11 SCC 462.
18. (1998) 6 SCC 1.
19. (2005) 7 SCC 627.
20. (2008) 12 SCC 418.
21. (2009) 10 SCC 115.
22. (2009) 10 SCC 689.

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-Inspector B.C. Sarkar to take up the investigation of the case. After investigation, chargesheet was filed against the appellant and Abuzar Hossain under Section 302/34, IPC, and the case was 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 the FIR. Besides these two eyewitnesses, two more eyewitnesses, who on 11.02.2001 at about 9.00 P.M., were gossiping in front 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 High Court 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 party can approach Supreme 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. [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 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 (i.e. time taken in obtaining certified copy of the order of High Court and the time taken in placing the same before 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.

##NEXT FILE

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